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**TO: JAMES A. ROTHROCK**  
Virginia Department of Aging and Rehabilitative Services

**FROM: MICHELLE A. L'HOMMEDIEU**  
Assistant Attorney General

**DATE: September 3, 2013**

**SUBJECT: Exempt Regulations for Auxiliary Grant Program; 22VAC30-80 (4035/6682)**

I am in receipt of the attached regulations reflecting the changes in Virginia statutory law made by Chapters 803 and 835 of the *2012 Acts of the Assembly* regarding the transfer of the Auxiliary Grant Program from the Department of Social Services to the Department of Aging and Rehabilitative Services ("DARS"). You have asked the Office of the Attorney General to review and determine if the DARS Commissioner has the statutory authority to promulgate the proposed regulations and if the proposed regulations comport with applicable state law.

Virginia Code § 51.5-131 mandates that the Commissioner promulgate regulations that are necessary to carry out the provisions of the laws of the Commonwealth administered by DARS. *2012 Acts of the Assembly*, Chapters 803 and 835, transfers responsibility for the Auxiliary Grant Program to DARS effective July 1, 2013. The current regulations for the administration of the Auxiliary Grant Program promulgated by the Department of Social Services and its State Board remain in effect until the DARS Commissioner promulgates regulations pursuant to 59th, 64th and 65th enactments of Chapters 803 and 835 of the *2012 Acts*.

It is my opinion that the Commissioner has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act ("APA") and has not exceeded that authority. To date, the Commissioner has not yet acted on

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these regulations; and the Agency Background Document available on Town Hall reflects the as yet unknown date of the Commissioner's action.

Based on the foregoing, it is my view that these regulations are exempt from the procedures of Article 2 of the APA pursuant to Virginia Code § 2.2-4006(A)(4)(a) provided the regulations are filed with the Registrar within 90 days of the law's effective date and the requirements of Virginia Code § 2.2-4006(B) are met. If you have any questions or need additional information about these regulations, please contact me at 786-6005.

cc: Kim F. Piner, Esquire

Attachment

**Project 3801 - Final**

**DEPARTMENT FOR AGING AND REHABILITATIVE SERVICES  
Relocating existing regulation on Auxiliary Grants from DSS (-25) to DARS (-80)**

**CHAPTER 25 80  
AUXILIARY GRANTS PROGRAM**

**22VAC40-25-10. 22VAC30-80-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

~~"Adult foster care (AFC)"~~ "Adult foster care" or "AFC" means a locally optional program that provides room and board, supervision, and special services to an adult who has a physical or mental health need. Adult foster care may be provided for up to three adults by any one provider who is approved by the local department of social services.

"Assisted living care" means a level of service provided by an assisted living facility for adults who may have physical or mental impairments and require at least moderate assistance with the activities of daily living. Included in this level of service are individuals who are dependent in behavior pattern (i.e., abusive, aggressive, disruptive) as documented on the Uniform Assessment Instrument.

~~"Assisted living facility (ALF)"~~ "Assisted living facility" or "ALF" means, as defined in § 63.2-100 of the Code of Virginia, any congregate residential setting that provides or coordinates personal and health care services, 24-hour supervision, and assistance (scheduled and unscheduled) for the maintenance or care of four or more adults who are aged, infirm or disabled and who are cared for in a primarily residential setting, except (i) a facility or portion of a facility licensed by the State Board of Health or the Department of Behavioral Health and Developmental Services, but including any portion of such facility not so licensed; (ii) the home or residence of an individual who cares for or maintains only persons related to him by blood or marriage; (iii) a facility or portion of a facility serving infirm or disabled persons between the ages of 18 and 21, or 22 if enrolled in an educational program for the handicapped pursuant to § 22.1-214 of the Code of Virginia, when such facility is licensed by the department as a children's residential facility under Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia, but including any portion of the facility not so licensed; and (iv) any housing project for persons 62 years of age or older or the disabled that provides no more than basic coordination of care services and is funded by the U.S. Department of Housing and Urban Development, by the U.S. Department of Agriculture, or by the Virginia Housing Development Authority. Included in this definition are any two or more places, establishments or institutions owned or operated by a single entity and providing maintenance or care to a combined total of four or more aged, infirm or disabled adults. Maintenance or care means the protection, general supervision and oversight of the physical and mental well-being of an aged, infirm or disabled individual.

Assuming responsibility for the well-being of individuals residing in an ALF, either directly or through contracted agents, is considered "general supervision and oversight."

