



# Virginia Assisted Living Association

*"Virginia's Unified Voice for Assisted Living"*

April 7, 2016

VIA E-MAIL: [HCBSComments@dmas.virginia.gov](mailto:HCBSComments@dmas.virginia.gov)

Virginia Department of Medical Assistance Services  
600 East Broad Street  
Richmond, VA 23219

Re: Public Comments - Virginia's Proposed Statewide Transition Plan for Compliance with the Home and Community Based Services (HCBS) Final Rule's setting requirements (Pg. 1 of 4)

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The Virginia Assisted Living Association (VALA) is a non-profit membership organization dedicated to providing advocacy, communication, education, and resources for Virginia's assisted living industry. VALA's members represent the entire spectrum of the industry – providers of both non-profit and for-profit, and large and small assisted living communities. Currently, VALA's membership includes approximately 150 of assisted living communities with a combined resident capacity of nearly 12,000 residents.

VALA applauds the Virginia Department of Medical Assistance Services (DMAS) in thoroughly reviewing Virginia's waived programs to bring them into compliance with the new Centers for Medicare and Medicaid Services (CMS) Home and Community Based Services (HCBS) requirements and appreciates the opportunity to provide comments. However, after reviewing Virginia's proposed Statewide Transition Plan for Compliance with the HCBS Final Rule's setting requirements, we respectfully disagree with the Commonwealth of Virginia's determination that the changes required to bring each Alzheimer's Assisted Living (AAL) Waiver site into compliance are not practical or feasible. We understand that some of the requirements may require changes to current regulations, practices, and terminology, but we are confident that many of Virginia's assisted living communities are already at least partially compliant and would like to work with the Commonwealth of Virginia and CMS to become fully compliant. If the AAL Waiver program ceases to exist, it will force vulnerable elderly individuals with dementia to be removed from their homes and reside in facilities that may not be capable and/or suited to properly care for them.

With the increasing number of residents that have dementia, there are not an equal number of available affordable housing options. The AAL Waiver became effective in 2006 and has provided the opportunity for assisted living providers to more affordably provide better services and opportunities for the residents participating in the AAL Waiver program. The discontinuance of the AAL Waiver program will discourage providers from accepting Medicaid beneficiaries or developing new affordable housing options, which will then lead to more individuals inappropriately admitted into nursing homes, whereas the resident would have been better suited in an assisted living community. Since nursing homes are much more expensive compared with assisted living, this will place additional financial strain on Virginia's Medicaid programs.

VALA was very supportive of the initial review and meetings conducted by the Commonwealth of Virginia to develop the State's Transition Plan. Throughout the review process, it was our understanding through verbal and written communications that DMAS agreed "the minimum requirements listed by CMS in the Final Rule is closely aligned with what is already being required by DSS licensing." As per meeting minutes dated May 14, 2014, preliminary impressions by DMAS determined, "initial impression is that secured units/buildings serving AAL participants would qualify as home and community based settings." The meeting minutes also concluded that "The (DSS licensing regulations) regarding individual service plan requirements by DSS and the person centered service plan requirements from CMS per the Final Rule are mostly aligned."

While secured dementia settings may on its face be thought of as institutional in nature, we strongly disagree and emphasize that these settings are not prohibited by the HCBS rule. In fact, DMAS should utilize the CMS "heightened scrutiny" process that would allow assisted living communities to maintain a greater responsibility in demonstrating to the state and to CMS that they are in compliance with the HCBS requirements for person-centered care and community engagement.

Date: April 7, 2016

From: Virginia Assisted Living Association

Re: Public Comments - Virginia's Proposed Statewide Transition Plan for HCBS Final Rule Compliance (Pg. 2 of 4)

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As you know, CMS requires HCBS settings to meet certain qualifications as it pertains to the AAL Waiver program. We have listed some of these requirements as listed below and offered comments on how assisted living communities who participate in the AAL Waiver program are already in compliance with the CMS HCBS requirements, and as such the AAL Waiver program should continue.

