

State of Vermont
Division of Rate Setting

[phone] 802-652-6528
[fax] 802-652-6538

Agency of Human Services

Mailing address only:
103 South Main Street
Waterbury, VT 05671-2201

FedEx, UPS & hand deliveries:
25 Omega Drive, Suite 201
Williston, VT 05495

www.humanservices.vermont.gov/departments

To: Legislative Committee on Administrative Rules

From: Rebecca Fay, Staff Attorney, Division of Rate Setting



Date: December 19, 2014

Re: LCAR's Request for Supplemental Information Related to Final Proposed Rule No. 14P048—*Methods, Standards and Principles for Establishing Medicaid Payment Rates for Long-Term Care Facilities*

The Division of Rate Setting (DRS) presented the final proposed rule amendment to the *Methods, Standards and Principles for Establishing Medicaid Payment Rates for Long-Term Care Facilities*, to the Legislative Committee on Administrative Rules (LCAR) on December 4, 2014. LCAR decided to postpone voting on the final proposed rule until the next LCAR meeting scheduled for December 22, 2014, so that LCAR could receive additional information about this proposed rule. This memorandum addresses the concerns raised by LCAR during the December 4th hearing.

1. Budget

In the SFY 2015 Big Bill, the Department of Disabilities Aging and Independent Living (DAIL) was appropriated \$479,154 to expand nursing facilities' capacity to address the needs of residents with dementia. At the December 4th LCAR hearing, DRS explained this was a one year line item. However, this statement was not completely correct. This line item was added to DAIL's base budget. This means the amount appropriated will carry forward in future years to sufficiently cover the resulting cost of this rule amendment.

2. The Length of the Pilot

The Companion Aide Pilot Project will provide five nursing facilities with a rate adjustment for 2.5 years to fund additional LNAs, specifically to provide person-centered dementia care. As part of the regular rate setting process, the 2015 nursing facility nursing costs (including the Companion Aides) will be part of the selected nursing facilities' base year costs. Those base year costs will be used to calculate the facility's per diem rate for SFY 2018.

Because the nursing facility costs will be rolled into a future rate in perpetuity, LCAR expressed concern that this pilot would last longer than 2.5 years. However, there is an end date to the rate adjustment for participation in this Pilot: June 30, 2017, which is the point in time that the rate adjustment will end.



Typically, the DRS rules allow any facility to hire additional staff to provide care to their residents at any time. Under the current regulations, the facility waits until the increased costs for additional staff occur in a base year for these costs to be reflected in their rate. In contrast, under the proposed rule amendment, the selected nursing facilities would receive assistance with the initial costs through a rate adjustment and receive immediate reimbursement instead of waiting until the next rebase.

The purpose of this proposed rule amendment is to incentivize nursing facilities to effect a culture change in the care of residents with dementia in their facility. A culture change requires a collaborative effort between the State and the nursing facilities, which the Pilot is designed to foster. The Pilot was developed to address the growing problem of individuals with dementia being denied admission to nursing facilities in Vermont and to provide Licensed Nurse Aides (LNAs) who have a special focus on developing creative and effective ways to interact with the numerous Vermont nursing home residents suffering from dementia. This Pilot creates a mechanism to help nursing facilities care for residents with dementia. To its credit, this Pilot provides more staff to the selected nursing facilities. Once the pilot ends in 2.5 years, the nursing facility will receive reimbursement in their rates so they can afford to keep the additional trained and experienced staff to care for one of Vermont's most vulnerable populations. Increasing staff in the nursing facilities is something the rate setting process is designed to support. The fact that the cost of these Companion Aides rolls into future year's reimbursement is in accordance with the current rate setting process and serves as another incentive for facilities to participate in this Pilot.

3. Performance Measures

At the macro level, the approach to be piloted in these five selected homes is expected to achieve two primary goals: higher quality of life for residents with dementia and enhanced capacity in nursing homes to be able to care for the most challenging residents. The first of these outcomes, quality of life, answers the question: *will anybody be better off?* This will be reflected in and measured by:

- Reduced instances of resident to resident injurious behavior
- Reductions in overreliance on medications
- Improved resident satisfaction

The second outcome, which is really a system improvement performance measure, answers the question: *how well are we doing?* This will be reflected and measured by:

- Reduction in number of persons in hospital who want to move into a nursing home and are currently unable to do so because of challenging behaviors
- Reduction in the number of involuntary discharges due to behavioral history in the last year

Finally, we will track information that answers the question: *what we are doing?* This will be reflected in and measured by:

- Quarterly summaries of the Companion Aides' time
- Number of LNAs that worked as Companion Aides in the last 12 months, average length of service; and
- The specialized trainings the Companion Aides completed.

All of these data points are captured in the Ongoing Reporting Requirements form to be completed by the selected facilities as outlined in Attachment A¹ and incorporated herein by reference.

4. Rate Setting Rules.

The Companion Aide Pilot Project provides a rate adjustment as an incentive to five nursing facilities to add positions for LNAs with enhanced training in person-centered dementia care. A rate adjustment is one of the ways nursing facilities participating in Medicaid are reimbursed. All nursing home reimbursement must go through the Division of Rate Setting rules. 33 V.S.A. § 904.

This Pilot involves reimbursement, therefore, it is not necessary or appropriate to amend Vermont's *Licensing and Operating Rules for Nursing Homes*, pursuant to 33 V.S.A. §7117, which outlines the authority for the Secretary of the Agency of Human Services to "...prescribe minimum standards of care, program administration, and sanitation for facilities licensed under this chapter."

