



Proposed Regulation Agency Background Document

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| Agency name | DEPT OF MEDICAL ASSISTANCE SERVICES |
| Virginia Administrative Code (VAC) citation | 12 VAC 30 - 120 - 900 et seq. |
| Regulation title | Elderly or Disabled with Consumer Direction Waiver |
| Action title | Elderly or Disabled with Consumer Direction Waiver 2009 Updates |
| Date this document prepared | |

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*.

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

The proposed amendments to the DMAS' home and community based Elderly or Disabled with Consumer Direction (EDCD) Waiver program provide for the following changes: (i) allowing for Licensed Practical Nurses (LPNs) to supervise, as permitted by their professional licenses, personal care aides under agency-directed personal care and respite care services; (ii) requiring personal care agencies to ensure that the personal care aide has the required skills and training to perform services as specified in the individual's supporting documentation (Plan of Care); (iii) reflecting the replacement of the DMAS-122 form with the Medicaid Long-Term Care Communication Form (DMAS-225) along with the use of an automated electronic system for providers' use; (iv) removing licensing-type standards that apply to the physical plant of the adult day health care center; (v) permitting providers more time to secure service verification signatures; (vi) permitting providers' to document reasonable variances from waiver individuals' Plans of Care (POC), and (vii) providing for person-centered planning.

Further changes will permit, based on the personal care agency's assessment of the waiver individual, (i) longer periods of time between supervising Registered Nurse/Licensed Practical Nurse (RN/LPN) supervisory visits; (ii) new standards, consistent with licensing statute and regulations, are recommended for the new supervisory provider type of LPN; (iii) alternative

methods of personal care aide service documentation are permitted, and; (iv) the Medicaid contracted Fiscal/Employer Agent will now be responsible for obtaining criminal record checks for personal care aides in consumer-directed services. DMAS is proposing a universal format for all of its waiver regulations to facilitate provider participation across more than one waiver. As such, some existing regulation sections are being repealed with the content being merged into new sections in support of this new format.

Legal basis

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., the 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 and 325, 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.

DMAS' Elderly or Disabled with Consumer Direction (EDCD) Waiver operates under the authority of § 1915 (c) of the *Social Security Act* and 42 CFR § 430.25(b)(2) which permit the waiver of certain State Plan requirements. These cited federal statutory and regulatory provisions permit the establishment of Medicaid waivers to afford the states greater flexibility to devise different approaches to the provision of long term care services. This particular waiver provides Medicaid recipients who are either elderly or who have a disability with numerous supportive services to enable such individuals to remain in their homes and communities at lower costs, as opposed to being institutionalized in nursing facilities.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

This regulatory action updates the EDCCD waiver to accommodate changes in the industry and to provide greater clarity in these regulations. These proposed changes do not affect the health, safety, or welfare of citizens. They are intended to remove physical plant standards that, subsequent to DMAS regulations of several years ago, have been adopted by the Virginia Department of Social Services. They also intend to simplify and clarify provider requirements by permitting reasonable variances from waiver individuals' POCs. This action also provides for the adoption of person-centered planning processes in conformance with federal requirements.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)

The state regulations that are affected by this action are Elderly and Disabled with Consumer Direction Waiver (12 VAC 30-120-900 et. seq).

No changes are recommended for the eligibility criteria to be applied to waiver applicants nor are any new services, nor are increases to the covered services, being proposed. Currently, these regulations require the use of the DMAS-122 form by local departments of social services to communicate, to long term care providers, relevant information about waiver individuals' eligibility and patient pay amounts. With the patient pay information on the DMAS-122 form, providers are thereby enabled to submit their claims to DMAS.

Currently, the existing adult day health care services regulations contain providers' standards, similar to licensing standards, applicable to the centers' physical plants, staffing requirements, and nutrition services. For agency-directed personal care services, DMAS requires that the nurse supervisor perform visits (for initial assessments and follow up visits) to waiver individuals' homes within specified numbers of days depending on whether the waiver individual has a cognitive impairment or not. Current regulations require that DMAS approve personal care aide training classes for agencies. Current regulations permit someone who is only 10 years old to provide personal care aide services. Current regulations set a standard of a minimum of 40-hours of training for personal care aides. Currently, the regulations require that the consumer-directed services facilitator perform criminal record checks.