**The setting is integrated in and supports full access to the greater community**

*Many assisted living communities actively invite and schedule external community members to provide services offered by faith-based or social groups, entertainment, and recreational activities on-site for residents. Many assisted living providers have found that frail elders are hesitant and intimidated to participate in activities outside of the community for fear of injuring themselves; therefore, they thrive with activities and events scheduled within the safety of the community where they have chosen to live. Forcing these individuals to leave their communities against their will would actually deprive them of the rights and person-centered care that CMS is trying to achieve. Having individuals that participate in only on-site services and activities does not prohibit other individuals from accessing services and activities outside of the community.*

*According the AAL Waiver program, all participants receive an Auxiliary Grant. As per the Auxiliary Grant requirements in Virginia, participating assisted living communities must provide assistance with arranging transportation outside of the assisted living community for the participants. This transportation could be to receive medical care, to entertainment venues, or to other locations as desired by the individual, which meets the above mentioned requirements.*

**The setting is selected by the individual from among a variety of setting options.**

*In Virginia, there are more than 500 licensed assisted living communities. Even though not all of those communities accept individuals who receive the Auxiliary Grant or the Alzheimer's Assisted Living Waiver, they are still an option. Further, the individual/individual's legal representative considers many factors in determining a place of residence, such as proximity to family and friends; individual preferences on rural, suburban, or urban settings; social activities planned by the communities; and even physical aspects of the community, such as whether they have specific décor themes or physical layouts. Individuals are given the freedom to choose a community that makes them feel most at home and that mostly appeals to their personal interests and physical requirements.*

**The setting ensures individual rights of privacy, dignity, respect, and freedom from coercion and restraint.**

*The Standards for Licensed Assisted Living Facilities already require assisted living communities to ensure individual rights of privacy, dignity, respect, and freedom from coercion and restraint. The exceptions to these requirements are specifically outlined in the Standards for Licensed Assisted Living Facilities and pertain to emergency situations that threaten the safety of the resident or others or are medically necessary as authorized in writing by a physician. The use of these exceptions is not a frequent practice in assisted living communities.*

**The setting optimizes autonomy and independence in making life choices.**

*The Standards for Licensed Assisted Living Facilities specifically requires assisted living communities to allow the residents to maintain a freedom of choice regarding the care, services, and opportunities they receive. The Resident Rights as required by the Standards for Licensed Assisted Living Facilities are reviewed upon admission and annually with each resident and the resident's legal representatives, if applicable. The resident/resident's legal representative maintains the right to refuse services and medical attention.*

**The setting facilitates choice regarding services and who provides them.**

*The Rights and Responsibilities of Residents of Assisted Living Facilities as outlined by the Standards for Licensed Assisted Living Facilities require assisted living communities to allow residents the freedom to select health care services from reasonably available resources.*

**The setting must have a signed lease or other legally enforceable agreement providing similar protections**

*The Standards for Licensed Assisted Living Facilities already require that there be a written agreement/acknowledgement of notification dated and signed by the resident/resident's legal representative and the required representative of the assisted living community. The document must provide specific information or acknowledgement of review of specific documents as required in 22 VAC 40-72-390, including financial arrangements, discharge requirements, the Rights and Responsibilities of Residents of Assisted Living Facilities, medication policies, etc.*

**Individuals must have access to privacy in their sleeping units including lockable doors, choice of roommates, and freedom to furnish or decorate their unit.**

*According to the Technical Assistance provided by VDSS for 22 VAC 40-72-530C for the Standards for Licensed Assisted Living Facilities, a resident "may lock the door while inside the room if he is not a resident with a serious cognitive impairment who cannot recognize danger or protect his own safety and welfare." This section of the Standards would need to be amended to allow for lockable doors for residents within a secured setting with consideration to continued safety access by the appropriate staff or emergency personnel.*

