



Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30 -120-1600 through 1660
Regulation title	Alzheimer's Assisted Living Waiver
Action title	Alzheimer's Assisted Living Waiver Update
Date this document prepared	7/9/2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

This regulatory action updates the Alzheimer's Assisted Living Waiver (AAL) in order to accommodate changes in the industry and to provide greater clarity to the regulations. These changes will bring current Virginia Department of Social Services (VDSS) licensing standards and DMAS' waiver expectations more in sync with each other while reducing provider confusion and duplication of effort.

Proposed changes clarify clinical staff requirements and the number of activity hours and who is permitted to provide supervision. Initiation of these changes is expected to increase the available provider pool and provide enhanced participation in the waiver by eligible recipients.

A review of the NOIRA public comments indicates support for the proposed changes.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

DMAS Alzheimer's Waiver operates under the authority of § 1915 of the Social Security Act and 42 CFR § 430.25(c)(2) which permit the waiver of certain State Plan requirements. These cited federal statutory and regulatory provisions permit the establishment of Medicaid waivers to afford states with greater flexibility to devise different approaches to the provision of long term care services. This particular waiver provides Medicaid recipients who have diagnoses of Alzheimer's or related dementias with supportive services to enable such individuals to remain in their communities at lower cost, as opposed to being institutionalized in nursing facilities.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

The growth within the Medicaid AAL waiver has been gradual and many families who would otherwise qualify are not able to access services due to a limited provider pool. This limit has resulted from programmatic design differences between the VDSS licensing regulations and these DMAS waiver regulations. These changes will provide opportunities for the provider pool to increase moderately and which in turn will improve accessibility to the waiver while assuring the health and safety of all participants.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)

The state regulations that are affected by this action are the Alzheimer's Assisted Living Waiver (AAL) (12VAC 30-120-1600 et seq.)

Current AAL regulations contain requirements that exceed current VDSS licensing requirements. Due to these requirements, the provider community has chosen to not participate in this waiver program as initially anticipated. The areas of key concern are:

1. Staffing:
 - a. employing a full time RN when a program reaches 16 participants,
 - b. requiring only activity staff to provide activities,
 - c. requiring only nurses to distribute medications on 2 work shifts when recent professional licensing regulatory changes created registered medication aides, and limiting the credentials of direct care staff to Certified Nurse Aides while these providers' VDSS license requirements permit a wider choice of types of credentials.

2. AAL waiver activity hours currently exceed VDSS licensing requirements by 3 hours a week (from 19 to 16).

Proposed changes have been developed and agreed upon with the provider community. With these agreed upon revisions to the regulations, it is expected that the numbers of providers will increase and consequently, improvement in access to care will be experienced by the families who need these services.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The primary advantage of these proposed changes is the increased availability of these services to families and individuals who otherwise qualify for this program due to an increase in the providers rendering the needed service. This increased service availability is a benefit to all parties: families, providers, and localities. It will benefit the Commonwealth because the individuals who need this type of program will be cared for in a less expensive manner.

A secondary advantage is the streamlining of regulations between multiple state agencies which creates cost and service delivery efficiencies for providers. A third advantage is the removal from DMAS' regulations of requirements which are more like licensing standards. Since DMAS is not a licensing agency, it is not advantageous that its regulations contain such requirements. The disadvantage to all parties would be if the proposed changes are not implemented. If these changes are not implemented, individuals in need of these services have to be served in more expensive nursing facilities. Inconsistency of regulations between sister state agencies would continue to be a burden to providers in the absence of cost efficiencies. Nursing home providers are not expected to agree with changes that will enable the expansion of community providers as

this represents business competition for them. However, since the nursing facilities in the Commonwealth typically have an occupancy rate of 90% or higher (for CY 2007 it was 91.16%), it is not anticipated that this community program will have a significant negative business impact for nursing facilities.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The proposed regulatory changes do not create any standards that are more restrictive than federal requirements. The proposed changes do unify regulatory requirements between the Virginia Department of Social Services licensing standards, Department of Health Professions' licensing standards for health care professionals, and this Agency's waiver regulations.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

The proposed changes affect all localities equally as they apply statewide. The changes provide greater opportunity to provider enrollment and service availability for families in need.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In the development of these proposed changes DMAS sought input from the affected regulated industries and other state agencies. The process of discussion took place over several months and multiple meetings and concluded with consensus on the proposed changes. Attached is a list of participants.

