



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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MEMORANDUM

TO: EMILY MCCLELLAN
Regulatory Supervisor
Department of Medical Assistance Services

FROM: ELIZABETH M. GUGGENHEIM *Emc*
Assistant Attorney General

DATE: July 13, 2015

SUBJECT: Exempt final regulation regarding changes to the Alzheimer's Assisted Living Waiver

I have reviewed the final exempt regulation that would include residents of a "safe, secure environment" as defined in 22 VAC 40-70-10 as eligible for the Alzheimer's Assisted Living Waiver. You have asked the Office of the Attorney General to review the proposed regulation to determine if DMAS has the legal authority to promulgate the amended regulation as final exempt and if it would comport with state and federal law.

Based on that review, it is this Office's view that DMAS has the authority, subject to compliance with the provisions of Article 2 of the Administrative Process Act (APA), and has not exceeded that authority.

The amended regulation is required by Chapter 665, Item 301 TTTT of the *2015 Acts of the Assembly*. It is my view that the promulgation of this amended regulation is exempt from the procedures of Article 2 of the Administrative Process Act pursuant to Virginia Code § 2.2-4006(A)(4)(a).

If you have any questions, please feel free to contact me at 786-2071.

cc: Kim F. Piner
Senior Assistant Attorney General



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Final Text

Action: Alzheimer's Assisted Living Waiver Changes**Stage:** Final

6/16/15 1:15 PM [latest] ▼

12VAC30-120-1600

Part XVI

Alzheimer's Waiver

12VAC30-120-1600. Definitions.

The following words or terms when used in this regulation shall have the following meanings unless the content clearly indicates otherwise.

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

"Administrator" means the person who oversees the day-to-day operation of the facility, including compliance with all regulations for licensed assisted living facilities.

"Admissions summary" means the Virginia Uniform Assessment Instrument and other relevant social, psychological, and medical information gathered by the assisted living facility staff for use in the development and updates of the individual service plan.

"Alzheimer's" means a diagnosis of Alzheimer's as defined by the Diagnostic and Statistical Manual of Mental Disorders, 4th-5th Edition (~~DSM-IV-TR~~) (DSM V), published by the American Psychiatric Association.

"Alzheimer's Assisted Living Waiver" or "AAL Waiver" means the CMS-approved waiver that covers a range of community support services offered to individuals who have a diagnosis of Alzheimer's or a related dementia who meet nursing facility level of care.

"Americans with Disabilities Act" or "ADA" means the United States Code pursuant to 42 USC § 12101 et seq., as amended.

"Appeal" means the process used to challenge actions regarding services, benefits, and reimbursement provided by Medicaid pursuant to 12VAC30-110 and 12VAC30-20-500 through 12VAC30-20-560.

"Assisted living facility" means a congregate residential setting as defined in § 63.2-100 of the Code of Virginia.

"Auxiliary Grant Program" means a state and locally funded assistance program to supplement the income of an individual who receives Supplemental Security Income (SSI) or an adult who would be eligible for SSI except for excess income and who lives in a licensed assisted living facility with an approved rate.

"Barrier crime" means those crimes as defined in § 32.1-162.9:1 of the Code of Virginia.

"CMS" means the Centers for Medicare and Medicaid Services, which is the unit

of the U.S. Department of Health and Human Services that administers the Medicare and Medicaid programs.

"Designated preauthorization or service contractor" means DMAS or the entity that has been contracted by DMAS to perform preauthorization of services or service authorizations.

"Direct marketing" means either (i) conducting directly or indirectly door-to-door, telephonic or other "cold call" marketing of services at residences and provider sites; (ii) mailing directly; (iii) paying "finders' fees"; (iv) offering financial incentives, rewards, gifts or special opportunities to eligible individuals or family/caregivers as inducements to use the providers' services; (v) continuous, periodic marketing activities to the same prospective individual or family/caregiver for example, monthly, quarterly, or annual giveaways as inducements to use the providers' services; or (vi) engaging in marketing activities that offer potential customers rebates or discounts in conjunction with the use of the providers' services or other benefits as a means of influencing the individual's or family/caregiver's use of the providers' services.

