

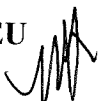


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**TO:** **KATHRYN A. HAYFIELD, Commissioner**  
Virginia Department of Aging and Rehabilitative Services

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

**DATE:** **July 22, 2022**

**SUBJECT:** **Exempt Final Regulation – Amend Assisted Living Facility Assessment Regulations, 22 VAC 40-110-10 et seq. (5732/9275)**

I am in receipt of the attached regulation to amend the Assisted Living Facility Assessment regulations 22 VAC 40-110-10 *et seq.* 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. The current regulations for the administration of assessments for assisted living facilities are set forth at 22 VAC 40-110-10 *et seq.* The proposed amendments to these regulations are necessary to reflect the changes to Virginia law by the adoption of Item 335.F of Chapter 2 of the 2022 Acts of Assembly (Spec. Sess. I) (the “Budget”).

Based on my review, it is my view that the DARS Commissioner has the authority to promulgate the final regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and Executive Order 19 (2022), and has not exceeded that authority. The Agency Background Document available on Town Hall reflects the Commissioner’s approval of these regulatory amendments on July 5, 2022. Based on the foregoing, it is my view that the amendments to these regulations are exempt from the

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procedures of Article 2 of the APA under Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about this regulation, please contact me at 786-6005.

cc: Kim F. Piner, Esq.

Attachment

**Project 6719 - Final**

**Department For Aging And Rehabilitative Services**

**Amend ALF Assessment regulations to comport with changes pursuant to the 2022  
Appropriation Act**

**22VAC30-110-10. Definitions.**

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

"Activities of daily living" or "ADLs" means bathing, dressing, toileting, transferring, bowel control, bladder control, and eating/feeding. An individual's degree of independence in performing these activities is a part of determining appropriate level of care and services.

"Administrator" means the licensee or person designated by the licensee who is responsible for the general administration and management of an assisted living facility and who oversees the day-to-day operation of the facility, including compliance with all regulations for assisted living facilities.

"Assessment" means a standardized approach using common definitions to gather sufficient information about an individual applying to or residing in an assisted living facility to determine the need for appropriate level of care and services.

"Assisted living care" means a level of service provided by an assisted living facility to individuals 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" or "ALF" means 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 years, or 22 years 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 of Social Services 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.

"Auxiliary Grants Program" means a state and locally funded assistance program to supplement the income of an individual who is receiving Supplemental Security Income (SSI) or an individual who would be eligible for SSI except for excess income, and who resides in an ALF, an adult foster care home, or supportive housing setting with an established rate in the

Appropriation Act. The total number of individuals within the Commonwealth of Virginia eligible to receive auxiliary grants in a supportive housing setting shall not exceed the number individuals designated in the Virginia law and the signed agreement between the department and the Social Security Administration.

"Case management" means multiple functions designed to link individuals to appropriate services. Case management may include a variety of common components such as initial screening of need, comprehensive assessment of needs, development and implementation of a plan of care, service monitoring, and follow-up.

"Case management agency" means a public human service agency which employs a case manager or contracts for case management.

"Case manager" means an employee of a public human services agency who is qualified to perform assessments and to develop and coordinate plans of care.

"Department" or "DARS" means the Virginia Department for Aging and Rehabilitative Services.

"Department designated case management system" means the official state automated computer system that collects and maintains information on assessments conducted by employees of the local department who meet the definition of qualified assessor.

"Dependent" means the individual needs the assistance of another person or needs the assistance of another person and equipment or a device to safely complete an ADL or IADL. For medication administration, dependent means the individual needs to have medications administered or monitored by another person or professional staff. For behavior pattern, dependent means the individual's behavior is aggressive, abusive, or disruptive.

"Discharge" means the process that ends an individual's stay in the ALF.

"Emergency placement" means the temporary status of an individual in an ALF when the individual's health and safety would be jeopardized by denying entry into the facility until requirements for admission have been met.

"Face-to-face" means interacting with an individual in need of an assessment in a manner that enables the qualified assessor or case manager to observe the individual's behavior and ability to perform ADLs and IADLs.

"Facility" means an ALF.

"Independent physician" means a physician who is chosen by an individual residing in the ALF and who has no financial interest in the ALF, directly or indirectly, as an owner, officer, or employee or as an independent contractor with the facility.

"Instrumental activities of daily living" or "IADLs" means for the purposes of this chapter, meal preparation, housekeeping, laundry, and money management. An individual's degree of independence in performing these activities is a part of determining appropriate level of care and services.

"Local department" means any local department of social services in the Commonwealth of Virginia.