Changes are proposed as follows: (i) to allow for LPNs to supervise, as permitted by their professional licenses, personal care aides under agency-directed personal care and respite care services; (ii) to require personal care agencies to ensure that the personal care aide has the required skills and training to perform services as specified in the waiver individual's supporting documentation; (iii) to correct the typographical error of the age of 10 years old to 18 years old for program aides in Adult Day Health Care; (iv) to reflect the replacement of the DMAS-122 form with the Medicaid Long-Term Care Communication Form (DMAS-225) along with the use of an automated electronic system for providers' use; (v) to remove licensing-type standards that apply to the physical plant of the adult day health care center; (vi) to permit providers more time to secure service verification signatures; (vii) to permit providers' to document reasonable variances from waiver individuals' POCs, and; (viii) to require agencies to secure criminal record and sex offender registry checks on persons in their employ.

Further changes will permit, based on the personal care agency's assessment of the recipient, (i) longer periods of time between supervising RN and LPN supervisory visits; (ii) new standards, consistent with licensing statute and regulations, are recommended for the new supervisory provider type of LPN; (iii) agencies must ensure that its aides have the training and skills

required to perform the services required in waiver individuals’ POCs; (iv) alternative methods of personal care aide service documentation are permitted, and; (v) the Medicaid contracted Fiscal/Employer Agent will now be responsible for obtaining criminal record checks for personal care aides in consumer-directed services, and; (vi) new prior (service) authorization limits are proposed for the existing covered services of assistive technology and environmental modifications pursuant to the authority of 42 CFR 440.230(d).

Duplicative statements, (such as in 12VAC 30-120-930(I)(4) and 12VAC30-120-970), are being removed to improve clarity and reduce confusion. DMAS is also adopting a universal format and consistent definitions, where possible, for all of its’ home and community based waiver regulations to facilitate provider participation across multiple waiver programs in response to provider requests.

Additional suggestions received from recipients’ advocates during this Notice of Intended Regulatory Action comment period are addressed in this proposed stage.

Issues

- Please identify the issues associated with the proposed regulatory action, including:*
- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
 - 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
 - 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

Prior to the NOIRA comment period, representative provider organizations addressed several issues with DMAS, as follows: (i) the need for a reasonable period of time to secure waiver individuals’ or family members’ signatures on provider records to document service delivery; (ii) alternative ways for providers to determine waiver individual eligibility status and patient pay amounts; (iii) legitimate documented variance from the waiver individual’s plan of care. All of these provider concerns are addressed in these proposed regulations. Furthermore, DMAS has instituted an automated system for providers’ use to facilitate their determination of waiver individuals’ status in support of their billing processes.

The advantage of incorporating these changes into the regulations for providers is that they will enhance providers’ ability to successfully render services covered by this waiver as well as effecting successful conclusions provider audits. Such changes will be beneficial to the agency and the Commonwealth due to reduced provider payment recoveries, which have resulted from failed provider audits. Such recoveries require considerable agency administrative time and costs and also drive provider appeals which are also administratively costly. There are no disadvantages for citizens or the Commonwealth in this action.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are

no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no requirements more restrictive than federal requirements. The requirements set out in these regulations conform to requirements in federally approved waiver.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities which are more affected than others as this waiver operates throughout the Commonwealth.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is 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 may do so via the Regulatory Townhall website, www.townhall.virginia.gov, or by mail, email or fax to Elizabeth Smith, R.N., Division of Long Term Care, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219, Elizabeth.Smith@dmas.virginia.gov (804/786-0569; fax 804/786-0050). Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

The agency began the process of complete review of these regulations in response to provider concerns raised as a result of provider post-payment audits. The agency met with stakeholders and providers two years ago to discuss this proposed regulatory action and all viable alternatives have been considered. This participatory approach has resulted in the recommendations for revisions to the regulations. A list of these represented affected entities is attached at the end of this document.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

