**COMMONWEALTH of VIRGINIA**

*Office of the Governor*

John E. Littel
Secretary of Health and Human Resources

December 6, 2022

To: The Honorable Glenn A. Youngkin, Governor
The Honorable L. Louise Lucas, Chair, Senate Committee on Education & Health
The Honorable Janet D. Howell, Chair, Senate Finance & Appropriation Committee
The Honorable Robert D. Orrock, Chair, House Committee on Health, Welfare & Institutions
The Honorable Barry D. Knight, Chair, House Appropriations Committee

From: John Littel, Secretary of Health and Human Resources

Subject: Chapter 559, Report on the Oversight and Regulation of Nursing Homes, Assisted Living Facilities, and Other Congregate Living Settings

Chapter 559 of the 2022 Acts of Assembly directs the Secretary of Health and Human Resources (Secretary) to:

> *study the current oversight and regulation of nursing homes, assisted living facilities, and other congregate living settings to improve efficiency and effectiveness of regulation and oversight, provide better transparency for members of the public navigating the process of receiving services from such facilities, and better protect the health and safety of the public. The Secretary shall report his findings and recommendations to the Governor and the Chairmen of the Senate Committees on Education and Health and Finance and Appropriations and the House Committees on Appropriations and Health, Welfare and Institutions by October 1, 2022.*

In accordance with this item, please find enclosed the *Report on the Oversight and Regulation of Nursing Homes, Assisted Living Facilities, and Other Congregate Living Settings*.

Please let me know if you have any questions regarding this report.

cc: Commissioner Colin Greene, Virginia Department of Health
Commissioner Danny Avula, Virginia Department of Social Services
Commissioner Nelson Smith, Virginia Department of Behavioral Health and Developmental Services

# STUDY OF OVERSIGHT AND REGULATION OF NURSING HOMES, ASSISTED LIVING FACILITIES, AND OTHER CONGREGATE LIVING SETTINGS

REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY

2022

OFFICE OF THE SECRETARY OF
HEALTH AND HUMAN RESOURCES

## PREFACE

The Office of the Secretary of Health and Human Resources (OSHHR) is submitting this report in response to the legislative mandate in Chapter 559 of the 2022 Acts of Assembly, which directed OSHHR to study the current oversight and regulation of nursing homes, assisted living facilities (ALFs), and other congregate living settings to improve efficiency and effectiveness of regulation and oversight, provide better transparency for members of the public navigating the process of receiving services from such facilities, and better protect the health and safety of the public. The legislative mandate requires OSHHR to submit the report of findings and recommendations "to the Governor and the Chairmen of the Senate Committees on Education and Health and Finance and Appropriations and the House Committees on Appropriations and Health, Welfare and Institutions by October 1, 2022."

### CHAPTER 559 WORKGROUP MEMBERS

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## EXECUTIVE SUMMARY

The General Assembly directed the Secretary of Health and Human Resources (SHHR) to "study the current oversight and regulation of nursing homes, assisted living facilities (ALFs), and other congregate living settings to improve efficiency and effectiveness of regulation and oversight, provide better transparency for members of the public navigating the process of receiving services from such facilities, and better protect the health and safety of the public." The Office of the Secretary of Health and Human Resources (OSHHR) convened two Chapter 559 Workgroup meetings in August and September of 2022, during which several informational presentations were given, feedback and public comment was received. The Chapter 559 Workgroup developed the following recommendations.

### RECOMMENDATIONS

1. Staff from Virginia Department of Health (VDH), Virginia Department of Social Services (DSS), Virginia Department of Behavioral Health and Developmental Services (DBHDS), and the Virginia Department of Aging and Rehabilitative Services (DARS) jointly create a "one-page" reference guide for consumers and families that explains common congregate living and long-term care terminology, the levels of long-term care available in Virginia, which agency provides oversight for the different levels of long-term care, and where consumers may go or whom to contact for more in-depth information.

2. Staff from VDH, DSS, DBHDS, and DARS, as well as other agencies within the Health and Human Resource Secretariat, jointly develop a "decision tree" or similar decision-support tool to assist consumers in determining what level of congregate living may be appropriate for themselves and/or their family members.

3a. All relevant Health and Human Resources websites prominently post the "one-page" reference guide and decision support tool, as well as links to the pertinent provider search pages for each agency to allow consumers to search for providers as well determine their history of regulatory compliance. This includes the websites of VDH, DSS, DBHDS, and DARS, as well as the websites of the Office of the State Long-Term Care Ombudsman and the regional and local long-term care ombudsmen offices. 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org should also be included in this effort.

3b. DSS, in cooperation with the VDH, DBHDS, and DARS, convene a work group to assess consumers' experience in finding the appropriate level of long-term care and congregate living for their needs, including (i) whether the Commonwealth's websites including 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org should be consolidated; (ii) the accuracy, consistency, and sources of information concerning long-term care and congregate living settings on 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org; (iii) what information about congregate living settings from VDH, DSS, DBHDS, and DARS should be included on 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org; and (iv) what public outreach efforts, if any, could increase consumer knowledge about these resources.

4. Request that the Virginia Code Commission review the terms and definitions for "provider" and "health care provider" through the Code of Virginia in reference to providers of congregate living settings regulated by the VDH, DSS, and DBHDS. The Code Commission's findings and recommendations could be shared with OSHHR, the Governor, and the General Assembly prior to the 2024 Regular Session. This recommendation could be accomplished either via legislation in the 2023 Regular Session or by letter from the Secretary of Health and Human Resources.

## ISSUES FOR FURTHER CONSIDERATION

1. The State Board of Health does not have the authority to set licensing fees for nursing homes and currently must use statutorily prescribed fee amounts that have not changed in 43 years, which places the agency and its oversight functions under financial strain. The current fee schedule for annual license renewal is based on patient bed capacity but is not to exceed $500. In 1979, this fee schedule nearly supported the entire cost of the licensure and inspection program. However, due to the rate ($1.50 per bed) and the cap placed within the statute ($500), the revenues collected from nursing homes during licensure and renewal are no longer adequate to cover the expenditures of the licensing program. Additionally, Va. Code § 32.1-130 has never been amended, nor were additional appropriations provided, to recognize additional costs incurred by the licensure and inspection program as a result of subsequent legislative mandates and Virginia-specific requirements for nursing homes.

2. The State Board of Social Services has not pursued a regulatory action to increase its licensing fees since at least 1991. Licensing fees cannot be used to support the DSS's oversight functions, which puts the agency and its oversight functions under financial strain. The fees generated by licensing can only be used for the purpose of education and training for staff of and technical assistance to ALFs to "improve the quality of care in such facilities" per Va. Code §§ 63.2-1700 and 63.2-1803.1. It would be helpful for DSS to have more flexibility to access funds for operational and licensing functions, including the training of providers. Additionally, in July of 2021, DSS's Division of Licensing Programs was directed by the General Assembly to move the child care portion of the program to the Virginia Department of Education (VDOE), which included transferring millions of dollars of associated block grant funding from DSS to VDOE; this is now a major contributing factor to a lack of funding for the ALF licensing program.

3. Despite the large increase in the number of FTE licensing specialists at DBHDS over the last 10 years, the average specialist's caseload is 106 services and 339 locations; this is above the national average of 88 facilities per licensing specialist as reported by the National Association of Rehabilitation Providers and Agencies (NARA). This is partially due to the 92% increase in the number of licensed providers, the 96% increase in the number of licensed services, and the 80% increase in the number of DBHDS-licensed locations since SFY 2012. Additionally, the Settlement Agreement with the Department of Justice has increased the amount of information each specialist must review. Conversely, DBHDS's employment of licensing specialists has increased 12.9% to 35 FTEs and overall FTE licensing and oversight staff has increased 70.9% to 53 FTE (comprised of 35 licensing specialists, nine incident management specialists, and nine specialized investigators).

4. Since federal fiscal year (FFY) 2015, the U.S. Centers for Medicare and Medicaid Services (CMS) has not increased funding to the Commonwealth for federal certification and survey activities that are performed by VDH for congregate living settings.

5. VDH, DSS, and DBHDS have experienced ongoing difficulty in attracting and retaining qualified employees to conduct inspections and other essential oversight functions mandated by either the Code of Virginia or CMS, even prior to the COVID-19 pandemic. The impact of prolonged vacancies has had an impact on the timeliness of inspections and other essential mandatory oversight functions.

6. VDH lacks meaningful enforcement options to compel compliance for nursing homes that violate Virginia-specific requirements. To remedy violations of state law, the State Health Commissioner only has the authority to require plans of correction (PoCs), restrict new admissions, or suspend or revoke a license. This is in contrast with penalties allowed under federal law, which include PoCs, directed PoCs, directed in-service training, state monitoring, temporary management, civil monetary penalties, discretionary denial of payment for new admissions, denial of payment for all individuals, and termination.