*Assisted living communities do allow flexibility in the choice of roommates as space permits and according to the personal relationships and preferences between the individuals. Individuals receiving the Auxiliary Grant are limited in financial resources, and any financial supplementation to pay the cost differential for a private room is considered to be income as per the Auxiliary Grant Program Overview. Therefore, financial constraints would limit the resident's choice to a private room. This section of the Auxiliary Grant Program would need to be amended to allow for the third party supplementation for payment of a private room to not be counted as income to allow for more freedom of choice for the resident.*

*The Standards for Licensed Assisted Living Facilities already require that residents are encouraged to furnish or decorate their rooms as space and safety considerations permit in accordance with 22 VAC 40-72-730.*

**Individuals must have the ability to control their daily schedules and activities and have access to food at any time.**

*The Standards for Licensed Assisted Living Facilities already require assisted living communities to provide a variety of activities to be made available for residents. If a resident requires an individual schedule of activities, that schedule shall be a part of the individualized service plan. As per the Standards, Residents maintain freedom of choice and shall not be forced to participate in activity programs offered by the facility and the community.*

*The Standards for Licensed Assisted Living Facilities already require assisted living communities to provide at least three well-balanced meals daily to each resident and to make bedtime and between meal snacks available for any resident desiring them, unless it is contraindicated by the attending physician as documented in the resident's record.*

**The individuals must have the ability to have visitors at any time.**

*22 VAC 40-72-540 of the Standards for Licensed Assisted Living Facilities require assisted living communities to allow daily visits to residents. In situations where visiting hours are restricted, daily visiting hours shall be posted in a place conspicuous to the public. This section of the Standards could be amended to allow for visiting hours to not be restricted except when imposed by the Commonwealth of Virginia during health emergencies.*

**The individuals must be able to physically maneuver within the residential setting.**

*The Standards for Licensed Assisted Living Facilities already require the assisted living community to provide freedom of movement for the residents to common areas and to their personal spaces. The facility does not lock residents out of or inside their rooms. Residents who are living in dementia settings with secured egress choose to do as a safety precaution. In some assisted living communities, technology, such as electronic pendants, is used to allow for more freedom of movement throughout the community while maintaining safety features. Family and friends of residents in secured settings are also allowed the opportunity to escort the resident inside and outside of the assisted living community for activities or excursions.*

**Any modifications made to the criteria must be the result of identified specific needs discovered through an independent (re)assessment and then documented and justified in a person-centered service plan.**

*The Standards for Licensed Assisted Living Facilities already require the assisted living community to document any deviation in the requirements and require the assisted living community to maintain the appropriate written documents of deviation as completed by the resident/resident's legal representative, the attending physician, the Commonwealth of Virginia, or other individual or entity as permitted by exceptions allowed in the Virginia regulations and standards.*

Date: April 7, 2016  
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Re: Public Comments - Virginia's Proposed Statewide Transition Plan for HCBS Final Rule Compliance (Pg. 4 of 4)

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**The Rule requires that the person-centered planning process is directed by the individual or the individual's chosen representative.**

*22 VAC 40-72-450 of the Standards for Licensed Assisted Living Facilities already require that the "care provision and service delivery shall be resident-centered to the maximum extent possible, and include: 1. Resident participation in decisions regarding the care and services provided to him; and 2. Personalization of care and services tailored to the resident's circumstances and preferences."*

In closing, VALA requests that DMAS reconsider its determination that assisted living communities with secured units are "fundamentally out of compliance with the HCBS regulations." We encourage DMAS to submit a transition plan for the AAL Waiver program utilizing the Heightened Scrutiny process. VALA looks forward to working with the Commonwealth of Virginia, CMS, and assisted living advocates on the work group of stakeholders as authorized by the 2016 Virginia General Assembly to review the AAL Waiver and achieve compliance with the Centers for Medicare and Medicaid Services Home and Community Based Services final rule requirements.

Should you have any questions regarding these comments, then please feel free to contact me at (804) 332-2111.

Cordially,



Judy Hackler  
Executive Director