



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Virginia Department of Social Services
VAC Chapter Number:	22 VAC 40-71-10 et seq.
Regulation Title:	Standards and Regulations for Licensed Assisted Living Facilities
Action Title:	Replace Emergency Regulation
Date:	December 13, 2001

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The name of a home for aged, infirm or disabled adults is changed from “adult care residence” to “assisted living facility.”

The regulation makes an allowance for a shared administrator when an assisted living facility and a nursing home are located in the same building, and when there is a management plan to ensure that residents receive proper care and supervision.

A section regarding freedom of movement for residents is added to the regulation to make sure that no resident’s movement is limited inappropriately.

A clear division is established between standards for special care units for residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia and standards for mixed populations as set forth in the regulation. Special care units for residents with dementia may be locked if in conformance with building and fire safety codes. Specific admission, staffing, programmatic and building requirements have been added for special care units to protect the health and safety of the residents.

This regulation also includes changes in the Code of Virginia resulting from the following bills enacted by the 2000 General Assembly: House Bills 836, 837, 1168, 1169, 1194 and Senate Bill 577. In addition, the regulation includes changes in the Code of Virginia resulting from House Bill 1384 enacted by the 1996 General Assembly. The material in the regulation is taken directly from the Code, with some adjustment in format, to make it fit the regulation, but with no elaboration in content. Without making these changes, the regulation would not reflect current law.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The following sections of the Code of Virginia are the sources of the legal authority to promulgate the regulation: Section 63.1-25 (mandatory) allows State Board to make regulations to carry out the purpose and intent of Title 63.1; Section 63.1-174 (mandatory and discretionary) addresses the State Board's overall authority to promulgate regulations for assisted living facilities and specifies content areas to be included in the standards; Section 63.1-174.001 (mandatory) relates to admission, retention and discharge of residents; and Section 63.1-182.1 (discretionary) relates to resident rights. Section 63.1-174 specifies that the regulations authorize assisted living facilities to provide safe, secure environments for resident with serious cognitive impairments due to a primary psychiatric diagnosis of dementia if the facilities comply with the Board's regulations. These regulations must define serious cognitive impairment and safe, secure environment. The Code of Virginia may be found on the web at <http://leg1.state.va.us>.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The regulation is needed in order to replace the emergency regulation, which will expire on October 8, 2002. The replacement regulation covers the same subject matter as the emergency regulation, i.e., areas addressed in House Bill 1251 enacted by 2000 General Assembly and House Bill 2490 enacted by the 2001 General Assembly. The replacement regulation is more specific and provides more detail in certain areas than the emergency regulation in order to adequately protect the health, safety and welfare of vulnerable adults in assisted living facilities. It includes provisions when an administrator is shared between an assisted living facility and a nursing home to ensure the facility is properly managed and resident care remains at an acceptable level. The regulation includes requirements related to admission, care, services, and physical plant to protect residents with serious cognitive impairments due to dementia who reside in special care units. Freedom of movement is also addressed in the regulation to make sure that residents are not limited in movement inappropriately.

The regulation also incorporates other changes relating to assisted living facilities that were made in the Code of Virginia in 2000 and in 1996 so that the regulation will be current with the related law.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The replacement regulation will take the place of the emergency regulation and will address the same subject areas as the emergency regulation. The replacement regulation addresses the changes in the Code of Virginia that are a result of House Bill 1251 from the 2000 General Assembly session and House Bill 2490 from the 2001 General Assembly session.

The name of a home for aged, infirm or disabled adults is changed from “adult care residence” to “assisted living facility.” The change in name makes the type of facility and types of services offered more easily recognizable to the general public. This helps to assure the welfare of residents since decisions about placement and continued residence can be made more easily and more quickly.

The regulation makes an allowance for a shared administrator when an assisted living facility and a nursing home are located in the same building, and when there is a management plan to ensure that residents receive proper care and supervision.

A section regarding freedom of movement for residents is added to the regulation to make sure that no resident’s movement is limited inappropriately.

A clear division is established between standards for special care units for residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia and standards for mixed populations as set forth in the regulation. Special care units for residents with dementia

may be locked if in conformance with building and fire safety codes. Specific admission, staffing, programmatic and building requirements have been added for special care units to protect the health and safety of the residents.