# INTRODUCTION

## STUDY MANDATE

**CHAPTER 559 OF THE 2022 ACTS OF ASSEMBLY, DIRECTED THE SECRETARY OF HEALTH AND HUMAN RESOURCES (SHHR) TO "STUDY THE CURRENT OVERSIGHT AND REGULATION OF NURSING HOMES, ASSISTED LIVING FACILITIES, AND OTHER CONGREGATE LIVING SETTINGS TO IMPROVE EFFICIENCY AND EFFECTIVENESS OF REGULATION AND OVERSIGHT, PROVIDE BETTER TRANSPARENCY FOR MEMBERS OF THE PUBLIC NAVIGATING THE PROCESS OF RECEIVING SERVICES FROM SUCH FACILITIES, AND BETTER PROTECT THE HEALTH AND SAFETY OF THE PUBLIC." THE STUDY MANDATE IS INCLUDED AS APPENDIX A. THE SECRETARY OF HEALTH AND HUMAN RESOURCES IS TO REPORT FINDINGS AND RECOMMENDATIONS TO THE GOVERNOR AND THE CHAIRMEN OF THE SENATE COMMITTEES ON EDUCATION AND HEALTH AND FINANCE AND APPROPRIATIONS AND THE HOUSE COMMITTEES ON APPROPRIATIONS AND HEALTH, WELFARE AND INSTITUTIONS.**

## STUDY ACTIVITIES

In response to the legislative mandate, the Office of Secretary of Health and Human Resources (OSHHR) convened a workgroup of representatives from impacted organizations and state agencies to learn more about the issues identified in the legislation. The workgroup received a variety of presentations about the oversight, regulation, and methods of accessing information about congregate and long-term care services in Virginia. The OSHHR convened two meetings during 2022: the first was held on August 24 and the second on September 15. The workgroup discussions are summarized below.

### AUGUST 24 MEETING

The assembled workgroup members and agency staff reviewed the legislative mandate and discussed the scope of what would be included in "congregate living settings." Staff from the Virginia Department of Health (VDH) presented about state and federal oversight for nursing homes[1] and certified nursing facilities.[2] Staff from the Virginia Department of Social Services (DSS) presented about state oversight of assisted living facilities (ALFs) and children's residential facilities (CRFs). The workgroup members and OSHHR questioned VDH and DSS about different aspects of the oversight functions before transitioning to a discussion about what Virginia-specific consumer information was publicly available about congregate living settings and long-term care, where it was located, how it was maintained, and opportunities for improvement.

### SEPTEMBER 15 MEETING

The Executive Director of the Joint Commission on Health Care (JCHC) presented about the JCHC's recent studies on nursing homes and ALFs as well as study findings. While the JCHC current study effort does not directly address the issues raised by Chapter 559 (2022 Acts of Assembly), the JCHC's executive director stated that available public information varies significantly between ALFs and nursing homes, especially regarding locating placements and when assessing costs and quality. The JCHC research had not found that separate licensing by VDH and DSS impeded oversight. Staff from the Department of Behavioral Health and

[1] Va. Code § 32.1-123 defines nursing home as "any facility or any identifiable component of any facility licensed pursuant to this article in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more non-related individuals, including facilities known by varying nomenclature or designation such as convalescent homes, skilled nursing facilities or skilled care facilities, intermediate care facilities, extended care facilities and nursing or nursing care facilities."

[2] Va. Code § 32.1-123 defines certified nursing facility as "any skilled nursing facility, skilled care facility, intermediate care facility, nursing or nursing care facility, or nursing home, whether freestanding or a portion of a freestanding medical care facility, that is certified as a Medicare or Medicaid provider, or both, pursuant to § 32.1-137."

Developmental Services (DBHDS) presented about the licensing and state oversight of intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs) and psychiatric residential treatment facilities (PRTFs). VDH staff provided updates about federal funding from the Centers for Medicare & Medicaid Services (CMS) for federal fiscal year[3] (FFY) 2023 as well as recent requests for data and information from the U.S. Senate Special Committee on Aging about state survey agencies,[4] VDH then presented about federal oversight of ICF/IIDs and PRTFs.

After questioning the presenters, the workgroup and OSHHR discussed potential recommendations and whether to focus the recommendations on Virginia consumers' experience in locating appropriate congregate living setting and level of long-term care needed for themselves or their loved ones.

### REPORT OUTLINE

Following the discussion of the study mandate, this report provides an overview of Virginia's congregate living settings, which agency is responsible for licensing and oversight, the major challenges each agency faces in licensing and oversight, and the current available consumer information regarding congregate living settings with the goal of providing better transparency for members of the public navigating the process of receiving services from such facilities, and better protecting the health and safety of the public. The report then outlines the findings and recommendations discussed by the Chapter 559 Workgroup.

## CONGREGATE LIVING SETTINGS IN VIRGINIA

### DIFFERING LEVELS OF CARE

#### NURSING HOMES AND CERTIFIED NURSING FACILITIES

VDH's Office of Licensure and Certification (OLC) is responsible for the state licensure and inspection of nursing homes and for conducting federal surveys of certified nursing facilities on behalf of CMS.[5] A nursing home is a medical care facility "in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more nonrelated individuals..."[6] VDH OLC is also responsible for the certificate of public need (COPN) program, which is the means and method by which the Commonwealth maintains control over the supply of certain medical care facilities and health services. Certain projects (e.g., opening a nursing home, adding beds to a nursing home, etc.) require the project owner to demonstrate that there is a public need for that specific project before the project can be commenced. Unless delayed at the request of the applicant, the COPN process takes 120 calendar days. After obtaining a COPN, the facility can obtain a nursing home license from the State Health Commissioner, which expires December 31 each calendar year; there is no explicit grant of authority in the Code of Virginia for conditional, provisional, or other denoted type of license that is anything less than a full license to own, establish, conduct, maintain, manage or operate a nursing home.

A certified nursing facility is a long-term care facility that has chosen to participate in the Medicare and/or Medicaid programs and, therefore, are subject to the Conditions of Participation (CoPs) and Conditions for

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[3] The federal fiscal year is October 1 to September 30.

[4] A state survey agency is a jurisdiction's state department of health that has a contract with CMS to perform federal oversight activities under Title XVIII and Title XIX of the Social Security Act; VDH is the state survey agency in the Commonwealth.

[5] CMS is authorized by § 1864 of the Social Security Act to "make an agreement with any State which is able and willing to do so under which the services of the State health agency...will be utilized by him for the purpose of determining whether an institution therein...or whether an agency therein..." complies with the CoPs and CfCs. VDH is the only Virginia state agency authorized to enter into such a contract with CMS, pursuant to Va. Code § 32.1-137.

[6] *See* Va. Code § 32.1-123.

Coverage (CfCs) for those programs. Certified nursing facilities must comply with the CoPs, CfCs, and state licensure regulations. Nursing homes that have chosen not to participate in Medicare and/or Medicaid are not subject to the CoPs and CfCs. Though the State Board of Health has not elected at this time to make a distinction between the levels of care a nursing home may provide,[7] CMS does distinguish between skilled nursing facilities (SNFs) certified under Medicare and nursing facilities (NFs) certified under Medicaid; if a long-term care facility opts to be certified under both, it is considered a SNF/NF. While the overwhelming majority of certified nursing facilities are freestanding nursing homes—which is what the public typically thinks of when envisioning these types of facilities—there are a small number of certified nursing facilities that CMS considers "distinct part" SNFs, NFs, or SNF/NFs; these are the extended care or nursing care units within a hospital. In the Commonwealth, these units operate under a hospital license issued by the State Health Commissioner just like all other hospital units, but they have a separate CMS provider number from the hospital as CMS considers that unit to be a different provider (and subject to different reimbursement methodologies, CoPs, and CfCs) from the hospital.

As of October 1, 2022, there are 288 freestanding nursing homes; 278 of these are certified nursing facilities in which all beds are dually certified to participate in Medicare and Medicaid, and two are certified nursing facilities with some beds certified to participate in Medicare and Medicaid and some beds private pay only. Eight freestanding nursing homes do not participate in Medicare or Medicaid at all, and there are two certified nursing facilitates operated by DBHDS that are not subject to nursing home license. Finally, there are seven distinct part SNFs, NFs, and SNF/NFs operating under a hospital license. This information is summarized in Figure 1.

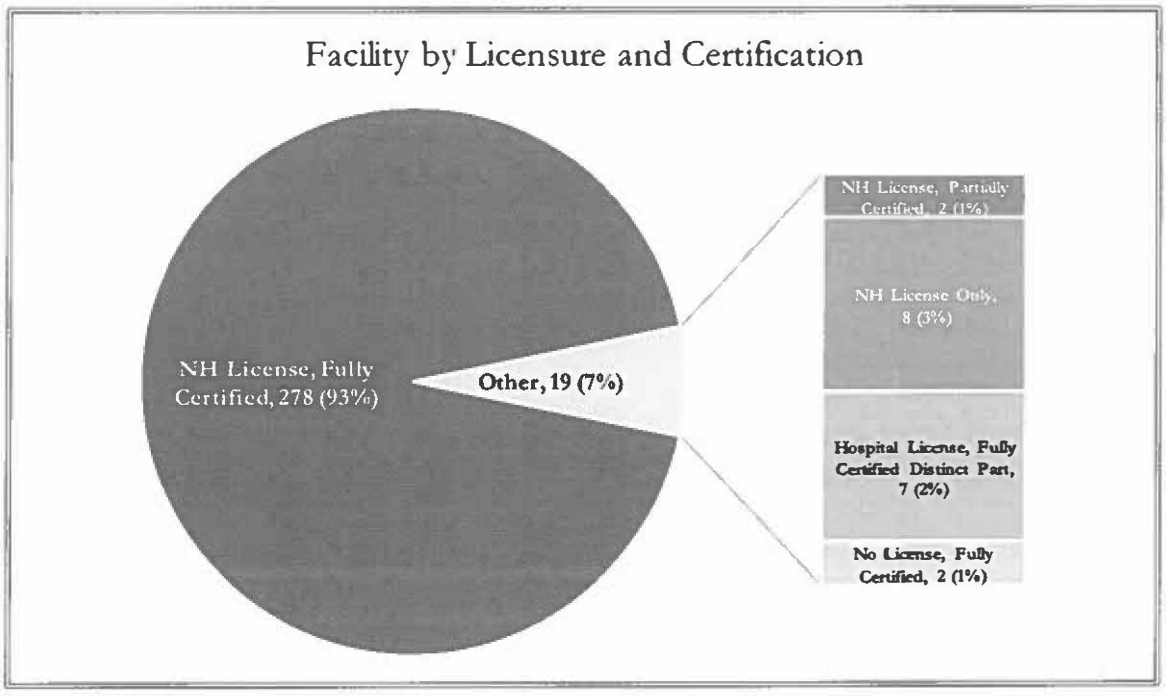


*Figure 1. Facility by Licensure and Certification.*

[7] *See* Va. Code § 32.1-127(B)(3), which gives the State Board of Health the discretion to "classify…nursing homes by type of specialty or service…" and license them according to such classification.

