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Regulatory
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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES (DMAS)
Virginia Administrative Code (VAC) citation	12 VAC 30-120-211 through 12 VAC 30-120-249
Regulation title	Waivered Services
Action title	Mental Retardation/Intellectual Disability Waiver Changes
Date this document prepared	

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an “emergency situation” as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The Administrative Process Act (Section 2.2-4011) states that an agency may adopt regulations in an “emergency situation”: (A) upon consultation with the Attorney General after the agency has submitted a request stating in writing the nature of the emergency, and at the sole discretion of the Governor; (B) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of Subdivision A.4 of § 2.2-4006; or (C) in a situation in which an agency has

an existing emergency regulation, additional emergency regulations may be issued as needed to address the subject matter of the initial emergency regulation provided the amending action does not extend the effective date of the original action.

This emergency regulation is required to comply with the Centers for Medicare and Medicaid Services' (CMS) review and approval of the Mental Retardation Waiver application renewal. Item 306 PPP of the 2009 Virginia Appropriations Act states that, "upon approval by the Centers for Medicare and Medicaid Services of the application for renewal of the Mental Retardation Waiver, expeditious implementation of any revisions shall be deemed an emergency situation pursuant to § 2.2-4002 of the Administration Process Act."

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Waivered Services, Part IV, Mental Retardation Waiver (12VAC30-120-211 through 249) and also authorize the initiation of the promulgation process provided for in § 2.2-4007.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

This emergency regulation is required in order to meet the Centers for Medicare and Medicaid Services (CMS) requirements for the renewal of the Mental Retardation/Intellectual Disability (MR/ID) Waiver (previously referred to as the Mental Retardation Waiver). DMAS covers these services pursuant to a waiver of certain federal requirements, permitted by application to CMS, the federal Medicaid authority. CMS approved the request for the renewal effective July 1, 2009; the waiver will expire June 30, 2014.

The MR/ID Waiver program provides supportive services in the homes and communities of persons with diagnoses of MR/ID or children younger than the age of six years who are at risk of developmental delay. This program permits these individuals to remain in their homes and communities rather than being institutionalized in an Intermediate Care Facility for the Mentally Retarded (ICF/MR). The MR/ID Waiver program currently supports 8,052 slots (one slot per waiver enrollee). The 2009 Virginia General Assembly funded another 200 slots which will be made available January 1, 2010. These slots were incorporated into the Waiver renewal application.

To ensure continuation of waiver services, DMAS, in collaboration with the Department of Behavioral Health and Developmental Services (DBHDS), formerly known as the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), submitted to CMS the MR/ID waiver

renewal application requesting approval by July 1, 2009. CMS has approved Virginia's request. These proposed emergency regulations support the renewal application; therefore, these regulations are critical to successful implementation of the waiver upon receipt of CMS' approval for the continuation of essential services currently available to Virginians.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

This proposed emergency regulation changes existing regulations to meet federal requirements for waiver renewal. CMS requires states to assure the health and welfare of individuals enrolled in a home and community based waiver and to assure financial accountability and administrative authority in program operations. The major changes incorporated into the waiver renewal application include person-centered planning, a standardized instrument to document an individual's needs and supports, a risk assessment process, the service facilitation process, automation of the patient pay process, guidance to community services boards on urgent care criteria and changes in nomenclature to reflect current terms used throughout the waiver renewal.

CMS requires that states use person-centered planning (PCP) to ensure that individuals enrolled in home and community based waivers fully participate in the planning for their services and supports. Virginia's Systems Transformation Grant and other complementary efforts have resulted in the development of certain core elements of a person-centered planning process for Virginia. Person-centered planning goes beyond the traditional individualized planning processes used in the waiver. The person-centered approach relies much less on the service system and focuses on the individual receiving waiver services and supports. To accomplish PCP across Virginia, these emergency regulations incorporate the essential definitions and activities needed to implement PCP. These definitions include person-centered planning, individual support plan, plan for supports and use of a standardized assessment tool, which is discussed below. These definitions and activities further ensure the individual's health and welfare and meet CMS' requirements for waiver renewal.

As part of the PCP process, the waiver renewal application specifies that DBHDS will identify one tool and schedule as set forth in the agency guidance documents for the MR/ID waiver. Use of one standardized tool will ensure consistency across Virginia in identifying individuals' needs for waiver supports and services. This tool will also be used to collect data consistently across the Commonwealth.

As mentioned previously, CMS and Virginia place great importance on the health and welfare of individuals enrolled in waiver programs. To this end, an annual risk assessment is included in the waiver renewal application. This risk assessment will be conducted, and risk mitigation will be incorporated into each individual support plan as a component of PCP.

Virginia regulation has historically required that an individual choosing the consumer-directed model for service delivery receive the services of a services facilitator. The consumer-directed model enables the individual enrolled in the waiver, or the family/caregiver acting in their behalf, the authority to hire and direct attendants providing personal care, respite, and companion services. In CMS's review of the MR/ID Waiver renewal application, CMS noted that the use of a services facilitator cannot be required by the state. Virginia removed this requirement from the waiver renewal application and these emergency regulations propose also to remove this requirement from Virginia's regulation. To ensure that the essential tasks related to the delivery of consumer-directed services and supports are performed, these emergency regulations also propose that the individual or the family or caregiver will perform those tasks (e.g., development of a plan of supports, submission of the plan for prior authorization, record documentation, etc.) when services facilitation is not chosen by the individual or their family/caregiver.

Also, as “services facilitation” is included in the waiver renewal as a service rather than an administrative activity, a definition will be added as a part of this emergency regulation to describe services facilitation.