This regulation also includes changes in the Code of Virginia resulting from the following bills in the 2000 General Assembly session: House Bills 836 (community service board access to assisted living facilities), 837 (disclosure of staffing), 1168 (training of mandatory reporters), 1169 (posting related to resident rights), 1194 (training for new applicants for licensure) and Senate Bill 577 (training for new applicants for licensure). In addition, the regulation includes changes in the Code of Virginia resulting from House Bill 1384 (Do Not Resuscitate orders) in the 1996 General Assembly session. The material in the regulation is taken directly from the Code, with some adjustment in format, to make it fit the regulation, but with no elaboration in content. Without making these changes, the regulation would not reflect current law.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.

Chapter 808 of the 2000 Acts of Assembly mandated that the regulation take into consideration cost constraints of smaller operations. The Department has carefully considered these cost constraints again. Cost impacts, including differential impacts according to facility size, types, locations, etc., are routinely and carefully reviewed during the promulgation process. In order to adequately protect the health and safety of residents, no additional special concessions could be made to the regulation, which offers minimal protection to an increasingly vulnerable population. Residents are equally at risk in smaller facilities and in larger ones and deserve the same protection. The allowable variance process already exists as a means for considering special circumstances and hardships. A facility may request an allowable variance if it believes that a regulation poses a special hardship and that an alternative method of compliance or suspension of a regulation would not endanger the safety and well-being of residents. The Department considers the request and the specific circumstances involved and may grant an allowable variance. There may be some smaller facilities that do not agree with the way the Department has handled the consideration of cost constraints of smaller operations.

In the development of the regulation, the Department has addressed potential conflicts between placement of a resident in a special care unit and the rights of the resident. There is no hard line to be drawn here, however, and some people may not agree on the best way to handle these matters.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

ESTIMATED IMPACT ON CUSTOMERS/RECIPIENTS

22 VAC 40-71-275 – The proposed regulation stipulates that unless a resident has a serious cognitive impairment and cannot recognize danger or protect his own safety and welfare, the resident shall be allowed to freely leave the facility. If the facility chooses to discharge residents they can no longer detain, the resident or his family would have the cost of relocating the resident.

22 VAC 40-71-700 B 1 – A physician's assessment of a person entering a special care unit is mandated by Code, but the proposed regulation specifies areas to be included in the assessment and also specifies qualifications for the physician. These requirements may increase costs to potential residents of special care units to ensure assessments cover the required areas and to ensure that the physicians completing the assessments meet the required qualifications.

22 VAC 40-71-700 B 2 – Written approval of placement in a special care unit is mandated by Code. The proposed regulation states that as soon as a person on the list of priority disapproves of the placement, the resident must be discharged from the special care unit. This could result in the expense of having to place a resident elsewhere if the assisted living facility could not provide care for the person outside the special care unit.

Any increased costs to the assisted living providers may result in increased fees for residents of assisted living facilities.

ESTIMATED IMPACT ON LOCAL DEPARTMENTS OF SOCIAL SERVICES' OPERATIONS

Not Applicable.

ESTIMATED IMPACT ON VDSS' OPERATIONS

None.

ESTIMATED IMPACT ON PROVIDERS/OTHER STAKEHOLDERS

22 VAC 40-71-10 – Several definitions were changed or added. None would have a fiscal impact except in the definition of assisted living where an exception was added for housing projects funded by the U.S. Department of Housing and Urban Development, the U.S. Department of Agriculture, or the Virginia Housing Authority for seniors or disabled persons. These projects that provide no more than basic coordination of care services are not defined as assisted living facilities so would not have the expense of licensure as such.

22 VAC 40-71-45 – As mandated by Code, the proposed regulation requires that assisted living facilities provide reasonable access to community services boards. This would have no fiscal impact.

22 VAC 40-71-50 – As mandated by Code, the proposed regulation requires that a person applying for an initial license receive training focusing on health and safety requirements and resident rights. The department offers this training at no charge so the only cost incurred is the cost of the operator's time in attending the required training.