Despite the differing licensing and certification status of the facilities, the vast majority of the 33,167 long-term care beds in the Commonwealth participate in Medicare, Medicaid, or both, as indicated in Figure 2.

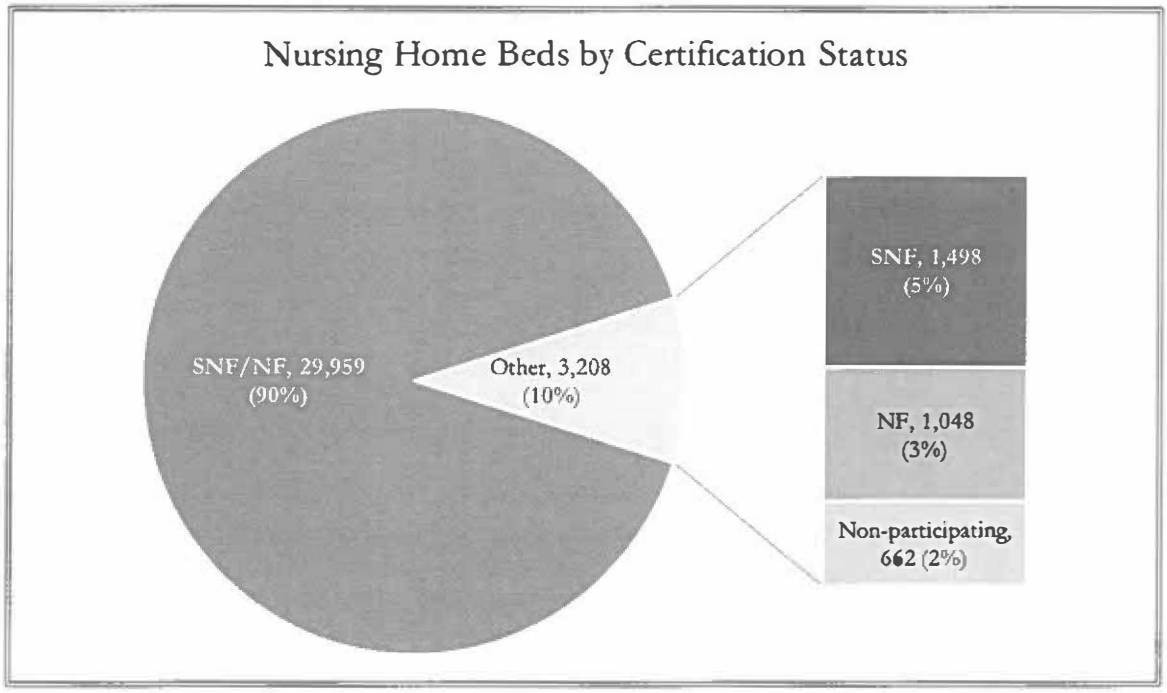


*Figure 2. Nursing Home Beds by Certification Status*

ASSISTED LIVING FACILITIES AND CHILDREN'S RESIDENTIAL FACILITIES

DSS's Division of Licensing Programs is responsible for the state licensure and inspection of ALFs, adult day care, and CRFs. An ALF is a "congregate residential setting that provides or coordinates personal and health care services, 24-hour supervision, and assistance (scheduled and unscheduled) for the maintenance or care of four or more adults who are aged, infirm or disabled and who are cared for in a primarily residential setting"[8] and specifically excludes nursing homes. ALFs are not subject to COPN laws, so providers need only obtain licensure before beginning operations. Likewise, there is no federal oversight of ALFs. As of October 1, 2022, there are 568 ALFs in the Commonwealth, which represent 37,831 beds. Unlike the State Health Commissioner's licensing authority, the Commissioner of Social Services is authorized to grant conditional and provisional licenses in addition to regular licenses to operate an ALF. A conditional license is valid for six months and issued "to an applicant to operate a new facility in order to permit the applicant to demonstrate compliance with licensure requirements."[9] Similarly, a provisional license is also valid for six months and issued "if the applicant is temporarily unable to comply with all of the licensure requirements."[10]

ALFs can be licensed for two levels of care--residential living and assisted living. ALFs that provide assisted living care can also have a "safe, secure environment," also known as a "memory care unit." Residential living care is for adults with physical or mental impairments who need only minimal assistance with the activities of daily living (ADL). Assisted living care is for adults with physical or mental impairments who require at least moderate assistance with ADLs. A "safe, secure environment" is a specialized unit for residents with serious cognitive impairments due to dementia, who cannot recognize danger or assure their own safety or welfare.

[8] *See* Va. Code § 63.2-100.

[9] *See* Va. Code § 63.2-1707.

[10] *Id.*

Most ALFs (86%) are licensed for assisted living level of care, and 249 ALFs (44%) have a Special Care Unit, for the "safe, secure environment" level of care.

Oversight of CRFs is also the responsibility of DSS's Division of Licensing Programs; there is no federal oversight of DSS-licensed CRFs. A CRF is a "facility, child-caring institution, or group home that is maintained for the purpose of receiving children separated from their parents or guardians for full-time care, maintenance, protection and guidance, or for the purpose of providing independent living services to persons between 18 and 21 years of age who are in the process of transitioning out of foster care."[11] As of October 1, 2022, there are 18 CRFs in the Commonwealth, which represent 408 beds. The same regular, conditional, and provisional licensing framework used for ALFs applies to CRFs.

CRFs can offer specialized programs for a targeted population. A CRF can meet additional requirements to have an independent living program, mother/baby program, or wilderness program. An independent living program teaches independent living skills based on the age of the resident. A mother/baby program is focused on parenting education and life skills for an adolescent parent. Wilderness programs are structured outdoor and adventure type activities to provide guidance for residents. Currently, Virginia does not have any licensed wilderness programs. Available CRFs located in Virginia can be found on the DSS website. The search can be by the facility's name or location. The CRF's contact information, license type, licensing inspector, inspection data, and violations can be found through the DSS website.

INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH INTELLECTUAL DISABILITIES

Oversight of intermediate care facilities for ICF/IIDs is split between VDH, which exercises federal oversight on behalf of CMS, and DBHDS, which is responsible for state oversight. ICF/IID providers must apply to DBHDS to be licensed to provide services. It should be noted that the Commonwealth does require a COPN prior to establishing an ICF/IID with 13 or more beds;[12] however, because the State Board of Behavioral Health and Developmental Services prohibits ICF/IIDs from having more than 12 beds, this COPN requirement is functionally moot.[13]

As of October 1, 2022, DBHDS licenses 21 ICF/IIDs and 68 ICF/IID service locations. Providers that meet the requirements for licensure are issued a conditional license which is valid for six months. Similar to DSS, a conditional license is issued to providers who are able to demonstrate compliance with administrative and policy regulations, but have not yet been able to demonstrate compliance with all regulations. A conditional license may be renewed for an additional six months, but shall not exceed 12 successive months. DBHDS may issue a full license to providers that are able to demonstrate compliance with all applicable regulations. A full license may be valid for one year or for three years.

For the purposes of federal certification, ICF/IIDs are a provider type that exists exclusively under Title XIX of the Social Security Act. ICF/IIDs are institution-or distinct parts of institutions-that are primarily for the diagnosis, treatment, or rehabilitation of the intellectually disabled or persons with related conditions. They provide, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitative services to help individuals function at their greatest ability. ICF/IIDs must provide care for four or more individuals unrelated to the proprietor. For any provider type, if the jurisdiction that provider is in requires licensure, then CMS requires the provider to obtain licensure prior to seeking federal certification. However, the mechanism of a given jurisdiction's licensing program does not have to match the mechanism of federal provider certification. For example, CMS requires that each ICF/IID have a single provider number, whereas DBHDS issues licenses for both ICF/IID services and service locations.

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[11] *See* Va. Code § 63.2-100.

[12] *See* Va. Code §§ 32.1-102.1:2(A), 32.1-102.1:3(A)(5), and 32.1-102.1:3(B)(1).

[13] *See* Va. Code § 37.2-409 and 12VAC35-105-330(B).

PSYCHIATRIC RESIDENTIAL TREATMENT FACILITIES

Oversight of psychiatric residential treatment facilities PRTFs is split between VDH, which exercises federal oversight on behalf of CMS, and DBHDS, which is responsible for state oversight. Providers that want to provide psychiatric residential treatment services must apply to DBHDS to be licensed. There are no COPN requirements for PRTFs.

As of October 1, 2022, DBHDS licenses 32 PRTFs, Providers that meet the requirements for licensure are issued a conditional license which is valid for six months. Again, similar to DSS, a conditional license is issued to providers who are able to demonstrate compliance with administrative and policy regulations but have not yet been able to demonstrate compliance with all regulations. A conditional license may be renewed for an additional six months but shall not exceed 12 successive months. DBHDS may issue a full license to providers that are able to demonstrate compliance with all applicable regulations. A full license may be valid for one year or for three years. DBHDS conducts an annual unannounced inspection of each service.[14] Providers that are not able to demonstrate compliance with specific regulations are issued a citation and must develop and implement a corrective action plan. Providers that are unable to maintain compliance with licensing regulations may be issued a provisional license or may have their license revoked.