"Maximum physical assistance" means that an individual has a rating of total dependence in four or more of the seven activities of daily living as documented on the uniform assessment instrument.

"Medication administration" means for purposes of this chapter, assessing the degree of assistance an individual requires to take medications in order to determine the individual's appropriate level of care.

"Minimal assistance" means dependency in only one ADL or dependency in one or more IADLs as documented on the uniform assessment instrument. Included in this level of services are individuals who are dependent in medication administration as documented on the UAI.

"Moderate assistance" means dependency in two or more ADLs as documented on the UAI.

"Private pay" means that an individual residing in an ALF is not eligible for the Auxiliary Grants Program.

"Prohibited conditions" means physical or mental health conditions or care needs as described in § 63.2-1805 of the Code of Virginia. An ALF shall not admit or allow the continued residence of an individual with a prohibited condition. Prohibited conditions include an individual who requires maximum physical assistance as documented on the uniform assessment instrument and meets nursing facility level of care criteria as defined in the State Plan for Medical Assistance. Unless the individual's independent physician determines otherwise, an individual who requires maximum physical assistance and meets nursing facility level of care criteria as defined on the State Plan for Medical Assistance shall not be admitted to or continue to reside in an ALF.

"Public human services agency" means an agency established or authorized by the General Assembly under Chapters 2 and 3 (§§ 63.2-200 et seq. and 63.2-300 et seq.) of Title 63.2, Chapter 14 (§ 51.5-116 et seq.) of Title 51.5, Chapters 1 and 5 (§§ 37.2-100 et seq. and 37.2-500 et seq.) of Title 37.2, or Article 5 (§ 32.1-30 et seq.) of Chapter 1 of Title 32.1, or hospitals operated by the state under ~~6.1 and 9 (§§ 23-50.4 et seq. and 23-62 et seq.) of Title 23 Chapters 22 and 23 (§§ 23.1-2200 et seq. and 23.1-2300 et seq.) of Title 23.1~~ of the Code of Virginia and supported wholly or principally by public funds, including but not limited to funds provided expressly for the purposes of case management.

"Public pay" means that an individual residing in an ALF is eligible for the Auxiliary Grants Program.

"Qualified assessor" means a person who is authorized to perform an assessment, reassessment, or change in level of care for an individual who is seeking admission to an ALF or who resides in an ALF. For public pay individuals, a qualified assessor is an employee of a public human services agency who is trained in the completion of the uniform assessment instrument and is authorized to approve placement for an individual who is seeking admission to or residing in an ALF. For private pay individuals, a qualified assessor is staff of the ALF trained in the completion of the uniform assessment instrument or an independent physician or a qualified assessor for public pay individuals.

"Reassessment" means an update of information on the UAI after the initial assessment. In addition to an annual reassessment, a reassessment shall be completed whenever there is a significant change in the individual's condition.

"Residential living care" means a level of service provided by an ALF for individuals who may have physical or mental impairments and require only minimal assistance. The definition of residential living care includes the services provided by the ALF to individuals who are assessed as capable of maintaining themselves in an independent living status.

"Significant change" means a change in an individual's condition that is expected to last longer than 30 days. It does not include short-term changes that resolve with or without intervention, a short-term acute illness or episodic event, or a well-established, predictive, cyclic pattern of clinical signs and symptoms associated with a previously diagnosed condition where an appropriate course of treatment is in progress.

"Targeted case management" means the provision of ongoing case management services by an employee of a public human services agency contracting with the Department of Medical Assistance Services to an individual who is receiving an auxiliary grant in an ALF who meets the criteria set forth in 12VAC30-50-470.

"Total dependence" means the individual is entirely unable to participate in the performance of an ADL.

"Uniform assessment instrument" or "UAI" means the department-designated assessment form. There is an alternate version of the uniform assessment instrument that may be used for individuals paying privately to reside in the ALF.

"Virginia Department of Medical Assistance Services" or "DMAS" means the single state agency designated to administer the Medical Assistance Services Program in Virginia.

**22VAC30-110-20. Individuals to be assessed.**

A. All individuals applying to or residing in an ALF shall be assessed face-to-face using the UAI prior to admission, at least annually, and whenever there is a significant change in the individual's condition.

1. When the qualified assessor or case manager and individual are unable to be in the same physical space to conduct an assessment due to the individual's location in another state or due to hazardous travel conditions for the qualified assessor or case manager, the use of video conferencing to conduct the assessment shall be permitted.

2. The appropriate qualified assessor or case manager shall review the assessment with the adult within seven working days of admission to the ALF to ensure all assessment information is accurate.