22 VAC 40-71-60 – In the proposed regulation, if a licensed nursing home administrator serves as the administrator of both an assisted living facility and a licensed nursing home, the assisted living facility will have the increased cost of developing the required written management plan.

If the shared administrator does not provide the direct management of the assisted living facility, the proposed regulation requires that a manager be designated. This manager must meet the current qualifications and training requirements for the administrator of a facility providing residential living care. For facilities currently providing residential living care, there is no fiscal impact since in the proposed regulation the requirements for the designated manager do not differ from those for the administrator in the current regulation. For facilities currently providing assisted living care, costs would decrease since the manager in the proposed regulation would have to meet fewer training and qualification requirements than those for the administrator in the current regulation.

22 VAC 40-71-80 - As mandated by Code, the proposed regulation requires that facilities inform mandated reporters of the consequences for failing to report suspected abuse, neglect or exploitation. Since the current regulations require personnel to be trained on reporting suspected abuse, neglect or exploitation, this added requirement would have no fiscal impact.

22 VAC 40-71-150 - As mandated by Code, the proposed regulation requires upon admission of a resident and upon request, the assisted living facility provide information on staff and services. This would have minimal fiscal impact.

22 VAC 40-71-270 - As mandated by Code, specifications are made relating to the posting of policies and procedures regarding resident rights. This would have minimal fiscal impact.

22 VAC 40-71-275 – The proposed regulation stipulates that unless a resident has a serious cognitive impairment and cannot recognize danger or protect his own safety and welfare, the

resident shall be allowed to freely leave the facility. For facilities that had been inappropriately detaining residents, there may be an increased cost for providing increased supervision of the more mobile residents or a revenue loss if the facility chooses to discharge residents they can no longer detain.

22 VAC 40-71-410 - As mandated by Code, the provision is made for an employee with a current certification in cardiopulmonary resuscitation to carry out a Do Not Resuscitate order, but an operator of an assisted living facility may provide that the employee is not required to do so. This would have no fiscal impact.

22 VAC 40-71-700 A 1 – A clarification that staff must be awake and on duty was added to the proposed regulation to clarify that the exception allowing a staff person to be asleep at night does not apply. This clarification would have no fiscal impact since this clarification on the current regulation was issued in August 1997.

22 VAC 40-71-700 A 3 – The proposed regulation allows an employee to meet the direct care staff's initial 4-hour cognitive impairment training requirement by providing documentation of training received in the year prior to employment in the assisted living facility. This will result in a cost decrease since there is no clause in the current regulation allowing for transfer of previous training in order to meet the initial training requirements.

22 VAC 40-71-700 A 4 – The proposed regulation allows an employee to meet the administrator's initial twelve-hour training requirement by providing documentation of training received in the year prior to employment. This will result in a cost decrease since there is no clause in the current regulation allowing for transfer of previous training in order to meet the initial training requirements.

22 VAC 40-71-700 A 5 – The proposed regulation requires that the currently required cognitive impairment training also be relevant to the population in care and include training on safety considerations. There may be an increased cost to ensure the training meets those requirements.

22 VAC 40-71-700 A 6 – The proposed allows one hour of orientation for employees other than the administrator and direct care staff to be completed within one month of employment rather than within one week of employment as required by the current regulation. There will be a cost decrease for facilities as a result of this change because it will give them longer to present the training and they will not have to train staff members who remain employed only a short time.

22 VAC 40-71-700 A 7 – A clarification is added that security monitoring applies to residents with serious cognitive impairments who cannot recognize danger or protect their own safety and welfare. Also, constant staff oversight and delayed egress mechanisms are added to the examples of monitoring systems. This clarification will not result in a cost increase to facilities and may cause a cost decrease for facilities that had misunderstood the current requirements.

If a resident's ability to leave the facility is limited because he has a serious cognitive impairment and cannot recognize danger or protect his own safety and welfare, the proposed regulation requires that the resident's record reflect the behavioral observations or other bases for

making the determination of the impairment. Facilities serving these residents would have the increased cost of ensuring this documentation is in the resident's record.