Like ICF/IIDs, for the purposes of federal certification, PRTFs are a provider type that exists exclusively under Title XIX of the Social Security Act. To be federally certified as a PRTF, a facility other than a hospital must provide psychiatric services to individuals under age 21 in an inpatient setting; must be accredited by The Joint Commission, Commission on Accreditation of Rehabilitation Facilities (CARF), Council on Accreditation of Services for Families and Children (COA), or other accrediting organization with comparable standards recognized by the Commonwealth; and must have or must execute a provider agreement with the Virginia Department of Medical Assistance Services (DMAS). Also like ICF/IIDs, CMS requires that each PRTF have a single provider number, whereas DBHDS issues licenses for both PRTF services and service locations.

## LICENSING & OVERSIGHT ACTIVITIES

VIRGINIA DEPARTMENT OF HEALTH

Licensure applications for nursing homes are processed by regional medical facility inspector (MFI) teams. Presently, both the application process for COPN and licensing are entirely paper-based, as is payment of fees; however, VDH OLC is planning to launch an online application system for licensure in December 2022 and hopes to expand this system to COPN in the future. As the state survey agency, VDH is required to use CMS-provided information technology systems to capture federal survey data and reports and is permitted to use those same systems for state inspection data and reports.

Figure 3VDH OLC cross-trains these MFIs in state and federal oversight and regulations to maximize efficiency. Nursing home state licensure inspections are required "not less often than biennially"[15] and CMS requires certified nursing facilities to be surveyed every 12 to 15 months.[16] In a single on-site visit to a nursing home that is also a certified nursing facility, the MFI team is concurrently conducting state inspections and federal surveys so the work is accomplished in one trip and minimizes interruptions to facility operations. A

[14] *See* Va. Code § 37.2-411.

[15] *See* Va. Code § 32.1-126(B).

[16] *See* 42 CFR § 488.308(a) and (b).

site visit typically takes one week, plus the time in the office to complete the report. VDH OLC's Division of Acute Care Services likewise cross-trains its MFIs in state and federal oversight and regulations to maximize efficiency. The MFIs, supervisors, and support staff who carry out surveys of PRTFs[17] (Figure 4) also are conducting federal surveys of 12 to 13 other provider types and state licensure inspections of hospitals.

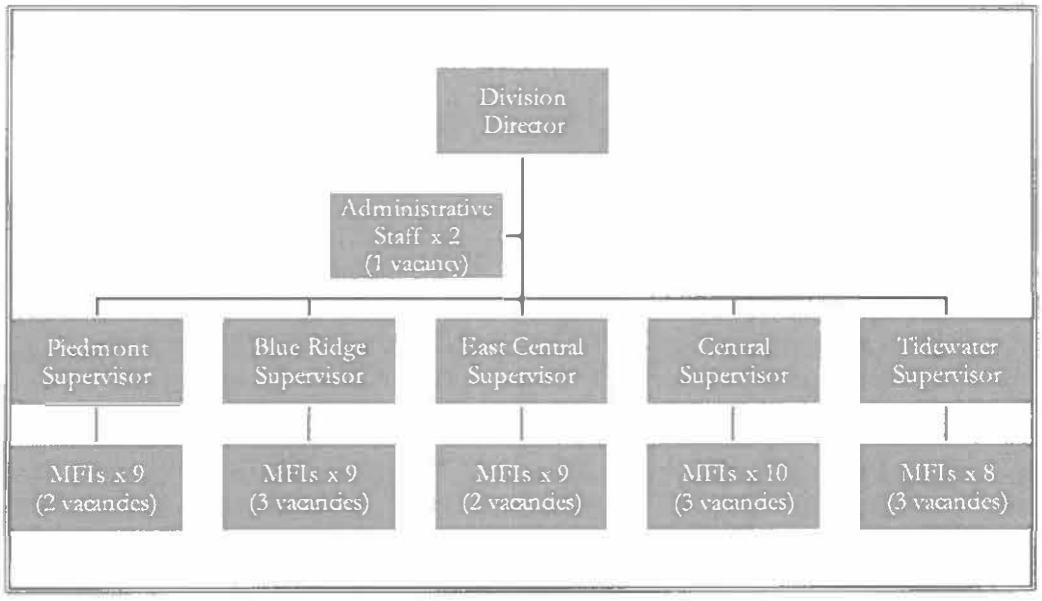


*Figure 3. VDH OLC Division of Long-Term Care Services.*

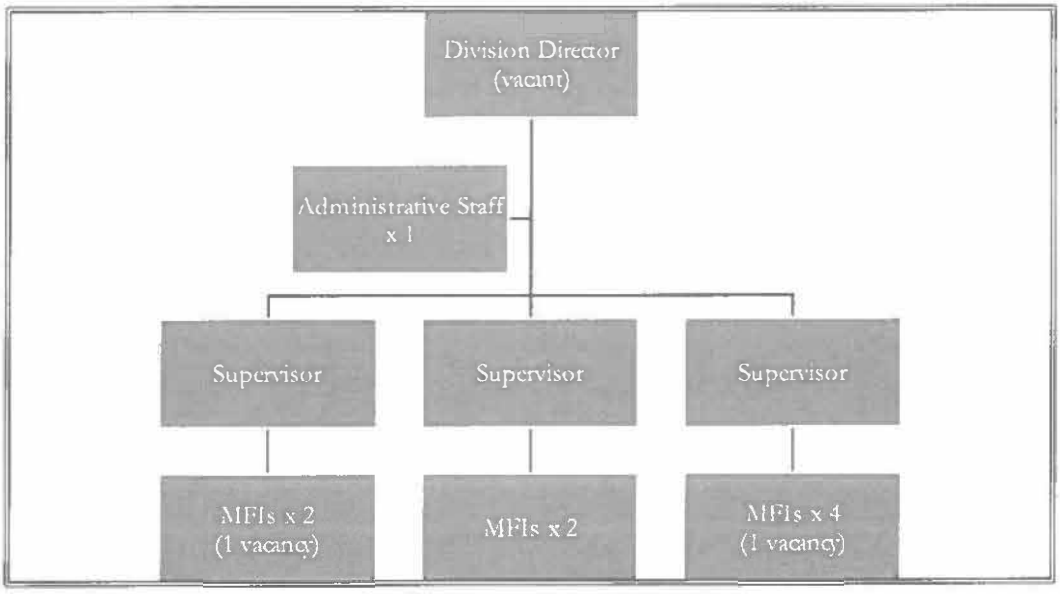


*Figure 4. Portion of VDH OLC's Division of Acute Care Services Involved with PRTF Certification*

[17] VDH OLC's Division of Acute Care Services has additional staff—including MFIs, supervisors, and support staff—whose responsibilities do not include PRTF certification activities and are not included in this report or in Figure 4.

Of the 13 MFI vacancies identified in Figure 3, VDH only has enough funding to hire eight, leaving five MFI positions permanently vacant because neither the federal government nor state government have made sufficient appropriations. VDH is unable to generate any nongeneral fund revenue through collection of fees or other assessments on nursing homes to close this gap because the Code of Virginia has not given that authority to the State Board of Health, as it has done for other licensing programs like hospice;[18] instead, the Code of Virginia prescribed a "service charge of $1.50 per patient bed for which the... nursing home is licensed, but not less than $75 nor more than $500... for each license upon issuance and renewal"[19] in 1979, which has subsequently never been amended.

For all MFI vacancies, regardless of whether funding exists to hire, VDH has encountered numerous workforce challenges in recruiting for those positions. Because VDH uses the same MFIs to conduct both state inspections and federal surveys, these employees must be qualified to perform this work under both VDH's standards and CMS's standards; likewise, their supervisors must also meet these requirements as they periodically accompany their teams on-site for inspections and surveys. CMS requires an MFI to have one of the following qualifications:[20, 21]

- Hospital administrator;
- Industrial hygienist;
- Laboratory or medical technologist, bacteriologist, microbiologist, or chemist;
- Medical record librarian;
- Nurse;
- Nursing home administrator;
- Nutritionist;
- Pharmacist;
- Physical Therapist;
- Physician;
- Qualified Intellectual Disabilities Professional;
- Sanitarian;
- Social worker; or
- Any other health professional category used within the Commonwealth, provided the Commonwealth has determined it to be commensurate with the other listed professions.

Additionally, CMS requires minimum training requirements be met by MFIs within the first year of employment. This training typically takes 12 months to complete. MFIs cannot independently conduct any federal survey task for certified nursing facilities until they have become SMQT-certified and must be accompanied by a preceptor has been SMQT-certified until that time. All of this combined makes it difficult for VDH to recruit qualified candidates as MFIs, and the salaries that VDH can offer are frequently not competitive with private employers looking to hire candidates with similar qualifications.

As the state survey agency for CMS, VDH is required to track its time and effort on federal surveys to the tenth of an hour to ensure federal funds are not being used to support state-only activities. Approximately 10% of the time and effort for MFIs in the Division of Long-Term Care Services is spent on state licensure in FFY2022. The devotion of the majority of time and effort to federal certification activities is attributable to a number of factors. First, there is very little revenue and appropriations to support state licensure for nursing

[18] *See*, e.g., Va. Code §§ 32.1-162.3(B) and 32.1-162.9(B).

[19] *See* Va. Code § 32.1-130(A).

[20] *See* § 4009B of the CMS *State Operations Manual*.

