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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 13, 1981

The Honorable Barbara A. Gill
The Senate of Maine
State House
Augusta, Maine 04333

The Honorable Edward Kelleher
House of Representatives
State House
Augusta, Maine 04333

The Honorable Charlotte Sewall
The Senate of Maine
State House
Augusta, Maine 04333

The Honorable Mary MacBride
House of Representatives
State House
Augusta, Maine 04333

Dear Senator Gill, Senator Sewall, Representative Kelleher and Representative MacBride:

This letter is in response to Questions VII and IX posed by you in your letter of February 24, 1981 and which pertain to the compliance of Maine's Certificate of Need program with federal requirements. In response to Question VI which concerns hearing requirements, we are attaching hereto a copy of a recent Superior Court opinion which addresses your concerns.

BACKGROUND:

The National Health Planning and Development Act of 1974, as amended,[1] requires as a pre-condition to the receipt of federal funds for numerous public health and health planning programs that a comprehensive health planning system be established in each state. Essential to this system is the administration of a satisfactory certificate of need (hereinafter CON) program by a state agency designated as the State Health Planning and Development Agency (hereinafter SHPDA).[2] Federal law does not dictate the vehicle for implementing a CON program; rather it establishes standards for a CON program and anticipates that the SHPDA will secure the necessary

1. 42 U.S.C. §300k et seq.

2. A second entity, a Health Systems Agency (hereinafter HSA), also participates in the CON program by reviewing proposals and making recommendations to the SHPDA.

authority, statutory or regulatory, for it to administer the program consistent with those standards. See 1979 U.S. Code Cong. & Ad. News 1306, 1348, n.2. If a State does not have a satisfactory CON program, as determined by the Secretary of the U.S. Department of Health and Human Services, the SHPDA is not eligible for full designation and the State may become ineligible to receive funds appropriated under the Public Health Service Act, the Community Mental Health Centers Act, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, and the Drug Abuse Office and Treatment Act of 1972.

Three years ago, the State of Maine enacted the Maine Certificate of Need Act of 1978 (22 M.R.S.A. §301 et seq.) which provided the Department of Human Services (hereinafter Department) with the necessary statutory and regulatory authority to administer a CON program. Since that time, the Department has implemented a CON program and has achieved full designation as a SHPDA.

Subsequent to the enactment of the Maine Certificate of Need Act, Congress passed the Health Planning and Resources Development Amendments of 1979, Pub. L. 96-79, 93 Stat. 592 (hereinafter P.L. 96-79). These amendments added new requirements to which a state CON program must conform in order for a SHPDA to maintain its designation. Because some of the provisions of P.L. 96-79 necessitate state legislative action in order to achieve compliance with the new federal requirements, the effective date for those provisions was deferred. P.L. 96-79, §129. More recently, some technical amendments were enacted pursuant to the Health Program Extension Act of 1980, Pub. L. No. 96-538, 94 Stat. 3183 (hereinfter P.L. 96-538) including the extension of the deadline for implementation of those new program elements requiring state legislative action. P.L. 96-538, §303(a).

ISSUES:

1. Do either P.L. 96-79 or P.L. 96-538 require amendments to the provisions of the Maine Certificate of Need Act pertaining to review of CON decisions rendered by the Department of Human Services?

2. What is the effective date of those provisions of P.L. 96-79 and P.L. 96-538 which require state legislative action to implement?

CONCLUSIONS:

While opinions as to federal statutes and regulations are, of course, ultimately subject to federal interpretation, we have reached the following conclusions:

1. Neither P.L. 96-79 nor P.L. 96-538 require amendments to the provisions of the Maine Certificate of Need Act pertaining to review of CON decisions rendered by the Department of Human Services.

2. The effective date of those provisions of P.L. 96-79 and P.L. 96-538 requiring legislative action within the State of Maine will be twelve months from the first day of the Second Regular Session of the 110th Legislature, namely, on or about January 6, 1983.

REASONS:

1. It is our opinion that the current provisions of the Maine Certificate of Need Act pertaining to review of Department decisions on CON applications comply with the minimum federal requirements for such review. An overview of the legislative history of the federal laws is essential to an understanding of our conclusion.

Since the enactment in 1974 of the Health Planning and Resources Development Act, federal statutes have prescribed as part of the CON procedure the following:

> "Provision for public hearings in the course of [HSA] and [SHPDA] review if requested by persons directly affected by the review; and provision for public hearings, for good cause shown, respecting [HSA] and [SHPDA] decisions." 42 U.S.C. §300n-1(b)(8).

The Maine Certificate of Need Act of 1978 accordingly incorporated language providing for public hearings during the course of review and for hearings for purposes of reconsideration. See 22 M.R.S.A. §§307(2) and 310. Federal regulations promulgated in January, 1977, also prescribed the following procedure:

> "Provision that any decision of the [SHPDA] under this sub-part (and the record upon which it was made) shall, upon request of the person proposing the new institutional health service, be reviewed, under an appeals mechanism consistent with State law governing the practices and procedures of administrative agencies by an agency of the State (other than the [SHPDA]) designated by the Governor." 42 C.F.R. §123.407(a)(10) (1977).

Accordingly, the Maine Certificate of Need Act of 1978 provided for judicial review of final decisions of the Department in accordance with 5 M.R.S.A. §11001 et seq. See 22 M.R.S.A. §311.