"DMAS" means the Department of Medical Assistance Services.

"DMAS staff" means persons employed by the Department of Medical Assistance Services.

"DSS" means the Virginia Department of Social Services.

"Enrolled provider" means an entity that is either licensed or certified by the appropriate state agency that also meets the standards and requirements set forth by DMAS and has a current, signed provider participation agreement with DMAS.

"Home and community-based waiver services" or "waiver services" means the range of community support services approved by the CMS pursuant to § 1915(c) of the Social Security Act to be offered to persons who are elderly or disabled who would otherwise require the level of care provided in a nursing facility. DMAS or the designated preauthorization/service authorizations contractor shall only give preauthorization/service authorization for medically necessary Medicaid-reimbursed home and community care.

"Individual" means the person receiving the services established in these regulations and who (i) meets the eligibility criteria for residing in a safe, secure environment as described in 22VAC40-72-10; (ii) meets the eligibility criteria for the AAL Waiver; and (iii) resides in a safe, secure environment of an assisted living facility.

"Individual service plan" means the written individual plan developed by the provider related solely to the specific services required by the individual to ensure optimal health and safety while living in the assisted living facility.

"Legally authorized representative" means a person legally responsible for representing or standing in the place of an individual for the conduct of the individual's affairs. This may include a guardian, conservator, attorney-in-fact under durable power of attorney, trustee, or other person expressly named by a court of competent jurisdiction or the individual as his agent in a legal document that specifies the scope of the representative's authority to act. A legally authorized representative may only represent or stand in the place of the individual for the function or functions for which he has legal authority to act.

"Licensed health care professional" or "LHCP" means any health care professional currently licensed by the relevant health regulatory board of the Department of Health Professions of the Commonwealth who is practicing within the scope of his license.

"Preadmission screening" means the process to: (i) evaluate the functional, nursing, and social supports of individuals referred for preadmission screening; (ii) assist individuals in determining what specific services the individuals need; (iii) evaluate whether a service or a combination of existing community services are available to meet the individuals' needs; and (iv) refer individuals to the appropriate provider for Medicaid-funded nursing facility or home and community-based care for those individuals who meet nursing facility level of care.

"Preadmission screening team" means the entity contracted with DMAS that is responsible for performing preadmission screening pursuant to § 32.1-330 of the Code of Virginia.

"Related dementia" means a diagnosis of Dementia of the Alzheimer's Type as defined by the Diagnostic and Statistical Manual of Mental Disorders, ~~4th~~ 5th Edition (~~DSM-IV-TR~~) (DSM V), published by the American Psychiatric Association.

"Safe, secure environment" means a self-contained special care unit as defined in 22VAC40-72-10.

"Serious, cognitive impairment" means a condition in which the individual cannot recognize danger or protect his own safety, as defined in 22 VAC 40-72-10, and who is also residing in a safe, secure environment as defined in 22 VAC 40-72-10.

"State Plan for Medical Assistance" or "Plan" means the Commonwealth's legal document approved by the Centers for Medicare and Medicaid Services identifying the covered groups, covered services and their limitations, and provider reimbursement methodologies as provided for under Title XIX of the Social Security Act.

"Virginia Uniform Assessment Instrument" or "UAI" means the standardized multidimensional questionnaire that is completed by the preadmission screening team, in a face-to-face meeting with the individual and legally authorized representative, as may be appropriate, which assesses an individual's physical health, mental health, and social and functional abilities to determine if the individual meets the level of care for certain publicly funded long-term care programs such as nursing facility services.

12VAC30-120-1610

12VAC30-120-1610. Individual eligibility requirements.

A. Waiver service population. The AAL Waiver shall be available through a § 1915(c) of the Social Security Act waiver to eligible aged and disabled Auxiliary Grant individuals who live in licensed assisted living facilities.