~~"Auxiliary Grants (AG) Program"~~ "Auxiliary Grants Program" or "AG" means a state and locally funded assistance program to supplement income of an individual receiving Supplemental Security Income (SSI) or adult who would be eligible for SSI except for excess income, who resides in an ALF or in AFC with an established rate.

"Certification" means a form provided by the department and prepared by the ALF annually certifying that the ALF has properly managed the personal funds and personal needs

allowances of individuals residing in the ALF and is in compliance with program regulations and appropriate licensing regulations.

"Department" means the ~~Virginia Department of Social Services~~ Department for Aging and Rehabilitative Services.

"Established rate" means the rate as set forth in the appropriation act or as set forth to meet federal maintenance of effort requirements.

"Personal needs allowance" means an amount of money reserved for meeting the adult's personal needs when computing the amount of the AG payment.

"Personal representative" means the person representing or standing in the place of the individual for the conduct of his affairs. This may include a guardian, conservator, attorney-in-fact under durable power of attorney, next-of-kin, descendent, trustee, or other person expressly named by the individual as his agent.

"Personal toiletries" means hygiene items provided to the individual by the ALF or AFC home including deodorant, razor, shaving cream, shampoo, soap, toothbrush, and toothpaste.

"Program" means the Auxiliary Grant Program.

"Provider" means an ALF that is licensed by the Department of Social Services or an AFC provider that is approved by a local department of social services

"Provider agreement" means a document that the ALF must complete and submit to the department when requesting to be approved for admitting individuals receiving AG.

"Qualified assessor" means an individual who is authorized by 22VAC40-745 to perform an assessment, reassessment, or change in level of care for an individual applying for AG or residing in an ALF.

"Rate" means the established rate.

"Residential living care" means a level of service provided by an ALF for adults who may have physical or mental impairments and require only minimal assistance with the activities of daily living. Included in this level of service are individuals who are dependent in medication administration as documented on the Uniform Assessment Instrument (UAI).

~~"Uniform Assessment Instrument (UAI)"~~ "Uniform Assessment Instrument" or "UAI" means the department-designated assessment form. It is used to record assessment information for determining the level of service that is needed.

#### Statutory Authority

§51.5-131 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

#### **22VAC40-25-15.22VAC30-80-15. Residency requirement.**

A. Individuals applying for AG must have resided in Virginia voluntarily for a minimum of 90 days with the intent to remain.

1. Individuals applying for AG must submit a written statement of intent to remain in Virginia on a form provided by the department.
2. Individuals applying for AG also may be required to provide verification of Virginia residency using one of the following documents:
  - a. Postmarked letters;
  - b. Public utility records or credit accounts;
  - c. Voter registration records;

- d. Home or apartment lease;
  - e. Real property records;
  - f. Medical bills; or
  - g. State or federal tax records.
- B. Exceptions to the 90-day residency requirement.
- 1. Individuals who have moved to Virginia to join a close relative who has lived in Virginia for at least 90 days. A close relative is limited to the individual's parent, grandparent, grandchild, brother, sister, spouse, or child. The close relative shall furnish verification of kinship at the time of application using one of the following documents:
    - a. Birth certificate;
    - b. Proof of marriage; or
    - c. Notarized affidavit.
  - 2. The close relative shall furnish proof of residency as specified in subdivision A 2 of this section.
- C. Virginia locality of residence.
- 1. An individual who is a resident of Virginia shall apply for AG in the locality in which he resides.
  - 2. The Virginia locality where the individual last resided prior to entering a Virginia-based institution, including but not limited to a nursing home, intermediate care facility, correctional facility, rehabilitation center, psychiatric facility, or medical facility, is the individual's place of residence for purposes of applying for AG.

Statutory Authority

§ 51.5-131 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

**22VAC40-25-20. 22VAC30-80-20. Assessment.**

A. In order to receive payment from the program for care in an ALF or in AFC, an individual applying for AG shall have been assessed by a qualified assessor using the UAI and determined to need residential or assisted living care or AFC.

B. As a condition of eligibility for the program, a UAI shall be completed on an individual prior to admission, except for an emergency placement as documented and approved by a Virginia adult protective services worker, at least once annually, and whenever there is a significant change in the individual's level of care, and a determination is made that the individual needs residential or assisted living care in an ALF or AFC.

C. The ALF or AFC provider is prohibited from charging a security deposit or any other form of compensation for providing a room and services to the individual. The collection or receipt of money, gift, donation or other consideration from or on behalf of an individual for any services provided is prohibited.