5. Companion Aides

In an effort to jumpstart this initiative, we chose the title—Companion Aides—so the nursing facilities could start thinking differently about how care is provided to residents with dementia. However, this is not a new category of LNA. The definition for a Companion Aide is "a Licensed Nurse Aide (LNA) with specialized training in person-centered dementia care." As part of licensure, LNAs are required to complete training regarding care of persons with dementia. *Affordable Care Act* § 6121. To aid nursing homes in meeting this requirement, the Centers for Medicare & Medicaid Services (CMS) have recommended trainings. *See Attachment B and C*. Thus, the Companion Aide is not a new category of LNA, but simply a new way of looking at the work the LNAs can perform.

Because the Companion Aide is an LNA, and LNAs are already regulated under Vermont law, it is not necessary to implement this Pilot pursuant to 33 V.S.A. §7117.

6. Regulatory and Oversight Protections

LCAR requested additional information concerning the enforcement of the proposed regulations and oversight of the Companion Aides if they do not complete the training

¹ Attachment A is the complete Companion Aide Pilot Project Application Package, which includes the Ongoing Reporting Requirements form.

requirements or fail to provide person-centered dementia care. Vermont's regulatory scheme currently provides oversight for LNAs and nursing facilities:

- LNAs are regulated by the Board of Nursing. 26 V.S.A. § 1591 *et. seq.* The Board of Nursing has regulatory authority over an LNA for unprofessional conduct. *See* 26 V.S.A. § 1595. Unprofessional conduct includes, but is not limited to, abuse or neglect of a patient and whether an LNA is unfit or incompetent to function in that role. *Id.*
- All Vermont nursing homes must comply with Vermont's *Licensing and Operating Rules for Nursing Homes* and federal regulations. The Vermont regulations implement state laws that govern licensing, operation, and standards of care. The regulations have specific provisions about quality of life and quality of care. *See Licensing and Operating Rules for Nursing Homes*, §§ 4 and 7.

Vermont's Division of Licensing and Protection, Survey & Certification (S&C), is responsible for assessing compliance with quality of care standards in Vermont nursing homes. All residents and family members of those who reside in nursing facilities have access to an enforcement process to help protect residents and promote quality of care. At any time, a resident, staff person, or family member can file a complaint with S&C. A nurse surveyor may then conduct an onsite investigation to determine if there is a quality of care concern. If a deficient practice is identified, the facility must submit a plan of correction to S&C and, if accepted, implement the plan to correct the quality issue. A nurse surveyor may then conduct a second visit to the facility to assure that the nursing home has corrected the deficient practice and has come back into compliance with the quality of care standard.

Vermont's current regulatory scheme will provide oversight to the Companion Aides in accordance with the current federal and state regulations. If there is a problem with the level of care provided, the resident or his or her family can file a complaint with S&C. Since state and federal laws already regulate LNAs and protect the residents within the nursing facilities, and Companion Aides are LNAs, it is not necessary to create a heightened level of oversight for them.

7. Posting the Names of Companion Aides

LCAR asked whether the proposed rule could be amended to include a requirement that the names of Companion Aides be posted within the facility. Federal law already requires nursing homes to post information about the following categories of direct care workers: registered nurses, licensed practical nurses or licensed vocational nurses, and certified nurse aides. 42 C.F.R. § 483.30(e)(iii). LNAs and certified nurse aides are synonymous. As indicated above, Companion Aides are LNAs. Therefore, because federal law already requires the nursing facilities to post the names of LNAs in order to comply with 42 C.F.R. § 483.30(e)(iii)(C), there is no need to restate this provision in the proposed rule.

Companion Aides will be working with residents with dementia. If we require the selected facilities to post the names of Companion Aides separately from the LNAs, this will result in an unintended consequence, a breach of the residents' privacy. The identification of

Companion Aides, who are LNAs dedicated to the care of residents with dementia, will indirectly disclose the medical conditions of the residents who work with the Companion Aides.

8. Public Input

At the December 4th hearing, the Vermont Ombudsman Project (VOP) submitted comments to LCAR about the proposed rule amendment. In one of comments, VOP incorrectly describes the public input process for this proposed rule. VOP asserts that DRS described its public input process in a memo dated November 20, 2014. Based on this VOP concludes that DRS only sought public input from the Vermont Healthcare Association (VHCA). That is false. VHCA was one of several entities to receive notice of the proposed rule amendment.

The November 20, 2014 memo, referenced by VOP, is titled “Explanation of Changes and Description of Reasons for Decisions Regarding Final Proposed Rule No. 14P048.” It details the public comments DRS received. However, this memo does not cover all of the entities that received information about this proposed rule. As part of the LCAR filing package, we submitted the Secretary of State form – Administrative Procedures – Public Interest Statement. In that statement, DRS explains that notice of the proposed rule was sent to all nursing facilities in Vermont participating in the Medicaid program and all their representatives of record, VHCA, the Vermont Association of Hospitals and Health Systems, the State Long-Term Care Ombudsman, the Community of Vermont Elders, and the Alzheimer's Association. In fact, a notice has been sent to interested parties at each stage of the rulemaking process with information about how to access information and comment. One notice was sent on September 18, 2014 after the proposed rule was filed with the Secretary of State. A second notice, that described the final proposed rule that was filed with the Secretary of State and LCAR, was sent to interested parties on November 24, 2014. A third notice was sent on December 11, 2014 updating interested parties regarding the outcome of the LCAR hearing on December 4, 2014.