CMS further instructed Virginia to address the process currently used to fill MR/ID waiver slots to ensure statewide consistency in the process. CMS is requiring that Virginia, through the DBHDS, develop guidelines to be used by community services boards (CSBs) and behavioral health authorities (BHAs) to identify those individuals on the urgent waiting list most in need when waiver slots become available. These proposed emergency regulations provide the DBHDS the authority to accomplish this directive.

The waiver renewal application includes DMAS’ conversion to an electronic information exchange between the local departments of social services, DMAS, and service providers (including those enrolled to provide services for the MR/ID waiver) for determination of the patient pay requirement for waiver services.

Other than what is described above, DMAS is not proposing any other significant changes to the waiver with this emergency regulation.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

The state regulations that are affected by this action are Waivered Services, Part IV, Mental Retardation Waiver (12 VAC 30-120-211 through 249).

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
Entire regulation		The State agency for administering MR programs is the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS).	Effective July 1, 2009, DMHMRSAS will change its name to the Department of Behavioral and Developmental Services (DBHDS).
Entire regulation		Person-centered language is not part of the current regulation.	Add definition for interrelated terms, “Person-Centered Planning (PCP),” “Individual Support Plan,” and “Plan for Supports.” Remove definitions for “Consumer Service Plan (CSP)” and “Individual Service Plan.” Ensure that “individuals” is used consistently instead of “recipients.” These changes reflect a person-centered approach as required by CMS as well as reflecting a national trend toward using the more person-centered terminology of “intellectual disability” and moving away from the use of “mental retardation.”
Entire regulation		“Mental retardation” is the term used throughout to	Replace the term “Mental Retardation (MR)” with the term “Mental Retardation/

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
		define population eligible for this waiver.	Intellectual Disability (MR/ID)” – MR and ID are synonymous in definition and classification. This change reflects the person centered focus incorporated into the waiver renewal application.
Entire regulation		The DMAS-122, Patient Information Form, is described.	Effective March 1, 2009, the DMAS-122 became obsolete. With the exception of patient pay amount (which is now automated), the DMAS-225, Medicaid Long-Term Care Communication Form, replaces the DMAS-122. Patient pay will be determined through information in the Medicaid Management Information System that providers can access. This process is described in the waiver renewal application.
12VAC30-120-211, 213, 215		The American Association on Mental Retardation (AAMR) has been the national policy-setting organization for MR.	In 2007, the AAMR changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). AAIDD’s definition for MR/ID is in the waiver renewal application.
12VAC30-120-211, 227		Currently, the degree requirement for a qualified mental retardation professional (QMRP) is limited to having a bachelor’s degree in a human services field when providing crisis stabilization.	Change definition of QMRP and for providers of crisis stabilization to include individuals with a bachelor’s degree in a field other than human services, and who also hold an advanced degree in a human services field, to meet the qualifications. This is needed for certification and mirrors the federal definition of QMRP reflected in the waiver application.
12VAC30-120-213		Urgent criteria determines who should be served first, based on the needs of the individual at the time a slot becomes available and not on any predetermined numerical or chronological order.	Proposed regulations will provide DBHDS the authority to give CSBs/BHAs guidance regarding a consistent, statewide process to select individuals from the urgent waiting list to occupy available slots.
12VAC30-120-213, 215		There is no current requirement for an annual risk assessment or risk mitigation in the Individual Support Plan.	Add requirement for annual risk assessment and incorporate risk mitigation into the Individual Support Plan. This addition is in response to a CMS request that it be included in the waiver renewal application.
12VAC30-120-213, 215		Currently, each provider completes his or her own	Include language requiring a comprehensive assessment to be

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
		provider-specific functional assessment.	completed every three years on a DBHDS-approved assessment tool and retain language regarding the level of functioning survey being completed annually. This is in accordance with CMS requirements in the waiver renewal application.
12VAC30-120-215		Enrollment and preauthorization data have historically been shared by written hard copies.	Remove the word “written” and define the method of communicating in DMAS guidance documents to allow for electronic communications.
12VAC30-120-223, 225		Individuals participating in consumer-directed waiver services shall have a services facilitator.	Remove the requirements that individuals participating in the consumer-directed service model must have a services facilitator and change the wording to “may” have a service facilitator. Services facilitation is a waiver service and federal law prohibits states from requiring an individual to receive a waiver service. This change is reflected in the renewal application.
12VAC30-120-225		The services facilitator submits the criminal background check and documents findings.	Change the regulation to reflect the process described in the waiver renewal application to secure criminal background checks and child protective services checks. The program’s fiscal agent performs this activity.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

There are no alternatives to meeting the CMS requirements for the approval of the MR/ID Waiver renewal application. Federal regulations require that each home- and community-based waiver be reviewed every five years, and CMS changes must be made in order for the State to continue to receive federal matching funds for the provision of the waiver to individuals who meet eligibility criteria.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

DMAS is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, and 3) potential impacts of the regulation. The agency/board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: 1) projected reporting, recordkeeping, and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Helen Leonard, Long Term Care Division, DMAS, 600 East Broad Street, Richmond, VA 23219; telephone: 804-786-2149; fax: 804-225-2984; e-mail: IDwaiver@dmass.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

This regulation was developed with input from the Intellectual Disability community. DMAS will continue to collaborate with the affected community as this process moves forward.

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

DMAS will use the participatory approach to develop a proposal if it receives at least 25 written requests to use the participatory approach prior to the end of the public comment period. Persons requesting the agency use the participatory approach and interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and their organization (if any). Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children, or encourage or discourage economic self-sufficiency, and the assumption of responsibility for one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment. The MR/ID Waiver does encourage self-pride and an assumption of responsibility for oneself, particularly when an individual elects the consumer-directed model of service delivery.