Statutory Authority

§ 51.5-131 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

**22VAC40-25-30, 22VAC30-80-30. Basic services.**

The rate established under the program shall cover the following services:

1. Room and board.
  - a. Provision of a furnished room;
  - b. Housekeeping services based on the needs of the individual;
  - c. Meals and snacks provided in accordance with 22VAC40-72 including, but not limited to food service, nutrition, number and timing of meals, observance of religious dietary practices, special diets, menus for meals and snacks, and emergency food and water. A minimum of three well-balanced meals shall be provided each day. When a diet is prescribed for a individual by his physician, it shall be prepared and served according to the physician's orders. Basic and bedtime snacks shall be made available for all individuals desiring them and shall be listed on the daily menu. Unless otherwise ordered in writing by the individual's physician, the daily menu, including snacks, for each individual shall meet the guidelines of the U.S. Department of Agriculture's Food Guide Pyramid, taking into consideration the age, sex, and activity of the resident. Second servings shall be provided, if requested, at no additional charge. At least one meal each day shall include a hot main dish; and
  - d. Clean bed linens and towels as needed by the individual and at least once a week.
2. Maintenance and care.
  - a. Minimal assistance with personal hygiene including bathing, dressing, oral hygiene, hair grooming and shampooing, care of clothing, shaving, care of toenails and fingernails, arranging for haircuts as needed, and care of needs associated with menstruation or occasional bladder or bowel incontinence;
  - b. Medication administration as required by licensing regulations including insulin injections;
  - c. Provision of personal toiletries including toilet paper;
  - d. Minimal assistance with the following:
    - (1) Care of personal possessions;
    - (2) Care of personal funds if requested by the individual and provider policy allows this practice, and in compliance with 22VAC40-72-140 and 22VAC40-72-150, Standards for Licensed Assisted Living Facilities;
    - (3) Use of the telephone;
    - (4) Arranging transportation;
    - (5) Obtaining necessary personal items and clothing;
    - (6) Making and keeping appointments; and
    - (7) Correspondence;
  - e. Securing health care and transportation when needed for medical treatment;
  - f. Providing social and recreational activities; and
  - g. General supervision for safety.

Statutory Authority

§ 51.5-131 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

**22VAC40-25-40. 22VAC30-80-40. Personal needs allowance.**

A. The personal needs allowance is included in the monthly AG payment to the individual and must be used by the individual for personal items. These funds shall not be commingled with the funds of the provider and shall be maintained in a separate bank account. The personal needs allowance shall not be charged by the provider for any item or service not requested by the individual. The provider shall not require an individual or his personal representative to request any item or service as a condition of admission or continued stay. The provider must inform the individual or his personal representative of a charge for any requested item or service not covered under the AG and the amount of the charge. The personal needs allowance is expected to cover the cost of the following items and services:

1. Clothing;
2. Personal toiletries not included in those to be provided by the provider or if the individual requests a specific type or brand of toiletry;
3. Personal items including tobacco products, sodas, and snacks beyond those required in subdivision 1 c of ~~22VAC40-25-30~~ 22VAC30-80-30.
4. Hair care services;
5. Over-the-counter medication, medical copayments and deductibles, insurance premiums;
6. Other needs such as postage stamps, dry cleaning, laundry, direct bank charges, personal transportation, and long distance telephone calls;
7. Personal telephone, television, or radio;
8. Social events and entertainment offered outside the scope of the activities program; and
9. Other items agreed upon by both parties except those listed in subsection B of this section.

B. The personal needs allowance shall not be encumbered by the following:

1. Recreational activities required by licensing regulations (including any transportation costs of those activities);
2. Administration of accounts (bookkeeping, account statements);
3. Debts owed the provider for basic services as outlined by regulations; or
4. Provider laundry charges in excess of \$10 per month.