22 VAC 40-71-700 A 12 – The proposed regulation requires that if there are indications that ordinary objects or materials that may be harmful to a resident who has a serious cognitive impairment and cannot recognize danger or protect his own safety and welfare, these materials be inaccessible except under staff supervision. There may be a cost increase for staff supervision or for the removal of the potentially harmful objects or materials.

22 VAC 40-71-700 B 2 – Written approval of placement in a special care unit is mandated by Code. The proposed regulation states that as soon as a person on the list of priority disapproves of the placement, the resident must be discharged from the special care unit. This could result in loss of revenue for the assisted living facility if it could not provide care for the person outside the special care unit.

22 VAC 40-71-700 B 3 – The proposed regulation requires the facility to document that the list of priority was followed in obtaining written approval for placement of a resident in the special care unit. There may be a cost increase for staff to provide this documentation.

22 VAC 40-71-700 B 4 – For residents in special care units, the facility will be required to make a determination periodically as to whether a resident's continued residence in a special care unit is appropriate. There will be additional costs incurred by facilities to make the determination and provide the required documentation of this determination.

22 VAC 40-71-700 B 5 – The proposed regulation requires the establishment of therapeutic goals for residents of special care units and the documentation of the goals in the resident's individualized service plan. There would be no cost impact associated with this requirement since establishment of goals and documentation of them in an individualized service plan are required in the current regulation.

22 VAC 40-71-700 B 6 –12 – These sections of the proposed regulation establish requirements for the activities program in the special care unit. The required number of hours of activities has not increased from the current regulation, but in the proposed regulation, specific types of activities must be available. There may be a cost increase for facilities to ensure their activities programs contain the required types of activities.

22 VAC 40-71-700 B 13 – A designated employee responsible for managing and coordinating the activities program in the special care unit is required by the proposed regulation. This employee must be on-site in the special care unit 20 hours each week and must meet certain qualifications. Facilities with special care units that did not have a trained staff person in charge of activities will have an increased cost as a result of this proposed regulation.

22 VAC 40-71-700 B 14 – Facilities with special care units will be required in the proposed regulation to obtain documentation of the qualifications of the activities coordinator/manager and retain this documentation in the employee's file. There may be nominal costs incurred by facilities to obtain and retain this documentation.

22 VAC 40-71-700 B 15 – The proposed regulation requires 2 direct care staff members to be awake and on duty in each special care unit except in certain situations when there are no more than 5 residents in the unit. Because the exception is not in the current regulation, there would potentially be a cost decrease for some facilities with special care units.

22 VAC 40-71-700 B 17 – The proposed regulation requires the administrator and direct care staff to receive within 2 months of employment 4 hours of training in cognitive impairments due to dementia. The current regulation requires this training to be received within 6 months of employment. Facilities with special care units may incur increased costs associated with ensuring staff receive the training by an earlier date. However, the proposed regulation allows an employee to meet the direct care staff's initial 4-hour training requirement by providing documentation of training received in the year prior to employment in the assisted living facility. This could result in a cost decrease since there is no clause in the current regulation allowing for transfer of previous training in order to meet the initial training requirements.

22 VAC 40-71-700 B 18 – The proposed regulation requires the administrator and direct care staff in special care units to receive within the first year of employment 6 hours of training in caring for residents with dementia (this is in addition to the 4 hours of training required by 22 VAC 40-71-700 B 17). Since this training is counted toward the annual training requirements required in the current regulation, there would be no increased cost for facilities.

22 VAC 40-71-700 B 19 - 20 – The proposed requirements for the qualifications of the persons developing and providing the training for staff in special care units may increase the cost of training for facilities with special care units.

22 VAC 40-71-700 B 21 – In the proposed regulation, direct care staff in special care units must attend 16 hours of annual training during the first year of employment compared to 12 hours of annual training required by the current regulation. This will result in increased costs for the facilities with special care units.

22 VAC 40-71-700 B 22 – In the proposed regulation for facilities with special care units, a change is made that allows one hour of orientation for employees other than the administrator and direct care staff to be completed within one month of employment rather than one week of employment as required by the current regulation. There will be a cost decrease for facilities as a result of this change because it will give them longer to present the training and not have to train staff members who remain employed only a short time.