B. For private pay individuals, qualified staff of the ALF or an independent physician may complete the UAI. Qualified staff are ALF employees who have successfully completed department designated training course on the UAI for either public or private pay assessments. The ALF maintains documentation of the completed training. The administrator or the administrator's designated representative shall approve and sign the completed UAI for private pay individuals. A private pay individual may request the assessment be completed by a qualified public human services agency assessor. When a public human services agency assessor completes the UAI for a private pay individual, the agency may determine and charge a fee for private pay assessments ~~that may not exceed the amount DMAS reimburses for public pay assessments.~~

C. For public pay individuals, the UAI shall be completed by a case manager or a qualified assessor to determine the need for residential care or assisted living care services. The assessor is qualified to complete the assessment if the assessor has completed the department designated training course on the UAI. Assessors who prior to January 1, 2004, routinely completed UAIs as part of their job descriptions may be deemed to be qualified assessors without the completion of the training course. Qualified assessors who may initially authorize ALF services for public pay individuals are employees of:

1. Local departments;
2. Area agencies on aging;
3. Centers for independent living;
4. Community services boards or behavioral health authorities;
5. Local departments of health;
6. State facilities operated by the Department of Behavioral Health and Developmental Services;
7. Acute-care hospitals;
8. Department of Corrections; and
9. Independent physicians who have a signed provider agreement with DMAS to conduct ALF assessments.

D. For public pay individuals, the ALF shall coordinate with the qualified assessor or case manager to ensure that the UAI is completed as required. If the individual has not been assessed, the local department benefits worker shall inform the individual or the individual's legal representative of the need to be assessed prior to admission. If the individual has not applied for an auxiliary grant, the qualified assessor or case manager conducting the assessment shall inform the individual or the individual's legal representative of the need to submit an application for an auxiliary grant.

E. The cost of ALF assessments conducted by qualified assessors identified in 22VAC30-110-20 for public pay individuals shall be borne by each entity conducting the assessment.

**22VAC30-110-30. Determination of services to be provided.**

A. The assessment shall be conducted using the UAI. The UAI is comprised of a short assessment and a full assessment. The short assessment is designed to briefly assess the individual's need for appropriate level of care and services and to determine if a full assessment is needed.

B. The following sections of the UAI shall be completed as follows:

1. For private pay individuals, the assessment shall include sections related to identification and background, functional status, which includes ADLs, continence, ambulation, IADLs, medication administration, and behavior pattern. The private pay or public pay UAI may be used.

2. For public pay individuals, the short form of the UAI shall be completed. The short form consists of sections related to identification and background, and functional status (i.e., the first four pages of the UAI), plus sections on medication administration, and behavior pattern. If, upon assessment, it is determined that the individual is dependent in at least two ADLs or is dependent in behavior, then the full assessment shall be completed.

3. For private pay and public pay individuals, the prohibited conditions section shall be completed.

C. The UAI shall be completed within 90 days prior to the date of admission to the ALF. If there has been a significant change in the individual's condition since the completion of the UAI that would affect the admission to an ALF, a new UAI shall be completed as specified in 22VAC30-110-20.

D. When an individual moves to an ALF from another ALF, a new UAI is not required except that a new UAI shall be completed whenever there is a significant change in the individual's condition or the most recent UAI was completed more than 12 months ago.

E. In emergency placements, the UAI shall be completed within seven working days from the date of placement. An emergency placement shall occur only when the emergency is documented and approved by (i) a local department adult protective services worker for public pay individuals or by (ii) a local department adult protective services worker or independent physician for private pay individuals.

F. The UAI shall be completed annually on all individuals residing in ALFs and whenever there is a significant change in the individual's condition.

G. The ALF shall provide an area for assessments and reassessment to be conducted that ensures the individual's privacy and protects confidentiality.

H. At the request of the ALF, the individual residing in the ALF, the individual's legal representative, the individual's physician, the Virginia Department of Social Services, or the local department, an independent assessment using the UAI shall be completed to determine whether the individual's care needs are being met in the current ALF. An independent assessment is an assessment that is completed by an entity other than the original assessor. The ALF shall assist the individual in obtaining the independent assessment as requested. If the request is for a private

pay individual, the entity requesting the independent assessment shall be responsible for paying for the assessment.

I. The assessor shall consult with other appropriate human service professionals as needed to complete the assessment.

J. Qualified assessors who are employees of local departments shall enter ALF assessments in the department designated case management system.

~~K. DMAS shall reimburse for completion of assessments and authorization of ALF placement for public pay individuals pursuant to this section.~~