Statutory Authority

§ 51.5-131 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

**22VAC40-25-45. 22VAC30-80-45. Conditions of participation in the program.**

A. Provider agreement for ALF.

1. As a condition of participation in the program, the ALF provider is required to complete and submit to the department a signed provider agreement as stipulated below. The agreement is to be submitted prior to the ALF accepting AG payment for qualified individuals. A copy of the ALF's current license must be submitted with the provider agreement.
2. The ALF provider shall agree to the following conditions in the provider agreement to participate in the program:

- a. Provide services in accordance with all laws, regulations, policies, and procedures that govern the provision of services in the facility;
- b. Submit an annual certification form by October 1 of each year;
- c. Care for individuals with AG in accordance with the requirements herein at the current established rate;
- d. Refrain from charging the individual, his family, or his authorized personal representative a security deposit or any other form of compensation as a condition of admission or continued stay in the facility;
- e. Accept the established rate as payment in full for services rendered;
- f. Account for the personal needs allowances in a separate bank account and apart from other facility funds and issue a monthly statement to each individual regarding his account balance;
- g. Provide a 60-day written notice to the regional licensing office in the event of the facility's closure or ownership change;
- h. Provide written notification of the date and place of an individual's discharge or the date of an individual's death to the local department of social services determining the individual's AG eligibility and to the qualified assessor within 10 days of the individual's discharge or death; and
- i. Return to the local department of social services determining the individual's AG eligibility, all AG funds received after the death or discharge date of an individual in the facility.

B. As a condition of participation in the program, the AFC provider shall be approved by a local department of social services and comply with the requirements set forth in 22VAC40-771.

#### Statutory Authority

§ 51.5-131 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

#### **22VAC40-25-50. 22VAC30-80-50. Establishment of rate.**

The established rate for individuals authorized to reside in an ALF or in AFC is the established rate as set forth in the appropriation act or as set forth by changes in the federal maintenance of effort formula. The AG payment is determined by adding the rate plus the personal needs allowance minus the individual's countable income. The effective date is the date of the individual's approval for AG by the local department of social services.

#### Statutory Authority

§ 51.5-131 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

#### **22VAC40-25-60. 22VAC30-80-60. Reimbursement.**

A. Any moneys contributed toward the cost of care pending AG eligibility determination shall be reimbursed to the individual or contributing party by the ALF or AFC provider once eligibility for AG is established and that payment received. The payment shall be made payable to the individual, who will then reimburse the provider for care. If the individual is not capable of managing his finances, his personal representative is responsible for reimbursing the provider.



B. In the event an ALF is closed, the facility shall prorate the rate up to the date of the individual's discharge and return the balance to the local department of social services that determined the individual's eligibility for the grant. If the facility maintained the individual's personal needs allowance, the facility shall provide a final accounting of the individual's personal needs allowance account within 60 days of the individual's discharge. Verification of the accounting and of the reimbursement to the individual shall be mailed to the case management agency responsible for the individual's annual reassessment. In the event of the individual's death, the provider shall give to the individual's personal representative a final accounting of the individual's funds within 60 calendar days of the event. All AG funds received after the death or discharge date shall be returned to the local department of social services responsible for determining the individual's AG eligibility as soon as practicable. Providers who do not comply with the requirements of this regulation may be subject to adverse action.

#### Statutory Authority

§ 51.5-131 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

#### **22VAC40-25-70. 22VAC30-80-70. Certification.**

A. ALFs shall submit an annual certification form by October 1 of each year for the preceding state fiscal year. The certification shall include the following: identifying information about the ALF, census information including a list of individuals who resided in the facility and received AG during the reporting period and personal needs allowance accounting information. If a provider fails to submit an annual certification form, the provider will not be authorized to accept additional individuals with AG.

B. All information reported by an ALF on the certification form shall be subject to audit by the department. Financial information that is not reconcilable to the provider's general ledger or similar records could result in establishment of a liability to the provider. Records shall be retained for three years after the end of the reporting period or until audited by the department, whichever is first.

C. All records maintained by an AFC provider, as required by 22VAC40-771, shall be made available to the department or the approving local department of social services upon request. All records are subject to audit by the department. Financial information that is not reconcilable to the provider's records could result in establishment of a liability to the provider. Records shall be retained for three years after the end of the reporting period or until audited by the department, whichever is first.

#### Statutory Authority

§ 51.5-131 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume , Issue , eff. Month dd, yyyy.

FORMS ~~(22VAC40-25)~~ (22VAC30-80)

~~Auxiliary Grant Program Provider Agreement, 032-02-0747-01-eng (rev. 6/12).~~

~~Auxiliary Grant Certification, 032-02-0747-04-eng (rev. 4/12).~~

[Auxiliary Grant Program Provider Agreement, 032-02-0747-02-eng \(rev. 6/13\)](#)

[Auxiliary Grant Certification, 032-02-0747-06-eng \(rev. 5/13\)](#)

[Statement of Virginia Residency and Intent to Remain in Virginia, 032-02-0749-00-eng \(eff. 12/12\)](#)