



Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC_30-120
Regulation title	Waiver Programs: Assisted Living Waiver
Action title	Repeal Assisted Living Waiver
Date this document prepared	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

This regulatory action concerns the Assisted Living program that the Department of Medical Assistance Services implemented in August 1996. It was designed to serve individuals living in community assisted living facilities (ALFs). This waiver program, which gave additional financial support to ALFs for these qualifying individuals, was discontinued, in March 2000, by the Centers for Medicare and Medicaid Services (CMS) due to concerns about the program's operation. Since this program's enabling federal waiver has been discontinued, there is no more need for these related regulations so they are being repealed in this action.

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., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

DMAS initiated this home and community based waiver in concert with 1993 General Assembly action to significantly reform the assisted living (formerly the adult care residence) industry (§§ 63.1-25.1, 63.1-172, and 63.1-173.3). DMAS derived its authority to operate this waiver from § 1915 (b) of the *Social Security Act* which permitted the coverage of these services in ALFs as an alternative to the more costly nursing facility care.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

The regulatory action is not essential to protect the health, safety, and welfare of citizens. This action is needed in order to repeal these waiver regulations that are no longer operable. This waiver has been discontinued by the Centers for Medicare and Medicaid Services so there is no longer any need for the companion regulations.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

This regulatory action affects DMAS’ Waiver Programs: Assisted Living Services for Individuals Receiving Auxiliary Grants Residing in Adult Care Residences (12 VAC 30-120-450 et seq.)

In 1993, the Virginia General Assembly approved significant legislation to reform the assisted living (formerly the adult care residence) industry. The 1993 and 1995 legislative sessions amended § 63.1-25.1 of the *Code of Virginia* requiring that Auxiliary Grant (AG) recipients be evaluated by a case manager or other qualified assessor to determine their need for residential care. Section 63.1-173.3 of the *Code* was also amended to require that the Uniform Assessment Instrument be completed upon admission and at subsequent intervals as determined by regulations promulgated by the Board of Social Services for each Auxiliary Grant resident. Section 63.1-172 of the *Code* was also amended to establish two-tier licensing for adult care residences. Residences were required to offer a level of service to individuals who had physical or mental impairments and who required at least a moderate level of assistance with activities of daily living.

DMAS sought federal approval of a waiver, under the authority of § 1915 (c) of the *Social Security Act*, to provide home and community based services for persons who were determined to be at risk of nursing home placement in the near future but for the provision of the type of care that was provided in an assisted living facility. In 1994, Chapter 965, Item 396 F of the 1994

Acts of Assembly authorized DMAS to seek this waiver to make payments for intensive assisted living services provided to residents of adult care residences who were AG recipients. DMAS' waiver was initiated in August 1996.

DMAS' Assisted Living Waiver regulations established coverage criteria and payment for two types of assisted living services available to recipients of AG residing in licensed adult care residences: (i) regular assisted living services for those individuals who did not meet the criteria for waiver services but who required at least a moderate level of assistance with activities of daily living, and (ii) intensive assisted living services for those individuals who met the level of care criteria for waiver services.

DMAS' waiver permitted Medicaid reimbursement for intensive assisted living services using level of care criteria which was essentially the same as that used in the Elderly or Disabled (ED) Waiver which is now known as the Elderly or Disabled with Consumer Direction (EDCD) waiver.

In March 2000, the Centers for Medicare and Medicaid Services declined to renew its approval of this waiver due to concerns about the program's operation, effectively withdrawing federal financial participation. This waiver non-renewal concerned four issues: (i) concern that these individuals be provided their choice of either institutional or home and community based services; (ii) concern that these individuals be re-evaluated at least annually; (iii) concern that the state's licensing/certification standards were being met for services provided in the waiver, and; (iv) concern that all facilities covered by section 1616(e) of the *Social Security Act* comply with the state's requirements for board and care facilities.

In spite of DMAS' efforts to address these concerns, CMS terminated its federal financial participation with the Commonwealth for this waiver. Consequently, DMAS elected to continue the intensive assisted living payments for the few remaining individuals in this waiver under a grandfather provision in the budget. The Commonwealth's funding for this service was discontinued as a result of budget reductions in 2010 (2010 *Acts of Assembly*, Chapter 874, Item 297 VV). Because Medicaid providers are permitted up to one year from the date of service in which to submit their claims for reimbursement, DMAS had to retain operational regulations until June 30, 2011. Subsequent to the passage of this time period, DMAS is initiating this regulatory action to repeal these regulations.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

There are no alternatives to the repeal of these regulations in light of the loss of the waiver, federal financial participation and the discontinuance of state funding.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency is also 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, record-keeping 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 comments may do so via the Regulatory Town Hall website, www.townhall.virginia.gov, or by mail, email, or fax to Melissa Fritzman, Div of Long Term Care, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219; 804/225-4206 or fax to 804/786-1680. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by the last day of the public comment period.

A public hearing will not be held.

Participatory approach

Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, regulatory advisory panels) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The agency is not using the participatory approach for this repeal action. The agency will receive and respond to all comments that are received.

Family impact

Assess the potential 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, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.