In addition to any other comments, DMAS is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, DMAS is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Townhall website, www.townhall.virginia.gov, or by mail, email or fax to Steve Ankiel, 600 East Broad Street, Richmond, Virginia 23219 Fax 804/786-0206, email Steve.ankiel@dmas.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.</p>	<p>The proposed changes are intended to increase provider enrollment thereby enabling more qualifying recipients to enroll in this waiver. The enabling legislation (2007 Acts of the Assembly Chapter 847, Item 302 (W)) has capped enrollment at 200 persons and DMAS cannot exceed this number. As of 5/31/09, only 30 individuals have been enrolled. The average cost per year of an individual in this waiver is \$11,183 (total funds).</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There would be no change in the current cost to localities to implement the proposed regulations.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>The proposed changes will impact the Assisted Living facilities (7 are enrolled now; 13 potentially could enroll) by providing for Medicaid reimbursement thereby allowing them to retain residents. These proposed changes will also affect needy citizens by providing them a health care resource they currently do not have.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>Enrollment to be an AAL waiver provider is voluntary. Currently there are 114 VDSS-specialty-care-licensed facilities in Virginia who could provide AAL Waiver services. As of May 2009, only 7 providers have enrolled as waiver providers. Currently, 13 more providers have expressed a desire to participate but such participation is contingent upon the adoption of these proposed regulatory changes.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>The proposed changes will not increase any expenditure that is currently budgeted for in the waiver. The proposed regulations will provide a much more cost effective environment for the provider community to operate within.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>These changes will enable DMAS to better conform to the requirements of 42 CFR § 447.204 which requires that agency's payments be sufficient to enlist enough providers so that services are available to recipients at</p>

	least to the extent that they are available to the general population.
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Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

Since the inception of this waiver, there have been two revisions to the waiver to achieve a full partnership with the provider community. Each of these revisions explored differing service options, staffing expectation, and delivery systems. None were agreed upon until this current revision. The key barriers to providers’ provision of services were costs associated with staffing and differing waiver and licensing requirements. All identified barriers have been addressed in these proposed revisions.

Other options explored include discontinuing this waiver and modifying the waiver to have a different focus. These options were not selected due to the fact that neither enhanced service delivery nor would canceling the waiver meet the health care needs of indigent persons with diagnoses of Alzheimer’s and related dementias.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

These proposed changes have no effect on the reporting of performance standards of the waiver or providers. The primary effect the proposed changes have is to simply create a service environment that will enable providers to provide the needed services.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

DMAS’ Notice of Intended Regulatory Action was published in the June 8, 2009 Virginia Register (VR 25:20) for its public comment period from June 8 to July 8, 2009. Comments were

received from the Virginia Assisted Living Association. The submitted comments were as follows:

Commenter	Comment	Agency response
Virginia Assisted Living Association (VALA)	VALA and its members have worked very closely with the Virginia Department of Medicaid Assistance Services and other key stakeholders in the assisted living industry to improve the Alzheimer's assisted Living Waiver program. We support the proposed changes that are the result of a collaborative effort among stakeholders, and we strongly believe this action will allow for more Virginia's citizens to benefit from this program.	DMAS appreciates the support of this important collaborative partner in this waiver program.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; or encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

12VAC30-120-1600 Definitions	Admissions summary is added to replace comprehensive assessment	Updates terminology in keeping with current community standards.
	Enrolled provider redefined to address licensing or	DMAS requires, consistent with federal law, that health care entities that enroll as