B. Eligibility criteria. To qualify for AAL Waiver services, individuals ~~must~~ shall meet all of the following criteria:

1. The waiver individual ~~must~~ shall be either:

a. Elderly as defined by § 1614 of the Social Security Act; or

b. Disabled as defined by § 1614 of the Social Security Act.

2. The waiver individual ~~must~~ shall meet the criteria for admission to a nursing facility as determined by a preadmission screening team using the full UAI.

3. The waiver individual ~~must~~ shall have a diagnosis of either Alzheimer's or a related dementia as diagnosed by a licensed clinical psychologist or a licensed physician, or be a resident with a serious cognitive impairment, who resides in a safe, secure environment as defined in 22 VAC 40-72-10. ~~The individual may not have a diagnosis of mental retardation/intellectual disability as defined by the American Association on Intellectual and Developmental Disabilities, or a serious~~

~~mental illness as defined in 42 CFR 483.102(b).~~

4. The waiver individual ~~must~~ shall be receiving an Auxiliary Grant, and living in or seeking admission to a safe, secure unit of a DMAS-enrolled assisted living facility.

C. The individual may not have a diagnosis of intellectual disability as defined by the American Association on Intellectual and Developmental Disabilities, or a serious mental illness as defined in 42 CFR 483.102(b).

D. Assessment. Medicaid will not pay for any AAL Waiver services delivered prior to the date of the preadmission screening by the preadmission screening team and the physician signature on the Medicaid-Funded Long-Term Care Services Authorization Form (DMAS-96). Medicaid will not pay for any AAL Waiver services delivered prior to the individual's effective date of Medicaid eligibility and qualification for an Auxiliary Grant.

~~D.E.~~ E. Enrollment. For the enrollment of all CMS-approved waiver slots, individuals will be reviewed on a first-come, first-served basis in accordance with available waiver funding. If there is ~~not a~~ no waiver slot available for an individual, the individual shall be placed on the waiting list. Individuals ~~must~~ shall meet all waiver eligibility criteria in order to be placed on the waiting list.

~~E.F.~~ F. Preauthorization. Before a provider can bill DMAS for AAL Waiver services, preauthorization ~~must~~ shall be obtained from DMAS. Providers ~~must~~ shall submit all required information to the designated preauthorization contractor within 10 business days of initiating care. If the provider submits all required information to the designated preauthorization contractor within 10 business days of initiating care, services may be authorized beginning from the date the provider initiated services but not preceding the date of the physician's signature on the Medicaid-Funded Long-Term Care Services Authorization Form (DMAS-96). If the provider does not submit all required information to either the designated preauthorization contractor or DMAS within 10 business days of initiating care, the services may be authorized beginning with the date all required information was received by the designated preauthorization contractor, but in no event preceding the date of the preadmission screening team physician's signature on the DMAS-96.

~~F.G.~~ G. Review of the waiver individual's level of care. DMAS conducts this review based on the documentation submitted by the provider. The level of care assessments are performed to ensure that individuals receiving services in the waiver continue to meet the criteria for the waiver.

~~G.H.~~ H. Termination of services. In the case of termination of AAL Waiver services by DMAS, waiver individuals shall be notified of their appeal rights pursuant to 12VAC30-110, Eligibility and Appeals. DMAS may terminate AAL Waiver services for any of the following reasons:

1. The AAL Waiver is no longer required to prevent or delay institutional placement;
2. The waiver individual is no longer eligible for Medicaid;
3. The waiver individual is no longer eligible to receive an ~~auxiliary grant~~ Auxiliary Grant;
4. The waiver individual no longer meets AAL Waiver criteria;
5. The waiver individual has been absent from, or has not received services from, the assisted living facility for more than 30 consecutive days;
6. The waiver individual's environment does not provide for his health, safety, and

welfare; or

7. The assisted living facility no longer meets safe and secure licensing standards set by DSS or standards set by DMAS for service providers.