[21] VDH OLC has one MFI in the Division of Long-Term Care Services who does not meet these qualifications; however, this employee's tenure as an MFI predates these CMS requirements so the employee was grandfathered in under prior CMS requirements.

homes. As noted above, the nongeneral fund revenue is greatly constrained by a 43-year-old statute; VDH collected approximately $60,000 in nursing home fee revenue in state fiscal year (SFY)[22] 2022; the cost of the nursing home licensing program is over $500,000.[23] Appropriations provided from the general fund are first used to support the Commonwealth's mandatory contribution to the federal survey activities[24] and any shortage of federal funding for federal survey activities. CMS's funding to VDH has been flat since FFY2015 and any increase in costs—such as higher fuel costs or state-mandated raises—are borne by the Commonwealth through the general fund.

Second, despite the funding being unchanged from CMS, it still comprises the bulk of the funding for VDH's MFIs and the staff who support the MFIs. CMS sets annual metrics for each state survey agency to meet in its State Performance Standards System (SPSS); failure to meet these metrics can result in monetary fines against VDH, which incentivizes VDH to prioritize federal survey activities over state licensure activities. Finally, there is significant overlap in the subject areas (e.g., infection control, residents' rights, etc.) addressed by the state licensure statutes and regulations and the federal CoPs and CfCs, which is by intentional design by the General Assembly.[25] Licensed nursing homes that are also certified nursing facilities—which, as noted above, is the vast majority of long-term care facilities—must follow the stricter requirements for a given subject area, regardless of whether they were created by the state or federal government. In almost all subject areas where there is overlap, the federal requirements are stricter; however, the Commonwealth does have a number of subject areas[26] addressed in its licensure statutes that do not appear in the federal CoPs and CfCs; these requirements ae created by the State Board of Health via regulation.

VIRGINIA DEPARTMENT OF SOCIAL SERVICES

DSS's Division of Licensing Programs has 54 licensing inspectors and field staff to license and inspect ALFs and CRFs. These inspectors and field staff are currently divided among eight field offices located in Richmond, Norfolk, Fairfax, Warrenton, Newport News, Roanoke, Fishersville, and Abingdon. DSS conducts mandated ALF inspections annually for holders of regular licenses and every six months for holders of conditional and provisional licenses. DSS inspects CRFs at least every six months, regardless of the license type. When DSS receives a facility complaint for an ALF or CRF, DSS will initiate an investigation, in addition to the regular mandated inspections. In addition to licensing inspections, field staff provide training and technical assistance to licensed providers and partner with Virginia Commonwealth University (VCU) for educational conferences.

DSS is currently rolling out the Virginia Enterprise Licensing Application (VELA), which is a cloud-based information technology platform for licensing data and applications, including a provider portal to submit applications, pay fees, and upload inspection documents. VELA will replace the outdated Division of Licensing Programs Health and Information (DOLPHIN) System. DSS has several manual processes that exist outside of any information technology system, most crucially the required paperwork that must be completed by licensing inspectors. DSS previously used a system called Versa Mobile to capture inspection information; however, with a 2022 Virginia Information Technology Agency (VITA) initiative that required enhanced

[22] The state fiscal year runs from July 1 to June 30.

[23] This cost only accounts for the funded MFI positions and does not include the cost of the five unfunded MFI positions in the Division of Long-Term Care Services.

[24] Every state is obligated under federal law to pay 25% of the cost of federal survey activities related to Title XIX of the Social Security Act (i.e., Medicaid).

[25] Va. Code § 32.1-127(A) states, "The regulations promulgated by the [State Board of Health] to carry out the provisions of [Article 1 (§ 32.1-123 *et seq.*)] shall be in substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals and by specialists in matters of public health and safety, including health and safety standards established under provisions of Title XVIII and Title XIX of the Social Security Act, and to the provisions of Article 2 (§ 32.1-138 *et seq.*)."

[26] *See*, e.g., Chapter 215 (2021 Acts of Assembly, Special Session I), Chapter 846 (2020 Acts of Assembly), Chapters 291 and 292 (2019 Acts of Assembly), and Chapter 600 (2016 Acts of Assembly).

information security, the use of Versa Mobile by DSS licensing inspectors had to be discontinued. DSS licensing inspectors must now manually key inspection information that was previously automated. Per inspector accounts, this manual process substantially increases the amount of time required to complete necessary inspection paperwork.

DSS's Division of Licensing Programs has been in significant flux for the better part of the past decade. In 2016, DSS split the program leadership to cover the children's licensing program and adult licensing program, only to merge the program leadership back together two years later. In 2021, two-thirds of the employees in this division were moved to the Virginia Department of Education (VDOE) when the General Assembly moved the child care licensing oversight to that agency.[27] As noted previously, this included the transfer of millions of dollars of associated block grant funding from DSS to VDOE. This has had significant negative financial ramifications for the remaining operations at the DSS Division of Licensing Programs. DSS also lost institutional program knowledge as some employees transferred to VDOE were cross trained for both the children and adult programs.

VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

DBHDS's Office of Licensing is divided into several units—New Applicant Review Unit (four full-time equivalents (FTEs)), Incident Management Unit (nine FTEs), and Specialized Investigation Unit (nine FTEs)—and maintains a team of 35 licensing specialists to conduct inspections. The average caseload across all DBHDS licensing programs[28] for licensing specialists is 106 services and 339 locations. This is significantly greater than the national average of 88 facilities per licensing specialist as reported by the National Association of Rehabilitation Providers and Agencies (NARA).

DBHDS conducts an annual unannounced inspection of each service.[29] This includes a review of patient records, staff records, the physical environment, serious incidents that have occurred since the previous inspection, as well as any other areas that may be of concern.

In addition to annual inspections, DBHDS may review providers at any time to follow-up on complaints or serious incidents. During SFY22, DBHDS processed 815 complaints. Providers are required to report any serious incident to DBHDS within 24 hours of discovery. In SFY22, the Office of Licensing processed 22,424 serious incidents. All serious incidents are reviewed and triaged by an incident management specialist; concerns about health and safety or other regulatory violations are referred to a licensing specialist or investigator for follow-up. This may result in an investigation of the provider and if violations are found, the provider is required to implement corrective actions.

Providers that are not able to demonstrate compliance with specific regulations are issued a citation and must develop and implement a corrective action plan. Providers that are unable to maintain compliance with licensing regulations may be issued a provisional license or may have their license revoked.

While DBHDS has seen increases in staffing over the past several years, it has not been sufficient to keep pace with increasing expectations for oversight and the increasing number of providers and services. In 2019, DBHDS created an incident management unit to better track and respond to reports of serious incidents. However, requirements from the Settlement Agreement with the Department of Justice to ensure that providers have sufficient quality and risk management programs have increased the amount of time that it takes licensing specialists extended the time required to complete an annual inspection, making it difficult for specialists to review all of their assigned providers.

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[27] *See* Chapters 860 and 861 (2020 Acts of Assembly).

[28] DBHDS currently has 17 different licensing programs.

[29] *See* Va. Code § 37.2-411.

In November of 2021, DBHDS's Office of Licensing launched a new licensing information technology system, CONNECT, which allows providers to electronically submit all required paperwork such as initial applications, license renewal applications, service modifications, corrective action plans, and variance requests. CONNECT also has automated workflows to streamline the licensing processes and improve the transparency of data and communication with DBHDS staff.

## CONSUMER INFORMATION

The workgroup members received information about Virginia's existing information and referral programs created with the purpose of linking individuals and families to information about congregate care services. These information and referral programs and websites are described below.

Federal law (42 USC § 1396a(a)(9)(D)) requires state survey agencies to:

> ...maintain a consumer-oriented website providing useful information to consumers regarding all skilled nursing facilities and all nursing facilities in the State, including for each facility, Form 2567 State inspection reports (or a successor form), complaint investigation reports, the facility's plan of correction, and such other information that the State or the Secretary [of Health and Human Services] considers useful in assisting the public to assess the quality of long term care options and the quality of care provided by individual facilities.

Accordingly, VDH OLC posts and regularly updates the required information on its website, which includes the distinct part SNFs, SNF/NFs, and NFs in addition to the freestanding certified nursing facilities. VDH also voluntarily posts and updates state licensure inspection reports and PoCs for the nursing homes that do not participate in Medicare or Medicaid as well as the federal survey reports and PoCs for all ICF/IIDs. Similarly, though not mandated by the federal government, DSS's Division of Licensing Programs and DBHDS's Office of Licensing provide a facility search on their websites that provide the inspection dates and descriptions of violations.

2-1-1 Virginia is a service to connect the residents of Virginia with free information on available community services. Virginians may either call 2-1-1 and have a trained professional listen to their situation and provide confidential referrals or can visit 211Virginia.org to access this same information. This service is provided by DSS in partnership with the Council of Community Services, The Planning Council, the United Way of Central Virginia, and the United Way of Greater Richmond & Petersburg. The information found in 2-1-1 Virginia's databases is provided directly from the organization providing a service (e.g., a nursing home would register with 2-1-1 Virginia and then supply all the information that appears in the 2-1-1 Virginia database for that nursing home), so organizations providing services exercise a great deal of control over what information is and is not provided to prospective consumers.

Launched in 2001, SeniorNavigator is a 501c3 non-profit organization that operates a similar statewide database of long-term care services and supports on its website under contract with the Commonwealth. Like 2-1-1 Virginia, inclusion in the database is voluntary, and organizations that choose to be included control is the information provided and are responsible for keeping it updated.