22 VAC 40-71-700 B 23 – A specification is added that special care units may be locked and residents prohibited from exiting the facility or special care unit if there is conformance with applicable building and fire codes. Because locked special care units are not prohibited by the current regulation, there would be no increased cost for facilities.

22 VAC 40-71-700 B 27 – In the proposed regulation for facilities with special care units, buildings approved for construction or change in use group must have a glazed window area

above ground level in at least one of the common rooms. This may increase the cost of construction for new facilities or be an added expense for facilities changing use group.

22 VAC 40-71-700 B 29 – The proposed regulation requires that if there are indications that ordinary objects or materials that may be harmful to a resident who has a serious cognitive impairment and cannot recognize danger or protect his own safety and welfare, these materials be inaccessible except under staff supervision. There may be a cost increase for staff supervision or for the removal of the potentially harmful objects or materials.

22 VAC 40-71-700 B 30 – Environmental enhancements are required in special care units to promote the residents' independence and dignity. This may result in a cost increase for facilities with special care units.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

22 VAC 40-71-10: In this section, which includes definitions, the name of a home for aged, infirm or disabled adults is changed from “adult care residence” to “assisted living facility” and the definition of such a facility is clarified. (The name change occurs throughout the regulation.) An exception is added for housing projects for seniors or disabled adults that provide no more than basic coordination of care services when funded by the U.S. Department of Housing and Urban Development, the U.S. Department of Agriculture, or the Virginia Housing Development Authority.

22 VAC 40-71-10: In this section, the definition of “committee” is deleted and the definition of “conservator” is added. The term “committee” is no longer used and has been replaced with “conservator.” (The change occurs in other parts of the regulation.)

22 VAC 40-71-10: In this section, an occupational therapist is added to the examples of “licensed health care professional.”

22 VAC 40-71-10: In this section, a definition of “mandated reporter” is added.

22 VAC 40-71-10: In this section, the definition of “payee” is eliminated since the word does not appear anywhere else in the regulation.

22 VAC 40-71-10: In this section, a definition of “physician” is added.

22 VAC 40-71-10: In this section, a definitions of “safe, secure environment,” “serious cognitive impairment” and “special care unit” have been added.

22 VAC 40-71-10: In this section, a definition of “therapeutic goal” is added.

22 VAC 40-71-20: The language regarding the definition of assisted living facility and the exceptions is revised to reflect the changes made in 22 VAC 40-71-10.

22 VAC 40-71-45: A requirement is added that assisted living facilities provide reasonable access to community services boards.

22 VAC 40-71-50 D: A requirement is added that a person applying for an initial license receive training that focuses on health and safety regulations and resident rights.

22 VAC 60 B 5: An allowance is added for a licensed nursing home administrator to serve as an administrator of an assisted living facility and to service as the administrator of both an assisted living facility and a licensed nursing home when they are located in the same building.

22 VAC 40-71-60 I: A provision is added for a management plan when an assisted living facility and a nursing home have a single administrator.

22 VAC 40-71-60 J: When a manager is appointed under the provisions of 22 VAC 40-71-60 I, minimum qualifications and annual training requirements are set forth for that person.

22 VAC 40-71-80 B 6: A provision is added that in training personnel, mandated reporters must be informed of consequences for failing to report suspected abuse, neglect, or exploitation of residents.

22 VAC 40-71-150 W: A requirement is added that, upon admission of a resident and upon request, the assisted living facility provide information on staff and services.

22 VAC 40-71-270 E: Specifications are made relating to the posting of policies and procedures regarding resident rights.

22 VAC 40-71-270 G: The requirement for including various telephone numbers with a copy of resident rights is deleted since it is added to that which is provided for in 22 VAC 40-71-270 E.

22 VAC 40-71-275: A provision is added that residents who do not have serious cognitive impairments and an inability to recognize danger or protect their own safety and welfare must be able to freely leave the facility. A prohibition on the facility locking doors from the inside that lead to the outside is added, with an exception for special care units for residents with serious cognitive impairment due to dementia. There is also the addition of a provision ensuring that residents have freedom of movement within the facility.