As noted above, P.L. 96-79 was enacted in October, 1979, and included a number of amendments pertaining to procedures to be followed in the CON process. The result was that, in addition to the language contained in 42 U.S.C. §300n-1(b)(8), a new section, 42 U.S.C. §300n-1(b)(12)(D), specified that CON decisions were to be

"administratively reviewed";[3] another new section, 42 U.S.C. §300n-1(b)(12)(E), provided for judicial review of CON decisions upon request of persons adversely affected. Federal regulations adopted in October, 1980 to implement P.L. 96-79 interpreted §300n-1(b)(12)(D) to require an "administrative appeal", subsequent to any reconsideration hearing and prior to judicial review, even if the State law governing practices and procedures of administrative agencies permitted the practice of having courts as the initial appeals body. See 45 Federal Register 69740, 69766 and 69751 (October 21, 1980). Subsequently, however, §310 of P.L. 96-538 amended §300n-1(b)(12)(D) by striking the word "administratively".

It is a well established principle of statutory construction that one may assume that Congress was aware of established regulations and administrative interpretation when it enacted P.L. 96-538. See U.S. v. Douglas Aircraft Company, 510 F.2d 1387 (C.C.P.A. 1975); State of Wyoming v. U.S., 310 F.2d 566 (10th Cir. 1962). Cf. Realco Services, Inc. v. Halperin, 355 A.2d 743 (Me. 1976). One may also assume that, when a legislative body removes a statutory provision it intends to affect the operation of that provision. Ali v. Gibson, 483 F. Supp. 1102 (D.V.I. 1979); Link-Simon, Inc. v. Muehlebach Hotel Inc., 374 F. Supp. 789 (D. Me. 1974).

While we are unable to find any expressed intent relative to §310 of P.L. 96-538, it appears from the legislative history that Congress intended to alter the effects of §300n-1(b)(12)(D), as previously enacted by P.L. 96-79 and as interpreted by the federal Department of Health and Human Services, so that there would be no requirement of a separate administrative appeal when not otherwise required under State law. Section 311 of the Maine Certificate of Need Act clearly provides for the appeal of CON decisions to the Superior Court in accordance with Subchapter III of the Maine Administrative Procedure Act, 5 M.R.S.A. §11001 et seq. Therefore, it is our opinion that present State law provides for the review of Department decisions on CON applications under an appeals mechanism consistent with State law governing practices and procedures of administrative agencies.

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3. With the exception of the insertion of the word "administratively", 42 U.S.C. §300n-1(b)(12)(D) was essentially the same as the regulation promulgated as 42 C.F.R. §123.407(a)(10). 42 U.S.C. §300n-1(b)(12)(D), as enacted by P.L. 96-79, read as follows:

> "(D) The program shall provide that each decision of the [SHPDA] to issue, not to issue, or to withdraw a certificate of need or to approve or disapprove an application for an exemption under §300m-6(b) shall, upon request of any person directly affected by such decision, be administratively reviewed under an appeals mechanism consistent with State law governing the practices and procedures of administrative agencies or, if there is no such State law, by an entity (other than the [SHPDA]), designated by the Governor.

2. It is further our opinion that the effective date for those provisions of P.L. 96-79 which do require legislative action by the State of Maine will be twelve months after the first day of the second regular session of the 110th Legislature.

Section 129(b)(2) of P.L. 96-79, as amended by P.L. 96-538, provides as follows:

> (2) The amendments...shall take effect on the date of enactment of this Act, except that if the Secretary of Health, Education, and Welfare determines that any amendment made by any such section will require a State to change its laws before the State Health Planning and Development agency designated for such State may perform its functions under §1523(a)(4)(B) of the Public Health Service Act, such amendment shall take effect in such State -
>
> > (A) if the legislature of the State is in a regular session on the date of the enactment of the Health Program Extension Act of 1980 and the legislature will be in session for at least twelve months from such date, twelve months from such date, or
> >
> > (B) if the legislature of the State is in session on such date of enactment but twelve months do not remain in such session after such date or if the legislature of the State is not in session on such date, twelve months after the beginning of the first regular session of the legislature beginning after such date.

We note that the Health Program Extension Act of 1980, P.L. 96-538, was enacted into law on December 17, 1980. We note further that the first regular session of the 110th Legislature commenced on December 3, 1980.[4]

It is axiomatic that, in the absence of a conflict between legislative history and the reasonably plain meaning of a statute, and absent any jeopardy to the purposes of the statute, the ordinary meaning of the words will prevail. Aaron v. SEC, 100 S.Ct. 1945 (1980); Union Mutual Life Insurance Company v. U.S., 420 F. Supp. 1181 (D. Me. 1976). One should not resort to subtle or forced constructions.

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4. The convening of the Legislature on December 3, 1980 was in accord with Article IV, Part 3, §1 of the Constitution of Maine.

Champagne v. Fortin, 402 A.2d 471 (Me. 1979).

Since the Maine Legislature was in session on December 17, 1980, the date of enactment of P.L. 96-538, and less than twelve months were remaining in the session on that date,[5] the first contingency of P.L. 96-538, §129(b)(2)(B) would apply. Moreover, since the First Regular Session commenced on December 3, 1980, the twelve month period would begin to run upon the commencement of the Second Regular Session of the 110th Legislature on January 6, 1982. We have found no legislative history to indicate a contrary intent.

Sincerely,

James E. Tierney
Attorney General

JET:SLD:bjw

5. Pursuant to 3 M.R.S.A. §2, the first regular session must adjourn no later than 100 legislative days after its convening.