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| <p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.</p> | <p>There is no increase in the cost to the Commonwealth associated with the update of these regulations.</p> |
| <p>Projected cost of the new regulations or changes to existing regulations on localities.</p> | <p>These regulatory updates do not have a unique effect on small business. These regulations establish services covered under this waiver program and the agency’s limits on those covered services. These regulations establish standards that providers must meet in order for their billing claims to be paid by DMAS. These regulations do not create any new deadlines or reporting requirements than are currently in existence for all providers of Medicaid services.</p> <p>There is no increase in the cost to the localities associated with the update of these regulations.</p> |
| <p>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</p> | <p>Personal Care providers, Respite Care providers, Services Facilitators, Transition Coordinators, Adult Day Care Centers, and Durable Medical Equipment providers.</p> |
| <p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p> | <p>Personal Care Agencies: 579 Respite Care Agencies: 509 Adult Day Care Centers: 57 Transition Coordinators: 36 Services Facilitators: 580: this class type includes case managers and CSBs that do not provide the other EDCD services. Durable Medical Equipment: 1980: DMAS cannot identify what percentage of these businesses would meet the small business definition as it does not collect that information. DMAS estimates that the majority are small businesses, however.</p> |
| <p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of</p> | <p>There is no increase in the cost to the localities or providers associated with the update of these regulations.</p> |

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| <p>real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p> | |
| <p>Beneficial impact the regulation is designed to produce.</p> | <p>The beneficial impact of this regulation concerns the control and use of the Medicaid covered services in the Elderly or Disabled with Consumer Direction Waiver. This regulatory update will offer providers the advantage of clarification of provider requirements. This waiver serves 18,385 individuals as of June, 2010 by supporting them in their homes and communities thereby avoiding their need for more costly nursing facility care.</p> |

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

The agency has met with interested member advocates and providers (list attached) for six months during 2008-2009 to discuss this proposed regulatory action and viable alternatives have been considered. These suggested revisions represent the consensus of the agency’s advisory group.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

As a result of provider concerns, DMAS is proposing to permit additional time to obtain required waiver individual or family member’s signatures which verify receipt of services rendered. Also, DMAS is addressing providers’ expressed concerns with securing revised forms, from local departments of social services’ case managers, which contain patient pay information that is relevant to providers’ billing process. DMAS is also addressing the issue of variances from the waiver individuals’ plans of care.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

DMAS' Notice of Intended Regulatory Action was published in the October 26, 2009, *Virginia Register* (VR 26:4) for its public comment period from October 26, 2009, to November 25, 2009. Comments were received from the Virginia Office for Protection and Advocacy (VOPA). The VOPA comments are summarized as follows:

| Commenter | Comment | Agency response |
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| VOPA | <ol style="list-style-type: none"> 1. Concern was expressed about going from a RN supervising personal care aides to allowing LPN supervision. The concern centered on the reduction of quality of services thereby reducing the number of individuals who would desire to transition into the community from institutions through the Money Follows the Person program. VOPA urged that a mechanism be developed for ensuring that the individual's level of care was consistent with his UAI assessment and a consumer-friendly process for reporting dissatisfaction be developed. VOPA also urged additional consumer and family member education about this professional nursing supervision change and clarification of other quality assurance mechanisms so as not to deter individuals from transitioning into the community. 2. VOPA urged the maximum amount of choices and self-direction for the waiver individuals. VOPA concurred with agency documentation requirements of personal care aide duties so as to maximize the waiver individuals' choices. 3. VOPA stated that DMAS should refer to the Fair | <ol style="list-style-type: none"> 1. With this potential change, DMAS is responding to requests for consistency with licensing statutes, regulations, and industry standards. DMAS does not have the statutory authority to modify the professional license capabilities as duly set out by the Virginia Department of Health Professions. DMAS does share VOPA's concern about ongoing quality of care for waiver individuals and has addressed this need throughout these proposed regulations. These proposed regulations require that all initial assessments be performed by an RN and that LPNs be supervised by an agency RN. This ensures a mechanism for individual or family concerns to be addressed during the initial assessment and on an ongoing basis. 2. DMAS believes it has assured the maximum degree of choice and self-direction where such issues do not endanger the health, safety, or welfare of waiver individuals nor contribute to fraudulent billing activities. 3. DMAS has referred to all additional laws that are appropriate for this waiver |