22 VAC 40-71-410: Provision is made for an employee with a current certification in cardiopulmonary resuscitation to carry out a Do Not Resuscitate order in an assisted living facility, but an owner or operator may provide that the employee is not required to do so.

22 VAC 40-71-700: This section, which has requirements to protect residents with serious cognitive impairments who cannot recognize danger and protect their own safety and welfare, is reorganized. Subsection A now applies to mixed populations, i.e., any combination of (i) residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia who can't recognize danger or protect their own safety and welfare, (ii) residents with serious cognitive impairments due to any other diagnosis who can't recognized danger or protect their own safety and welfare, and (iii) other residents. Subsection A also applies when all the residents are described by (ii) in the previous sentence. Subsection B now applies to special care units only for residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia who cannot recognize danger or protect their own safety and welfare.

22 VAC 40-71-700 A: In this subsection, which relates to mixed populations, there is clarification of language relating to cognitive impairments so that it is clear the requirements are not limited to Alzheimers and related disorders. The following are other changes in this subsection.

22 VAC 40-71-700 A 1: A clarification that staff be awake and on duty is added and a note is added clarifying that the exception allowing a staff person to be asleep at night does not apply.

22 VAC 40-71-700 A 3 and 4: A provision is added to each of these subdivisions that previous training in the year prior to employment is transferable.

22 VAC 40-71-700 A 5 f: A topic on safety considerations is added to the cognitive impairment training curriculum.

22 VAC 40-71-700 A 6: A change is made that allows for one month after employment rather than one week for the completion of the one hour of orientation for employees other than the administrator and direct care staff.

22 VAC 40-71-700 A 7: A clarification is added that the security monitoring applies to residents with serious cognitive impairments who can't recognized danger or protect their own safety and welfare. Also, constant staff oversight and delayed egress mechanisms are added to the examples of monitoring systems. Residents with serious cognitive impairments who can't recognize danger or protect their own safety and welfare may be limited in respect to leaving the facility if their records reflect the basis for determining that they have such a condition.

22 VAC 40-71-700 A 12: A requirement is added that protects seriously cognitively impaired residents from potentially harmful materials and objects.

22 VAC 40-71-700 B: This subsection now relates to special care units only for residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia who cannot recognize danger or protect their own safety and welfare. The exception to the subsection for facilities licensed for ten or fewer residents no longer applies to special care units. An exception has been added that allows a resident's spouse, parent, adult sibling or adult child who otherwise would not meet the criteria to reside in a special care unit to live in the unit if certain conditions

are met. In addition to these revisions, the following are the requirements that are changed or added.

22 VAC 40-71-700 B 1: A requirement is added for a physician assessment that shows that a resident has a serious cognitive impairment due to a primary psychiatric diagnosis of dementia and is unable to recognize danger or protect his own safety and welfare. The diagnosis includes type or etiology and the assessment is to include specified areas.

22 VAC 40-71-700 B 2: A requirement is added that the facility obtain written approval to place a resident in a special care unit from a person in a specified order of priority.

22 VAC 40-71-700 B 3: A provision is added for documentation that the order of priority in 22 VAC 40-71-700 B 2 was followed.

22 VAC 40-71-700 B 4: A requirement is added for a periodic review of each resident regarding the appropriateness of continued residence in a special care unit.

22 VAC 40-71-700 B 5 and 6: Provision is made for the establishment of therapeutic goals for each resident and inclusion in activities.

22 VAC 40-71-700 B 7, 8 and 9: Types of activities to be available are specified and a provision is made for encouragement and assistance regarding resident participation in activities.

22 VAC 40-71-700 B 10: A provision is made for unscheduled staff and resident interaction in addition to scheduled activities.

22 VAC 40-71-700 B 11: There is specification that residents are to be given the opportunity daily to be outdoors, weather permitting.

22 VAC 40-71-700 B 12: A provision is added that, as appropriate, residents are to be encouraged to participate in supervised activities outside the special care unit.

22 VAC 40-71-700 B 13 and 14: A requirement is added that there be a person responsible for management or coordination of the activities program, that this person meet one of the qualifications outlined and that the qualification be documented.