Consumers can also use No Wrong Door (NWD), a partnership between the Virginia Department of Aging and Rehabilitative Services (DARS) and VirginiaNavigator.[30] OSHHR submitted a report in January 2006 in response to House Joint Resolution 657 (2005) concluding that a "No Wrong Door" approach was needed for long-term care services in the Commonwealth to empower individuals to pre-screen and manage their services online. Starting in 2006, the Commonwealth received grants to operationalize NWD, including a 2015 grant to expand the service statewide and a 2016-2017 branding and website launch to build an awareness campaign of the expansion. NWD connects Virginians with local partners (typically the local area agency on aging), who can

[30] VirginiaNavigator is part of the SeniorNavigator.org family of databases and websites.

in turn help older adults and individuals with disabilities understand their options, provide support with decisions, and help caregivers and family members find help when supporting a loved one who may be growing older or has a disability or chronic disease. NWD uses the electronic Communication, Referral, Information, and Assistance (CRIA) tool to enable local partners to make secure automated referrals, share information on the individuals they serve, track what is happening to an individual over time, and run progress reports at the client, agency, and community level. To access NWD services, Virginians can call a 24/7/365 toll-free line staffed by 2-1-1 Virginia; Virginians can also visit easyaccess.virginia.gov for live chat with 2-1-1 Virginia or to use the search engine. It should be noted that the engine pulls from the databases of VirginiaNavigator and the issues identified above about the origin, veracity, and completeness of information in the databases in 2-1-1 Virginia and SeniorNavigator.org are true for this database as well.

## FINDINGS & RECOMMENDATIONS

**FINDING 1:** There is no single consumer resource or information clearinghouse for Virginians which explains the continuum of long-term care and congregate living services and settings. Further, there is no single resource that details which agency has oversight or responsibility for each congregate living service or setting, how one can best determine which service or setting may best meet their needs, how to go about accessing services in their communities, and how to connect consumers and/or their families to information about the regulated entities' compliance with inspections and surveys.

**RECOMMENDATION 1:** Staff from VDH, DSS, DBHDS, and the Virginia Department of Aging and Rehabilitative Services (DARS) jointly create a "one-page" reference guide for consumers and families that explains common congregate living terms and long-term care terminology, the levels of long-term care available in Virginia, which agency provides oversight for the different levels of long-term care, and where consumers may go or whom to contact for more in-depth information

**FINDING 2:** If a consumer visits the websites of VDH, DSS, DBHDS, or DARS, there is no consistent or concise resource to assist consumers in determining which level of care is the most appropriate for their needs, how to determine the appropriate level of congregate living, and what options are available in their communities.

**RECOMMENDATION 2:** Staff from VDH, DSS, DBHDS, and DARS, as well as other agencies within the Health and Human Resource Secretariat, jointly develop a decision tree or similar decision-support tool to assist consumers in determining what level of congregate living may be appropriate for themselves and/or their family members.

**FINDING 3:** While there are several websites detailing congregate and long-term care options in the Commonwealth, there is no "one-stop-shop" resource for consumers. The information provided on each website varies, is typically self-submitted by businesses/organizations, and may be out of date or unverified with the agency responsible for oversight. Moreover, the number of available websites creates confusion for consumers.

**RECOMMENDATION 3A:** All relevant Health and Human Resources websites prominently post the "one-page" reference guide and decision support tool, as well as links to the pertinent provider search pages for each agency to allow consumers to search for providers as well determine their history of regulatory compliance. This includes the websites of VDH, DSS, DBHDS, and DARS, as well as the websites of the Office of the State Long-Term Care Ombudsman and the regional and local long-term care ombudsmen offices. 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org should also be included in this effort.

**RECOMMENDATION 3B:** DSS, in cooperation with the VDH, DBHDS, and DARS, convene a work group to fully evaluate consumers' experience in finding the appropriate level of long-term care and congregate living for their needs, including (i) whether websites including 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org should be consolidated; (ii) the accuracy, consistency, and sources of information concerning long-term care and congregate living settings on 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org; (iii) what information about congregate living settings from VDH, DSS, DBHDS, and DARS should be included on 2-1-1 Virginia, No Wrong Door Virginia, and SeniorNavigator.org; and (iv) what public outreach efforts, if any, could increase consumer knowledge about these resources.

**FINDING 4:** The term "provider" or "health care provider" has different definitions throughout the Code of Virginia, which may be a source of consumer confusion when interacting with providers of congregate living

settings and the state agencies responsible for oversight. This restricted the availability of COVID-19 federal funds for some providers of assisted living/ congregate living settings because federal guidelines only allowed the funds for "health care providers" and assisted living facilities are not considered "health care providers" under Virginia law.

**RECOMMENDATION 4:** Request that the Virginia Code Commission review the terms and definitions for "provider" and "health care provider" through the Code of Virginia in reference to providers of congregate living settings regulated by the VDH, DSS, and DBHDS. The Code Commission's findings and recommendations could be shared with OSHHR, the Governor, and the General Assembly prior to the 2024 Regular Session. This recommendation could be accomplished either via legislation in the 2023 Regular Session or by letter from the Secretary of Health and Human Resources.

## ISSUES FOR FURTHER CONSIDERATION

The following are issues raised during the August 24 and September 15 meetings, for which there are no specific recommendations. However, these issues are included for further consideration and public comment due to the impact they likely have on the efficiency and effectiveness of licensing, oversight, and regulation of congregate living settings.

**IDENTIFIED ISSUE 1:** The State Board of Health[31] does not have the authority to set licensing fees for nursing homes and currently must use statutorily prescribed fee amounts that have not changed in 43 years, which places the agency and its oversight functions under financial strain. The current fee schedule for annual license renewal is based on patient bed capacity, but is not to exceed $500. In 1979, this fee schedule nearly supported the entire cost of the licensure and inspection program. However, due to the rate ($1.50 per bed) and the cap placed within the statute ($500),[32] the revenues collected from nursing homes during licensure and renewal are no longer adequate to cover the expenditures of the licensing program. Additionally, Va. Code § 32.1-130 has never been amended, nor were additional appropriations provided, to recognize additional costs incurred by the licensure and inspection program as a result of legislative mandates and Virginia-specific requirements for nursing homes that were enacted after 1979.

**IDENTIFIED ISSUE 2:** The State Board of Social Services[33] has not pursued a regulatory action to increase its licensing fees since at least 1991. Licensing fees cannot be used to support the DSS's oversight functions, which puts the agency and its oversight functions under financial strain. The fees generated by licensing can only be used for purpose of education and training for staff of and technical assistance to ALFs to "improve the quality of care in such facilities" per Va. Code §§ 63.2-1700 and 63.2-1803.1. It would be helpful for DSS to have more flexibility to access funds for operational and licensing functions. Additionally, in July of 2021, DSS's Division of Licensing Programs was directed by the General Assembly to move the child care portion of the program to VDOE, which included transferring millions of dollars of associated block grant funding from DSS to VDOE; this is now a major contributing factor to a lack of funding for the ALF licensing program.

**IDENTIFIED ISSUE 3:** DBHDS licenses congregate living providers for developmental disabilities services for adult and children as well as providers for substance use disorder and mental health. Since state fiscal year (SFY) 2012, there has been a 92% increase in the number of licensed providers, 96% increase in the number of licensed services, and 80% increase in the number of DBHDS-licensed locations. While DBHDS has also experienced growth in the number of positions, the amount of information reviewed by specialists has significantly increased to address requirements of the Settlement Agreement with the Department of Justice. In SFY2012, DBHDS employed 31 full-time equivalent (FTE) licensing specialist to conduct annual inspections, investigations, and review serious incidents. Since then, DBHDS's employment of licensing specialists has only increased 12.9% to 35 FTEs and overall FTE licensing and oversight staff has only increased 70.9% to 53 FTE (comprised of 35 licensing specialists, nine incident management specialists, and nine specialized investigators). Despite these increases, the Commonwealth's average caseload for licensing specialists is 106 services and 339 locations, significantly greater than the average caseloads reported by the National Association for Rehabilitation Providers and Agencies (NARA).

[31] Pursuant to Va. Code § 32.1-12, the State Board of Health, not VDH, has the authority to promulgate regulations, which would include regulations establishing and assessing fees for licensure if such regulatory authority were granted.

[32] The fee schedule prescribed by Va. Code § 32.1-130 applies to hospitals as well as nursing homes.

[33] Pursuant to Va. Code § 63.2-1700, the State Board of Social Services, not DSS, has the authority to "adopt regulations and schedules for fees to be charged for processing applications for licenses to operate assisted living facilities..."

**IDENTIFIED ISSUE 4:** Since FFY2015, the CMS has not increased funding to the Commonwealth for federal certification and survey activities that are performed by VDH as the state survey agency for congregate living settings.

**IDENTIFIED ISSUE 5:** VDH, DSS, and DBHDS have experienced ongoing difficulty in attracting and retaining qualified employees to conduct inspections and other essential oversight functions mandated by either the Code of Virginia or CMS, even prior to the COVID-19 pandemic. The prolonged vacancies have impacted the timeliness of inspections and other essential mandatory oversight functions.

**IDENTIFIED ISSUE 6:** VDH lacks meaningful enforcement options to compel compliance for nursing homes that violate Virginia-specific requirements.[34] To remedy violations of state law, the State Health Commissioner only has the authority to require PoCs,[35] restrict new admissions,[36] or suspend or revoke a license.[37] This is in contrast with penalties allowed under federal law, which include PoCs,[38] directed POCs,[39] directed in-service training,[40] state monitoring,[41] temporary management,[42] civil monetary penalties,[43] discretionary denial of payment for new admissions,[44] denial of payment for all individuals,[45] and termination.[46] The workgroup received information about the federal and state inspection requirements as well as the sanctioning options and the potential for aligning the state's enforcement process with the federal process.