		<p>certification requirement.</p> <p>“Licensed health care professional” (LHCP) means any health care professional currently licensed by the appropriate health regulatory board & practicing within the scope of his profession.</p> <p>“Individual” defined as the persons receiving these waiver services.</p>	<p>providers be appropriately licensed or certified. This change to the definition for providers incorporates this operational standard.</p> <p>Clarifies professional staff roles and permits providers to use various licensed professionals in staffing functions instead of specifically RNs.</p> <p>Person-centered wording is proposed.</p>
<p>30-120-1610</p>	<p>Refers to AAMR</p>	<p>Reference updated to the new name of the organization. Enrollment section updated to allow for CMS to approve the number of waiver slots and moves reference to the waiver waiting list to its own new section.</p>	<p>External organization (AAMR) changed its name. CMS must approve the number of slots for this waiver as this ties directly to the amount of federal matching dollars DMAS may claim for this waiver.</p>
<p>30-120-1620</p>	<p>Specifies particular nursing license</p>	<p>Licensed health care professional is substituted.</p>	<p>Permits providers flexibility to use any one of several licensed staff to perform required functions. Changing activity hours to conform to licensing standard.</p>
<p>30-120-1630</p>	<p>Refers to approved providers</p>	<p>Change to enrolled providers</p>	<p>In order to enroll, providers must complete all applicable certification or licensing steps. DMAS is prohibited by federal law from reimbursing providers that have not been certified or licensed, as appropriate.</p>
<p>30-120-1640</p>	<p>Refers to Patient Information Form (DMAS-122)</p>	<p>Change to new form (Medicaid LTC Communication Form (DMAS-225)</p>	<p>DMAS has updated its form.</p>
	<p>Refers to VDSS reg cites for assisted living facilities</p>	<p>Change to current VDSS reg cites as that agency revised its regulations</p>	<p>Updated references to VDSS current assisted living facility regulations and re-organized staff training and experience requirements.</p>
	<p>Requires the ALF to use certain staff</p>	<p>Change to VDSS licensing standard</p>	<p>Regulated provider community requested the change to conform DMAS’ requirements to be in sync with the</p>

	for direct care.		existing VDSS licensing standards. Adding additionally to individual's visits with private physician to better ensure individual's needs are met. Added 'Alzheimer's or related' qualifiers to dementia for internal regulatory consistency.
30-120-1650	Refers to periods of absence from ALFs	Add that leave days shall be cumulative across a 12-month period.	Clarification of payment standard.
30-120-1660	Refers to utilization reviews	Modify language to improve specificity and timing.	Clarification.
	30-120-1670	New section	Consistency across all waiver programs that use waiting lists.
	30-120-1680	New section	Consistency across all waiver programs that could result in an appeal from either providers or recipients.

As an alternative to merging all seven waiver program regulations, as suggested during the course of the 2008 OAG Regulatory Reform Taskforce but which is opposed by the advocate communities, DMAS is proposing to develop a common format and organizational structure in order to achieve the needed consistency in definitions, organization, and program requirements for the regulated provider communities. Such commonalities across all waivers will help providers who are able to become participating providers in more than one waiver program. This applies to new sections 1605 (Waiver description and legal authority), 1670 (Waiver waiting list) and 1680 (Appeals).

Advisory Group Participants/Represented Organizations

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| 1. Beverly Soble | VHCA |
| 2. Dana Parsons | VANHA |
| 3. Carter Harrison | Alzheimer's Association |
| 4. May Fox | VALA |
| 5. Diane Catuska | VALA |
| 6. Judy Hackler | VALA |
| 7. Mike Williams | LTC Network |
| 8. Will Frank | LTC Network |
| 9. Richard Brewer | ALF owner |
| 10. Tom Stahlschmidt | Future Provider |
| 11. Hobart Harvey | VHCA |
| 12. Susan Green | VHCA |
| 13. Lynne Williams | DSS |
| 14. Terry Smith | DMAS |
| 15. Steve Ankiel | DMAS |
| 16. Emily Wingfield | VDH |