




COMMONWEALTH of VIRGINIA
Office of the Attorney General

Jason S. Miyares
Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

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

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

DATE: **October 23, 2023**

SUBJECT: **Exempt Final Regulation – Amend Assisted Living Facility Definition in Regulations, 22 VAC 30-80-10 and 22 VAC 30-110-10 et seq. (6278/10064)**

I am in receipt of the attached regulations to amend the Assisted Living Facility definition in regulations 22 VAC 30-80-10 and 22 VAC 30-110-10. You have asked the Office of the Attorney General to review and determine if the Department for Aging and Rehabilitative Services (“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 DARS regulations incorporating the definition for assisted living facilities are set forth at 22 VAC 30-80-10 and 22 VAC 30-110-10. The proposed amendments to these regulations are necessary to reflect the changes to Virginia law by the adoption of Chapters 148 and 149 of the 2023 Acts of Assembly (HB 1450 and SB 798 respectively).

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 August 3, 2023. 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 7630 - Final

Department For Aging And Rehabilitative Services

Amend Auxiliary Grant and ALF Assessment regulations to comport with changes pursuant

22VAC30-80-10. Definitions.

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" or "AFC" means a locally optional program that provides room and board, supervision, and special services to an individual who has a physical or mental health need. Adult foster care may be provided for up to three individuals 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 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, or infirm or disabled who have disabilities 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 individuals who are infirm or disabled persons who have disabilities between the ages of 18 and 21, or 22 if enrolled in an educational program for the ~~handicapped~~ individuals with disabilities pursuant to § 22.1-214 of the Code of Virginia, when such facility is licensed by the Virginia 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~~ individuals who are 62 years of age or older or the disabled individuals with disabilities 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 adults who are aged, or infirm or disabled adults who have disabilities. Maintenance or care means the protection, general supervision and oversight of the physical and mental well-being of an individual who is aged, or infirm or disabled individual who has a disability.

"Authorized payee" means the individual who may be a court-appointed conservator or guardian, a person with a valid power of attorney, or an authorized representative with the documented authority to accept funds on behalf of the individual. An authorized payee for the auxiliary grant shall not be (i) the licensee or (ii) the owner of, employee of, or an entity hired by or contracted by the ALF or AFC home.

"Authorized representative" means the person representing or standing in place of the individual receiving the auxiliary grant for the conduct of the auxiliary grant recipient's affairs (i.e., personal or business interests). "Authorized representative" may include a guardian, conservator, attorney-in-fact under durable power of attorney, trustee, or other person expressly named in writing by the individual as his agent. An authorized representative shall not be (i) the licensee or (ii) the owner of, employee of, or an entity hired by or contracted by the ALF, AFC home, or a supportive housing provider unless the auxiliary grant recipient designates such a person to assist with financial management of his personal needs allowance as a choice of last resort because there is no other authorized representative willing or available to serve in this capacity.

"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, an AFC home, or a supportive housing setting with an established rate. The total number of individuals within the Commonwealth of Virginia eligible to receive AG in a supportive housing setting shall not exceed the number designated in the signed agreement between the department and the Social Security Administration.

"Certification" means an official approval as designated on the form provided by the department and prepared by an ALF or a supportive housing provider. Each ALF shall annually certify that it 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. Each supportive housing provider shall annually certify that it is in compliance with this chapter.

"Department" means the Department for Aging and Rehabilitative Services.

"DBHDS" means the Department of Behavioral Health and Developmental Services.

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

"Licensee" means any person, association, partnership, corporation, limited liability company, or governmental unit to whom a license to operate an ALF is issued in accordance with 22VAC40-73.

"Personal funds" means payments the individual receives, whether earned or unearned, including wages, pensions, Social Security benefits, and retirement benefits. "Personal funds" does not include the personal needs allowance.

"Personal needs allowance" means a portion of the AG payment that is reserved for meeting the individual's personal needs. The amount is established by the Virginia General Assembly.

"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.

"Provider" means an ALF that is licensed by the Virginia Department of Social Services or an AFC provider that is approved by a local department of social services or a supportive housing provider as defined in § 37.2-421.1 of the Code of Virginia.

"Provider agreement" means a written agreement that ALF and supportive housing providers must complete and submit to the department when requesting approval to admit individuals receiving AG.

"Qualified assessor" means an individual who is authorized by 22VAC30-110 to perform an assessment, reassessment, or change in level of care for an individual applying for AG or residing in an ALF or a supportive housing setting. For individuals receiving services from a community services board or behavioral health authority, a qualified assessor is an employee or designee of the community services board or behavioral health authority.

"Rate" means the established rate.

"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 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).

"Supportive housing" or "SH" means a residential setting with access to supportive services for an AG recipient in which tenancy as described in § 37.2-421.1 of the Code of Virginia is provided or facilitated by a provider licensed to provide mental health community support services, intensive community treatment, programs of assertive community treatment, supportive in-home services, or supervised living residential services that has entered into an agreement with the DBHDS pursuant to § 37.2-421.1 of the Code of Virginia.

"Third-party payment" means a payment made by a third party to an ALF, an AFC home, or supportive housing provider on behalf of an AG recipient for goods or services other than for food, shelter, or specific goods or services required to be provided by the ALF, an AFC home, or a supportive housing provider as a condition of participation in the AG in accordance with 22VAC30-80-45.

"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.

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, or infirm, or disabled who have disabilities 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 individuals who are infirm or disabled persons who have disabilities between the ages of 18 and 21 years, or 22 years if enrolled in an educational program for ~~the handicapped~~ individuals with disabilities 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~~ individuals who are 62 years of age or older or the disabled individuals with disabilities 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 adults who are aged, or infirm, or disabled adults who have disabilities. Maintenance or care means the protection, general supervision, and oversight of the physical and mental well-being of an individual who is aged, or infirm, or disabled individual who has a disability.

"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 that 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 Chapters 22 (§ 23.1-2200 et seq.) and 23 (§ 23.1-2300 et seq.) of Title 23.1 of the Code of Virginia and supported wholly or principally by public funds, including 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.