[34] Pursuant to Va. Code § 30-169.1, VDH had previously provided cooperation and assistance to the Joint Commission on Health Care (JCHC) in 2021 on a number of nursing home-related issues, including the lack of sanctioning options for violations of state law. Two bills resulting from JCHC's work about nursing home staffing standards, HB330 and SB406 of the 2022 Regular Session, also attempted to address the lack of sanctioning options and proposed creating a fund from collect civil monetary penalties for grants "to assist in the provision of activities that protect or improve the quality of care or quality of life for residents, patients, and consumers of long-term care services; support resident and family councils and other consumer involvement in assuring quality care in nursing homes and long-term care services; and improvement initiatives in nursing homes and long-term care services." SB406 failed to report from the Senate Committee on Education and Health and HB330 was continued to 2023 by the House Committee on Health, Welfare and Institutions.

[35] *See* 12VAC5-371-60(F), 12VAC5-371-70(D), and 12VAC5-371-110(D).

[36] *See* Va. Code § 32.1-135(A).

[37] *Id.*

[38] *See* 42 CFR § 488.402(d).

[39] *See* 42 CFR § 488.406(a)(7).

[40] *See* 42 CFR § 488.406(a)(8).

[41] *See* 42 CFR § 488.406(a)(4).

[42] *See* 42 CFR § 488.406(a)(1).

[43] *See* 42 CFR § 488.406(a)(3).

[44] *See* 42 CFR § 488.406(a)(2)(ii).

[45] *See* 42 CFR § 488.406(a)(2)(i).

[46] *See* 42 CFR § 488.406(a).

# VIRGINIA ACTS OF ASSEMBLY -- 2022 SESSION

## CHAPTER 559

*An Act to direct the Secretary of Health and Human Resources to study the oversight and regulation of nursing homes, assisted living facilities, and other congregate living settings.*

[H 234]

Approved April 11, 2022

**Be it enacted by the General Assembly of Virginia:**

1. *§ 1. That the Secretary of Health and Human Resources (the Secretary) shall study the current oversight and regulation of nursing homes, assisted living facilities, and other congregate living settings to improve efficiency and effectiveness of regulation and oversight, provide better transparency for members of the public navigating the process of receiving services from such facilities, and better protect the health and safety of the public. The Secretary shall report his findings and recommendations to the Governor and the Chairmen of the Senate Committees on Education and Health and Finance and Appropriations and the House Committees on Appropriations and Health, Welfare and Institutions by October 1, 2022.*

## APPENDIX B – ACRONYMS AND ABBREVIATIONS

This is a listing of the acronyms and abbreviations appearing throughout the report and its appendices.

ALF – assisted living facility

BOI – Bureau of Insurance in the SCC

CARF – Commission on Accreditation of Rehabilitation Facilities

CCRC – continuing care retirement community

CfC – condition for coverage

CMS – U.S. Centers for Medicare and Medicaid Services

COA – Council on Accreditation of Services for Families and Children

CoP – condition of participation

CRF – children's residential facility

DARS – Virginia Department of Aging and Rehabilitative Services

DBHDS – Virginia Department of Behavioral Health and Developmental Services

DMAS – Virginia Department of Medical Assistance Services

DOLPHIN – Division of Licensing Programs Health and Information

DSS – Virginia Department of Social Services

FFY – federal fiscal year

FTE – full-time equivalent

ICF/IID – intermediate care facility for individuals with intellectual disabilities

JCHC – Joint Commission on Health Care

NARA – National Association for Rehabilitation Providers and Agencies

NF – nursing facility

NH – nursing home

OLC – Office of Licensure and Certification in VDH

PRTF – psychiatric residential treatment facility

SCC – State Corporation Commission

SFY – state fiscal year

SNF – skilled nursing facility

VCU – Virginia Commonwealth University

VDH – Virginia Department of Health

VDOE – Virginia Department of Education

VELA – Virginia Enterprise Licensing System

## APPENDIX C – STUDY CONTRIBUTORS' COMMENTS ON DRAFT FINDINGS, RECOMMENDATIONS AND ISSUES FOR FURTHER CONSIDERATION

Workgroup members were offered the opportunity to provide feedback and suggestions on the draft findings, recommendations, and issues for further consideration.

### LEADINGAGE VIRGINIA

Thank you for providing LeadingAge Virginia an opportunity to serve on the workgroup to address the provisions outlined in Chapter 559 (2022 Acts of Assembly) and provide feedback on the draft recommendations.

The continuum of aging services encompasses many levels of care. Although the legislation is focused on "congregate settings," we suggest that a recommendation be made that the resources developed for this legislative initiative should represent the entire continuum, including life plan/continuing care communities, senior affordable housing (HUD subsidized), assisted living, nursing homes, adult day centers, home care, home health, and hospice. Not doing so would present a fragmented system.

For the agencies that are referenced in the recommendations, we suggest indicating what levels of care they regulate. For example, the Department of Social Services oversees adult day centers and assisted living communities. We also suggest adding references/resources regarding the State Corporation Commission that regulates continuing care retirement communities and the U.S. Department of Housing and Urban Development that regulates senior affordable housing.

Please find attached the draft with some suggested changes.

# Study of Oversight and Regulation of Nursing Homes, Assisted Living Facilities, and Other Congregate Living Settings

Chapter 559 (2022 Acts of Assembly)

Draft Recommendations

FOR PUBLIC COMMENT

**The Secretary of Health of Human Resources is accepting public comment for the Draft Findings and Recommendations for the Study that was enacted by Chapter 559 (2022 Acts of Assembly). Public comment must be received by 12:00 noon Friday, October 7, 2022. Comments may be submitted by email to Rebekah Allen at Rebekah.Allen@vdh.virginia.gov**

## Draft Findings and Recommendations

***Finding 1:*** **There is no single consumer resource or information clearinghouse for Virginians which explains the continuum of long-term care and congregate living services and settings.**

The continuum of aging services is a fragmented system with regulatory oversight from various agencies. The aging continuum includes life plan/continuing care retirement communities, senior affordable housing, assisted living, nursing homes, adult day centers, home care, home health and hospice.

**Further, there is no resource that details which agency has oversight/responsibility for which congregate care service or setting, how one can best determine which service or setting may best meet their needs, how to go about accessing services in their communities, and how to connect consumers and/or their families to information about the regulated entities' compliance with inspections and surveys.** Following are the various agencies and the regulatory oversight (if applicable):

Virginia Department of Aging and Rehabilitative Services

Behavioral Health and Developmental Services

Virginia Department of Health. Nursing homes, home care organizations, and hospice

Virginia Department of Social Services. Adult Day and assisted living

State Corporation Commission, Bureau of Insurance. Continuing care retirement communities (comprise various levels of care, including but not limited to independent living, assisted living, and nursing home care)

U.S. Department of Housing and Urban Development (HUD). HUD Affordable senior housing

**Recommendation 1:** Staff from the Virginia Departments of Health, Social Services, Behavioral Health and Developmental Services, and Aging and Rehabilitative Services along with the Virginia State Corporation Commission Bureau of Insurance, ~~and Aging and~~

Commented [DP1]: May need to clarify why this agency is included due to reference of "congregate living settings" in Chapter 559.

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Rehabilitative Services should jointly create a "one-page" reference guide for consumers and families that explains common congregate living terms and elder care terminology, the levels of care available in Virginia, which agency provides oversight for the different levels of care, and where consumers may go or whom to contact for more in-depth information.

**Finding 2:** If a consumer visits the websites of the Virginia Departments of Health, Social Services, Behavioral Health and Developmental Services, and Aging and Rehabilitative Services, there is no consistent or concise resource to assist consumers determine which level of care is the most appropriate for their needs, how to determine the appropriate level of congregate care, and what options are available in their communities.

Commented [DP2]: The SCC has a guide that provides insight on CCRCs that could be relevant here. https://scc.virginia.gov/pages/b4fc...

**Recommendation 2:** Staff from the Virginia Departments of Health, Social Services, Behavioral Health and Developmental Services, and Aging and Rehabilitative Services, and other Health and Human Resource agencies should jointly develop a decision tree or similar decision-support tool to assist consumers in determining what level of congregate care may be appropriate for themselves and/or their family members.

**Finding 3:** While there are several websites detailing congregate and elder care options in Virginia, there is no "one-stop-shop" resource for consumers. The information provided on each website varies, is typically self-submitted by businesses/organizations, and may be out of date or unverified with the agency responsible for oversight. Moreover, both the number of available websites and choice of websites available are confusing and hard to navigate for consumers.

**Recommendation 3a:** The "one-page" reference guide and decision support tool, as well as links to the pertinent provider search pages for each agency to allow consumers to search for providers as well determine their history of regulatory compliance, should be posted prominently on all relevant Health and Human Resource websites. This includes the Virginia Departments of Health, Social Services, Behavioral Health and Developmental Services, and Aging and Rehabilitative Services; the websites of the Office of the State Long-Term Care Ombudsman and the regional and local offices; The State Corporation Commission; 2-1-1 Virginia.org, No Wrong Door Virginia, FIND, and on SeniorNavigator.org should also be included in this effort.

Commented [DP3]: Suggest including a representative from the Richmond HUD Division to serve on this workgroup. Following are some possible contacts to connect with...The Richmond office info: Richmond Asset Management Servicing Office
600 East Broad Street, 3rd Floor
Richmond, VA 23219-4920
Phone: (800) 842-2610
Fax: (804) 822-4987
TTY: Dial 7-1-1

Brenda Brown, Director
Asset Management Division (Baltimore Regional Office, includes Virginia)
brenda.l.brown@hud.gov
(410) 209-6510

**Recommendation 3b:** The Virginia Department of Social Services, in cooperation with the Virginia Department of Health, the Virginia Department of Behavioral Health and Developmental Services, and the Virginia Department of Aging and Rehabilitative Services, shall convene a work group to fully evaluate the consumer's experience in finding the appropriate level of elder care and congregate care for their needs, including (i) whether websites including 2-1-1 Virginia.org, No Wrong Door Virginia, and SeniorNavigator.org should be consolidated, (ii) the accuracy, consistency, and sources of information concerning elder care and congregate care settings on 2-1-1 Virginia.org, No Wrong Door Virginia, and SeniorNavigator.org; (iii) what information about congregate care settings

from the Virginia Departments of Health, Social Services, Behavioral Health and Developmental Services, and Aging and Rehabilitative Services should be included on 2-1-1 Virginia.org, No Wrong Door Virginia, and on SeniorNavigator.org, and (iv) what public outreach efforts, if any, could increase consumer knowledge about these resources.