22 VAC 40-71-700 B 15: There is a clarification that staff must be awake and on duty and that staff may not be asleep at night. There is an exception allowing one staff member rather than two that applies under certain circumstances if there are no more than five residents present in the special care unit.

22 VAC 40-71-700 B 17, 18, 19 and 20: The cognitive impairment training requirements that must occur within a specified time after employment for administrators and direct care staff are revised. The time period for receiving the training and the amount of training are changed, and the curriculum is more extensive. There is a provision for transfer of training completed in

the year prior to employment. The qualifications of the persons developing and providing the training are addressed more specifically.

22 VAC 40-71-700 B 21: The first year training requirement for direct care staff is increased by four hours.

22 VAC 40-71-700 B 22: A change is made that allows for one month after employment rather than one week for the completion of the one hour of orientation for employees other than the administrator and direct care staff.

22 VAC 40-71-700 B 23: A specification is added that special care units may be locked if there is conformance with applicable building and fire codes.

22 VAC 40-71-700 B 27: A requirement is added that buildings that are new or have a change in use group have a window in at least one of the common rooms.

22 VAC 40-71-700 B 29: A requirement is added protecting residents from potentially harmful materials and objects.

22 VAC 40-71-700 B 30: Environmental enhancements are provided to promote the residents' independence and dignity.

Alternatives

Please describe the specific 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.

This regulation will replace the emergency regulation, which was mandated by legislation passed by the 2000 General Assembly. DSS has developed the least intrusive and least burdensome methods to accomplish this end, while ensuring protection of vulnerable adults living in assisted living facilities. Regulations from several other states were examined and conditions in the assisted living industry in Virginia were carefully considered. Public comment was analyzed and revisions were made as appropriate. The Department consulted with providers, advocates for residents and other agency staff through the Assisted Living Facility Advisory Committee. Having a regulation is necessary to ensure that a minimal level of service and care is provided that is appropriate and adequate to meet the needs of aged, infirm or disabled residents.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

Ten people submitted comments during the NOIRA comment period. Four of them were from assisted living facilities, four were from senior housing projects (that are not assisted living facilities), and two were from a management company. Most of the people were from facilities or projects connected to the management company or were from the management company itself.

Half of the people who commented noted that the regulation should avoid additional or excessive documentation requirements as this takes time away from providing care and services to residents. The agency response was to only require additional documentation when absolutely necessary for ensuring that residents are being properly served.

Half of the people who commented urged the Department to not implement arbitrary staffing standards. The agency response was to not mandate increased staffing, although in order to adequately care for residents, there have been some increases in staff qualifications and training, particularly for the special care unit. Also, there has been a decrease in required staff in the special care unit under certain circumstances.

One person noted that the standards have the potential of increasing costs and therefore could displace residents from a facility. The agency response was to be constantly aware of the cost of any additional requirements and to minimize any potential increase, while still safeguarding the welfare of residents.

Almost all of the people who commented remarked that the definition of “serious cognitive impairment” in the emergency regulation should be changed. Except for one of these people, they wanted to include in the definition behavioral tendencies such as wandering, exit seeking or aggressive behavior. One person wanted to use clinical criteria to define serious. There was some misunderstanding about the relationship between the definition and criteria regarding who could be placed in a special care unit. The agency response was that the criteria established for the determination of serious cognitive impairment should not be restricted only to those who wander, exit seek, or are aggressive. The additional protections for those with serious cognitive impairments who cannot recognize danger or protect their own safety and welfare should not apply solely to those who have those behavioral tendencies. Another factor considered by the Department is that it is sometimes not possible to accurately predict those types of behavior or specific instances that may occur. The definition was developed utilizing accepted criteria and with the expertise of professionals in the field. In regard to the misunderstanding noted above, the Department will continue to provide consultation and training to clarify standards and correct any misunderstandings.

Regarding 22 VAC 40-71-275 in the emergency regulation, several people requested that the wording be reconsidered, taking into account individual resident conditions and resident safety and rights issues. The agency response was to reword part of the standard to ensure that it applied appropriately to all residents.

