




# COMMONWEALTH of VIRGINIA

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**TO:** JAMES A. ROTHROCK, Commissioner  
Virginia Department for Aging and Rehabilitative Services

**FROM:** ERIC J. REYNOLDS   
Assistant Attorney General

**DATE:** October 12, 2016

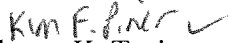
**SUBJECT:** Emergency Regulation – 22VAC30-80 (Auxiliary Grant – Supportive Housing)

I am in receipt of the attached emergency regulation regarding the Auxiliary Grant program. You have asked the Office of the Attorney General to review and determine if you, as the Commissioner of the Virginia Department of Aging and Rehabilitative Services, have the statutory authority to promulgate the proposed regulation and if the proposed regulation comports with applicable state and federal law.

Amendments to Va. Code § 51.5-160 and the addition of Va. Code 37.2-421.1, enacted in the 2016 Acts of Assembly, Chapter 567, added supportive housing as an optional residential setting for recipients of the Auxiliary Grant. Enactment clause #2 of Chapter 567 directs the Commissioner of the Department of Aging and Rehabilitative Services to promulgate regulations for the provision of supportive housing as a residential setting for Auxiliary Grants recipients.

It is my opinion that the Commissioner of the Department of Aging and Rehabilitative Services has the authority to promulgate this regulation, subject to compliance with the emergency regulation provisions of Article 2 of the Administrative Process Act (“APA”) and has not exceeded that authority.

If you have any questions or need additional information about these regulations, please contact me at (804) 786-3450.

  
cc: ~~Allyson K. Tysinger~~, Esquire  
Attachment



Logged in as

Eric J. Reynolds

## Emergency Text

**Action:** CH 0080 Adding supportive housing to Auxiliary Grant ...

**Stage:** Emergency/NOIRA

10/12/16 11:44 AM [latest] ▼

### 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 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" 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 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, or supportive housing setting with an established

rate. The total number of individuals within the Commonwealth of Virginia eligible to receive AG in an SH setting shall not exceed the number designated in the signed agreement between the department and the Social Security Administration.

"Certification" means a form provided by the department and prepared by ~~the an~~ an ALF or a supportive housing provider. Each ALF shall annually certifying certify that ~~the ALF~~ 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 the regulations for the administration of the Auxiliary Grants Programs (22VAC30-80).

"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.

"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, decedent, 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 or a supportive housing provider as defined in § 37.2-421.1 of the Code of Virginia.

"Provider agreement" means a ~~document~~ written agreement that ~~the ALF ALFs~~ and supportive housing providers must complete and submit to the department when requesting ~~to be approved for admitting~~ 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 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 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).

"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.

"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.

### **22VAC30-80-20. 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.

D. In order to receive payment from the AG program for care in the SH setting, an individual shall be evaluated by a qualified assessor in accordance with Section E of § 51.5-160 of the Code of Virginia. Eligible individuals shall be notified of the SH setting option and the availability of approved SH providers at the time of their annual level of care assessment.

### **22VAC30-80-30. Basic services in ALF or AFC homes.**

A. The rate established under the program for the ALF setting 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 an 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 guidance system or the dietary allowances of the Food and Nutritional Board of the National Academy of Sciences, 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.

B. The AFC provider shall adhere to the standards in 22VAC30-120-40.

**22VAC30-80-35. Basic services in SH settings.**

A. The rate established under the program for SH, as defined in 22VAC30-80-10, shall cover a residential setting with access to SH services that include:

1. Development of individualized SH service plans;

2. Access to skills training;

3. Assistance with accessing available community-based services and supports;

4. Initial identification and ongoing review of the level of care needs; and

5. Ongoing monitoring of services described in the individuals individualized SH plan.

B. The residential setting covered under the program for SH, as defined in 22VAC30-80-10, shall be the least restrictive and most integrated setting practicable for the individual and shall:

1. Comply with federal habitability standards;

2. Provide cooking and bathroom facilities in each unit;

3. Afford dignity and privacy to the individual; and

4. Include rights of tenancy pursuant to the Virginia Residential Landlord and Tenant Act (§ 55-248.2 et seq. of the Code of Virginia).

**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 22VAC30-120.

C. Provider agreement for SH.

As a condition of participating in the AG program, the SH provider shall enter an agreement with DBHDS pursuant to § 37.2-421.1 of the Code of Virginia. The SH provider shall submit a copy of the executed agreement and a copy of its current DBHDS license prior to the SH provider receiving payments from the AG program on behalf of qualified individuals. The SH provider shall provide SH services for each individual in accordance with § 37.2-421.1 of the Code of Virginia and all other applicable laws, regulations, and policies and procedures.

**22VAC30-80-50. Establishment of rate.**

The established rate for individuals authorized to reside in an ALF ~~or in an AFC,~~ or SH setting 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.

**22VAC30-80-60. Reimbursement.**

A. Any moneys contributed toward the cost of ~~care~~ basic services as defined in 22VAC30-80-30 and 22VAC30-80-35 pending AG eligibility determination shall be reimbursed to the individual or contributing party by the ALF ~~or AFC,~~ or SH 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~~ appropriate providers for basic services. 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.

**22VAC30-80-70. Certification.**

A. ~~ALFs~~ ALF and SH providers shall submit to the department 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 provider, census information including a list of individuals who resided in the facility or SH setting, and received AG during the reporting period and personal needs allowance accounting information if such personal needs accounting information is required by the setting. 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 or SH provider 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 22VAC30-120, 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.