**Finding 4:** The term "provider" or "health care provider" has different definitions throughout the Code of Virginia, which may be a source of consumer confusion when interacting with providers of congregate care settings and the state agencies responsible for oversight. This had the effect of restricting the availability of COVID-19 federal funds for some providers of assisted living/congregate care settings.

**Recommendation 4:** Request the Virginia Code Commission to convene a work group, including representatives of the Virginia Department of Health, the Department of Social Services, the Department of Behavioral Health and Developmental Services, the Department for Aging and Rehabilitative Services, the Virginia Health Care Association, Leading Age Virginia, the Virginia Center for Assisted Living, the Virginia Assisted Living Association, and other relevant stakeholders, to review the consistency of terms and definitions for "provider" or "health care provider" throughout the Code of Virginia in reference to providers of congregate care settings regulated by the Virginia Departments of Health, Social Services, and Behavioral Health and Developmental Services. A Report of the Code Commission's Findings and Recommendations will be submitted to the Secretary of Health and Human Resources prior to the 2024 General Assembly Session.

*Note – This request could be accomplished by letter from the Secretary of Health and Human Resources.

## Other Identified Issues

The following are issues raised during the Workgroup meetings held on August 24 and September 15 for which there are no specific recommendations. However, these issues are included for further consideration and public comment.

**Identified Issue 1:** The Virginia Department of Health does not have the authority to set licensing fees and currently must use statutorily prescribed fee amounts that have not changed in at least 43 years, which places the agency and its oversight functions under financial strain. The current fee schedule for annual license renewal is based on patient bed capacity but is not to exceed $500. In 1979, this fee schedule nearly supported the entire cost of the licensure and inspection program. However, due to the rate ($1.50 per bed) and the cap placed within the statute ($500), the revenues collected from hospitals and nursing facilities during licensure and renewal are no longer adequate to cover the expenditures of the program. Additionally, Va. Code § 32.1-130 has never been amended nor were additional appropriations provided, to recognize additional costs incurred by the licensure and inspection program as a result of legislative mandates.

*Note –This also includes licensure fees for hospitals.

**Identified Issue 2:** The Virginia Department of Social Services has not pursued a regulatory action to increase its licensing fees since at least 1991. Additionally, licensing fees cannot be used to support the Department's oversight functions, which puts the agency and its oversight functions under financial strain. The fees generated by licensing can only be used for purpose of education and training for staff of and technical assistance to assisted living facilities to, "improve the quality of care in such facilities" per § 63.1-1803.1. It would be helpful for the Department of Social Services to have more flexibility to access funds for operational and licensing functions, including the training of providers. In July of 2021 the Department of Social Services' Division of Licensing Programs was directed by the General Assembly to move the Child Care portion of the program to the Virginia Department of Education, which also included millions of dollars in block grant funding. This is now contributing to a lack of funding to the program.

**Identified Issue 3:** The Virginia Department of Behavioral Health and Developmental Services licenses congregate providers for developmental disabilities services for adult and children as well as providers for substance use disorder and mental health. While the number of licensed providers and services has almost doubled over the past decade, the number of licensing specialists in the Commonwealth has only grown by less than 10 percent. Since FY 2012, there has been a 92% increase in the number of licensed providers, 96% increase in the number of licensed services and 80% increase in the number of DBHDS licensed locations. Conversely, in 2013, the Department employed 31 licensing specialists and in 2022, employed 34 licensing specialists and nine specialized investigators. In Virginia, the average caseload for licensing specialists is 106 services and 339 locations, significantly greater than the average caseloads reported by the National Association for Regulatory Administration (NARA).

**Identified Issue 4:** Perennial underfunding by the Centers for Medicare and Medicaid Services for federal certification and survey activities that are performed by the Virginia Department of Health for congregate care settings

**Identified Issue 5:** The difficulty that the Virginia Departments of Health and Social Services have experienced in attracting and retaining qualified employees to conduct inspections and other essential oversight functions mandated by either the Code of Virginia or the Centers for Medicare and Medicaid Services. The impact of prolonged vacancies has had an impact on the timeliness of inspections and other essential oversight functions mandated by either the Code of Virginia or the Centers for Medicare and Medicaid Services.

**Identified Issue 6:** The Virginia Department of Health lacks meaningful enforcement options to compel compliance for nursing homes that violate Virginia-specific requirements. Violations of State law are limited to Plans of Correction (POC), restricting new admissions, or license suspension/revocation. This is in contrast with penalties allowed under federal law which include POC, directed POC, directed in-service, state monitoring, temporary management, civil monetary penalties, discretionary denial of payment for new admission, denial of payment for all individuals, and termination

## OFFICE OF THE STATE LONG-TERM CARE OMBUDSMAN

The recommendations provide a good foundation for significant work ahead for the designated workgroup that would focus on the need for a consolidated consumer-friendly tool to better enable an individual to more easily identify and responsibly select appropriate long-term care services from the array offered by multiple agencies under distinct licensing entities and standards. A 'one pager' is a laudable, but possibly antiquated term, as the tool may need to be more of an interactive roadmap that enables selection of settings and resources to meet needs, utilizing embedded links to select based on credible quality ratings, financial/ coverage options and eligibility, available levels of assistance, opportunities for continuity of care/ services with in a unified system, etc.

With regard to the clear need to improve transparency, recommendations should ensure that the designated workgroup or other appropriate body conduct an in-depth examination of the availability of – and significant gaps in – current publicly accessible information on the quality of LTC services, including not only comparative and valid quality ratings, but also ownership, regulatory compliance issues, etc.

We would underscore that the recommendations focus more on development of tools to assist the consumer to navigate what is currently often too 'silo-ed' a system. With the current reality, such tools will be helpful. It is concerning, though, that the workgroup – within the short time frame available – was not able to address some of the key issues that the legislation charged the workgroup to address, i.e., to study the current oversight and regulation of nursing homes, assisted living facilities, and other congregate living settings to improve efficiency and effectiveness of regulation and oversight. Key elements of these most important consumer protections are noted in the 'other issues' identified, but really merit our attention to develop specific recommendations for improved systems of oversight. It is of limited value to improve transparency of information and data related to quality of services if we do not ensure that we are enabling robust oversight and enforcement to improve quality. The 'issues' discussion appropriately identifies a number of variables that have tended to leave our regulatory entities hamstrung – lack of sufficient funding, lack of access to a more robust array of enforcement options that enable regulatory agencies to more nimbly address problems in a manner that better protects long-term care consumers and potentially results in minimal upheaval of their communities and lives, etc.

In addition, among recommendations to better protect individuals' health and safety across the LTC landscape, there must be concerted efforts to expand options – particularly for individuals with limited resources – to safe and affordable housing with access to supportive services. We must repair (or replace) the Auxiliary Grant system, and we must examine how Medicaid or other resources can be tapped to ensure access to congregate care/assisted living for the many individuals with limited resources that do not have viable alternatives when it comes to affording assisted living care of reasonable quality.

## VIRGINIA ASSISTED LIVING ASSOCIATION

Thank you for coordinating this important report. Below are our preliminary comments for the report:

- Finding 1: Line 3 – "Further, there is no single resource that details which agency has oversight"…
- Finding 2: Line 3 – "there is no consistent or concise resource to assist consumers in determining ~~determine~~ which level"…
- Recommendation 3a: Last line – "Wrong Door Virginia, and ~~on~~ SeniorNavigator.org"…
- Recommendation 4: *The Joint Commission on Health Care may also be considering this as an option.*

The points made in the initial report are very accurate to what was discussed, but I did not see "funding of care" included in any of the identified issues. Being able to find appropriate care that is affordable and in a preferred locality is a huge dilemma for individuals. In addition to the general public, this is also a significant issue for the protection of adults who are under guardianships, etc. A recent article highlighted this concern.

(https://richmond.com/state-council-on-long-termly-calls-for-more-help-with-assisted-living-home-care/article_0dd3a0da-40e7-11ed-a2ef-ebca5f6fea0b.html) Maybe it would be helpful to include funding options in the "one page" document. The information could include resources on what funding supports may be available (Auxiliary Grant, VA Aid & Attendance, DAP funds, etc.), where to apply for funding supports, and what funding resources cover which congregate settings.

### VIRGINIA DEPARTMENT OF AGING AND REHABILITATIVE SERVICES

Thank you for the opportunity to provide input on the draft recommendations of the Study of Oversight and Regulation of Nursing Homes, Assisted Living Facilities, and Other Congregate Living Settings. DARS would like to provide some clarifying information for Recommendations 3a and 3b regarding No Wrong Door (NWD) Virginia. The NWD Virginia initiative operates on a collaborative web-based platform, integrating an individual's unique needs to a live search engine of local and statewide options. This initiative housed at DARS is supported by two statewide resource databases, VirginiaNavigator (including SeniorNavigator) and Virginia 2-1-1, to offer a statewide one-stop, coordinated, and person –centered system.

DARS is always open to opportunities to help improve the user experience through NWD Virginia. If a licensing tool is developed, No Wrong Door would ensure that it is available to the public and through our web-based platforms as well as both our statewide resource directories.