Regarding 22 VAC 40-71-275 B in the emergency regulation, a couple of people commented that not every seriously cognitively impaired resident needed a security monitoring system. They wanted to limit the requirement for a security monitoring system when there were residents

who exhibited exit seeking or aggressive behavior, commenting again on changing the definition of serious cognitive impairment as noted above. Please see above for agency response.

Regarding 22 VAC 40-71-275 C, one person commented that a facility should be able to lock the door of a resident's room, upon the resident's or responsible party's written permission. Two people commented that the standard should be amended to allow the facility to lock the door of a resident's room in a special care unit when the resident is not in the room so that other residents will not take things from the room. The room could only be locked upon written request of the resident's representative and the resident would be given access to his room upon request or when indicated by behavior. The agency response was that adequate supervision of all the residents is required so that residents should not be roaming around special care units unsupervised. Having adequate staff to let a resident in his room based on behavior or request would probably require as much staff as making sure other residents didn't enter his room.

Regarding 22 VAC 40-71-700, some of the comments were the same as those already mentioned, in particular regarding the definition of serious cognitive impairment.

Regarding 22 VAC 40-71-700 A 7, two people noted that a security monitoring system for a mixed population interferes with the rights of residents who do not have a serious cognitive impairment. The agency response was to specify in the standard that the security monitoring was for residents with serious cognitive impairment who cannot recognize danger or protect their own safety and welfare. In addition, 22 VAC 40-71-275 specifies that others must be able to freely leave the facility.

Regarding 22 VAC 40-71-700 A 9, two people said this would interfere with the rights of those who do not have a serious cognitive impairment. The agency response was that the protective devices only had to be on the bedroom and bathroom windows of residents with serious cognitive impairments and on windows in common areas accessible to these resident and this was necessary for protection and did not interfere with the rights of others.

Regarding 22 VAC 40-71-700 B, three people commented that a resident's spouse who does not have a serious cognitive impairment should be allowed to reside in a special care unit with the resident. The agency response was to include a provision in the regulation that would allow a resident's spouse, parent, adult sibling or adult child who otherwise would not meet the criteria to reside in the special care unit to do so.

Regarding 22 VAC 40-71-700 B 1, one person expressed disagreement regarding the physician's assessment. The agency response was that the requirement is in the Code of Virginia and therefore may not be changed in the regulation.

Regarding 22 VAC 40-71-700 B 2, two people disagreed with the specified order of placement. The agency response was that the requirement is in the Code of Virginia and therefore may not be changed in the regulation. These people also commented on continued placement and the Department has developed technical assistance material that clarifies this and addresses their concern.

Regarding 22 VAC 40-71-700 B 3, two people said that the progress review should be once a year rather than twice and that it was excessive documentation. The agency response was to change the standard so that it is clear that a determination regarding the appropriateness of continued residence in the special care unit is what is required by this standard. Due to the continual development of new drugs and other possibilities, the twice a year determination was left unchanged to assure that people do not remain in the unit inappropriately.

Regarding 22 VAC 40-71-700 B 12, three people commented that it was not practical or cost effective or that it was too restrictive to have one designated person have to do all the activities in the special care unit. The agency response was to add a note to the standard that clarified that the designated person did not have to devote 20 hours to activities, nor was it required that that person conduct the activities.

There was one person who in some instances noted agreement with certain standards.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The Department has reviewed the regulation for clarity and as a result of this review and comments received from the public, the agency has made revisions to the regulation when needed for clarification purposes.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The Department will complete a review of this regulation three years from its effective date unless a legislative change or other circumstances require an earlier revision.

The goal of this regulation is to protect the health, safety, and welfare of aged, infirm or disabled adults who reside in assisted living facilities, in accordance with the Code of Virginia, and in a cost effective manner.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which 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.

It is difficult to assess the impact of this proposed regulatory action on residents and their families because there is such a wide diversity in types of facilities and in resident and family circumstances. In some cases, having an elderly or disabled family member reside in an assisted living facility may strengthen the relationship or the family; in other cases it may weaken the relationship or the family. Depending upon the economic situation of the family and the cost of meeting the elderly or disabled family member's needs in different settings, there may be an increase or a decrease in disposable family income.