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| | <p>Labor Standards Act and other pertinent laws when determining restrictions and opportunities for employment.</p> <p>4. VOPA expressed disappointment that DMAS had not included waiver individuals in its discussions with providers.</p> | <p>which fall within its regulatory purview.</p> <p>4. DMAS originally began its reconsideration of this waiver's regulations as a consequence of provider concerns resulting from audits. DMAS welcomes input from providers, waiver individuals, family members and EORs through the public comment period.</p> |
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Family impact

Please assess the 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, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

New regulation sections are being created to conform these existing regulations to the uniform regulatory format for waiver services. This new format has been devised for the purpose of consistency across all waiver programs for the purpose of ease of use by providers who operate in multiple waivers.

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change, rationale, and consequences |
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| § 900 | | Definitions. | Definitions have been expanded and modified as needed: (i) to protect waiver individuals' health, safety, and welfare; (ii) to conform to licensing standards; (iii) to better define covered services; (iv) to eliminate terms that are no longer used in the regulations; (v) to add medical professionals who are authorized to render services in this waiver; (vi) to distinguish between hands-on caregivers in the agency-directed and consumer-directed models of care; (vii) to update form numbers/names, affected state agency names, and generic terminology. |
| | § 905 | New section. | Contains waiver description and legal authority and addresses several overarching limits for waiver individuals that either are not in current regulations or are stated in provider manuals and other guidance documents. |
| § 910 | | Existing section being repealed. | General coverage statements have been moved to new waiver sections or deleted because of redundancy. |
| § 920 | | Existing section being modified. | Term of 'recipient' being changed to 'individual' to conform to person-centered planning concepts. Duplicate text removed. Service limits for waiver individuals who reside in assisted living facilities are clarified. Waiver individuals' responsibilities when they select consumer-directed services are clarified. |
| | § 925 | New section. | Merges service limit requirements of existing §§ 940, 950, 960, 970, and 980 which are being repealed. Also provides for voluntary and involuntary dis-enrollment from consumer-directed model of services and waiver individual choice in changing to the agency-directed model of care. |
| § 930 | | Existing section being modified. | Adding the federally required List of Excluded Individuals or Entities (LEIE) requirements for providers. Clarifies provider requirements for confidential handling of waiver individuals' records and files. Adds provider requirements to conduct searches of criminal record and sex offender registries for existing staff and also when hiring new personnel. Adds requirement of contract termination in cases of either felony convictions or having pled guilty to felony charges. Adds staff education and training requirements consistent with licensing standards as |

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| | | | contained in the <i>Code of Virginia</i> . Creates training requirements for staff of personal care agencies which are not yet licensed, but in the process of becoming licensed, by the Virginia Department of Health. |
| | § 935 | New section being created. | Merges service-specific provider requirements from current §§ 940, 950, 960, 970, and 980 which are being repealed. ADHC provider requirements that are now captured by VDSS licensing standards are being replaced with service standards necessary for DMAS reimbursement. A new subsection for services facilitation for consumer-directed services is provided to clarify DMAS' reimbursement requirements. Coverage of AT and EM services only in conjunction with MFP (the transitioning of individuals from facilities to the community) is continued as in the current regulations. |
| § 940 | | Being repealed. | Provisions have been moved to new §§ 925 and 935. |
| | § 945 | New section. | Provides clarification of provider standards to be met for Medicaid reimbursement and successful provider audits. |
| §§ 950,960, 970, 980. | | Existing sections being repealed. | Provisions have been re-arranged in new sections discussed above. |
| | § 990 | New section. | Provides for quality management reviews, utilization reviews, and level of care reviews. Some of these reviews by various DMAS staff may result in the recovery of expenditures to providers or in waiver individuals' loss of eligibility for waiver services when they no longer qualify. |
| | § 995 | New section. | Provides for provider and waiver individual rights of appeal subsequent to DMAS denials of service coverage or recovery demands resulting from provider audits. |

Participants

Bonnie Gordon, Virginia Association of Personal Care Providers

Joe Patti, Provider

Karen Ellis, Provider

Lisa Davey, Provider

Marcia Tetterson, Virginia Association for Home Care and Hospice

Olivia Jones, Provider

Tammy Reaves, Provider