



Fast Track Proposed Regulation Agency Background Document

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| Agency name | DEPT. OF MEDICAL ASSISTANCE SERVICES |
| Virginia Administrative Code (VAC) citation | 12 VAC 30-120- 450 et seq. |
| Regulation title | Assisted Living Services for Individuals Receiving Auxiliary Grants Residing in Adult Care Residences |
| Action title | Repeal Assisted Living Facility Regulations |
| 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*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.

This regulatory action repeals the Assisted Living program regulations that the Department of Medical Assistance Services (DMAS) implemented in August 1996. This program was designed to serve individuals living in community assisted living facilities (ALFs) under the authority of a federal waiver. This program gave additional financial support to ALFs for these qualifying individuals. The Centers for Medicare and Medicaid Services (CMS) discontinued this waiver in March 2000 due to concerns about the program's operation. This action is needed in order to repeal these waiver regulations that are no longer operable.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

I hereby approve the foregoing Agency Background document with the attached amended regulations regarding Repeal Assisted Living Waiver (12 VAC 30-120-450, 12 VAC 30-120-460, 12 VAC 30-120-470, and 12 VAC 30-120-480) and adopt the action stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012, of the Administrative Process Act.

Date

Cynthia B. Jones, Director
Dept. of Medical Assistance Services

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 General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of 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 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 Medicaid coverage of these services in ALFs as an alternative to the more costly nursing facility care.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health,

safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This regulatory action concerns the Assisted Living program that DMAS 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.

This action has no affect on the health, safety, or welfare of citizens of the Commonwealth or on the agency.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

CMS denied Virginia any further federal funding for the Assisted Living Services for Auxiliary Grant Individuals waiver program. Also, the Virginia General Assembly discontinued funding these additional payments for this program. The termination of both funding sources thereby leaves these regulations as serving no legal purpose. As DMAS had no other options in this matter, the Agency determined that repealing the regulations would not be controversial. Fast Track actions are permitted by the *Code of Virginia* § 2.2-4012.1.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

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 facilities (ALFs) 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 regular (\$3 per diem) and intensive assisted living services (\$6 per diem) 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, thereby 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.

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 there are no disadvantages to the public or the Commonwealth, please indicate.

There are no disadvantages to the Commonwealth or the agency in this action. In 2010, when the state's funding for this service was terminated, there were only about 1100 individuals for whom DMAS was making this additional payment to the approximately 248 ALFs. The DMAS payments were not a significant source of funding for these facilities. There is no disadvantage to the ALF industry either because they have not received these supplementary payments for a number of years.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is 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.

There are no requirements more restrictive than federal. The federal funding for this service has been discontinued.

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.

There are no localities that are particularly affected by this action as it applies statewide.

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.

Due to the action of the 2010 General Assembly, as set out in the 2010 Acts of the Assembly, Chapter 874, Item 297 VV, no policy alternatives were possible.

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.

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| Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures | (\$1,461,478 GF) each year FY 11 forward. |
| Projected cost of the new regulations or changes to existing regulations on localities. | \$0. |
| Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations. | Adult care residences/assisted living facilities |
| 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. | Approximately 278 providers were affected by this change and DMAS believes that most, if not all, are likely to be small employers, due to the nature of this industry. |
| All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and 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. | \$0. |
| Beneficial impact the regulation is designed to produce. | Clean up of the Virginia Administrative Code of regulations that are no longer in use. |

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.

There are no policy alternatives as this service is no longer funded by either the General Assembly or the federal funding agency.

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; nor 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.

Detail of changes

Please list 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 in each section. Please describe 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.

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change and rationale |
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| 12 VAC 30-120-450, 460, 470, 480 | | Provides the definitions, general coverage and requirements for assisted living services and facilities, and reevaluation of service need and utilization review. | Regulations are being repealed as the service is no longer funded. |