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## Proposed Regulation Agency Background Document

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| <b>Agency name</b>                                    | DEPT OF MEDICAL ASSISTANCE SERVICES   |
| <b>Virginia Administrative Code (VAC) citation(s)</b> | 12 VAC 30-50-130; 120-900; 120-935  |
| <b>Regulation title(s)</b>                            | Amount, Duration, and Scope of Services: Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services; Waiver Services: Individual and Family Developmental Disabilities Services (DD); Elderly or Disabled with Consumer Direction (EDCD), and Intellectual Disabilities (ID) |
| <b>Action title</b>                                   | Consumer Directed Services Facilitators   |
| <b>Date this document prepared</b>                    | 5/3/2016  |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

These changes will affect the Elderly or Disabled with Consumer Direction (EDCD) waiver as well as personal care services covered under the authority of the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program for persons 21 years of age and younger. These changes require that services facilitators (SFs) be required for all persons in the ED CD waiver. These changes also propose qualifications, education, and training for SFs.

Emergency Regulations for the Consumer Directed Services Facilitators regulations (12 VAC 30-50-130, 12 VAC 30-120-700, 120-770, 120-900, 120-935, 120-1020, and 120-1060) are currently in effect. This documentation is in support of the proposed stage of the permanent regulatory process.

(Regulations governing the Individual and Family Developmental Disabilities Support Waiver (now called the Family and Individual Supports Waiver) and the Intellectual Disabilities Waiver (now called the Community Living Waiver) are being addressed in a separate regulatory project called the "Three Waiver Redesign.")

### Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.*

- AD - agency-directed
- CD - consumer-directed
- DMAS - Department of Medical Assistance Services
- EDCD - Elderly or Disabled with Consumer Direction
- EOR - employer of record
- EPSDT - Early and Periodic Screening, Diagnosis and Treatment
- HCBS - home and community based services

### Legal basis

*Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.*

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.

Section 2.2-4011(A) of the *Code of Virginia* states that "[r]egulations that an agency finds are necessitated by an emergency situation may be adopted upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor." DMAS certifies an emergency exists affecting the health, safety, and welfare of Medicaid individuals who are electing to use consumer directed services but who are not being adequately or appropriately supported by services facilitators.

The Governor of Virginia authorized the emergency regulations under Virginia Code § 2.2-4011(A). These proposed stage regulations follow the emergency regulations, pursuant to Virginia Code 2.2-4007.05.

## Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

In select Medicaid home and community based services (HCBS) waivers and through the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program (for personal care only), enrolled individuals with a need for personal assistance, respite or companion services may receive these services using the consumer-directed (CD) model of service delivery, the agency-directed (AD) model of service delivery, or a combination of both. The CD model differs from the AD model by offering the individual the option to be the employer (hiring, training, scheduling, and firing) of attendants who are the individual's employees. Unlike the AD model, there is no home health agency involved in the selection and management of personal care attendants; the individual enrolled in the waiver is the employer. If the individual is unable to perform employer functions, or is younger than 18 years of age, and still elects to receive CD care, then a family member or caregiver must serve as the employer of record (EOR).

Individuals in the Elderly or Disabled with Consumer Direction (EDCD) Waiver have the option of CD services if criteria are met. The EPSDT program children also have the option of CD personal care services.

Individuals choosing CD services in the waivers stated receive support from a CD services facilitator (SF) in conjunction with CD services. The CD services facilitator is responsible for assessing the individual's particular needs for a requested CD service, assisting in the development of the plan of care, assuring service authorizations are submitted for care needs, providing training to the individual and family/caregiver on their responsibilities as an employer, and providing ongoing support of the CD services. The services facilitator provides necessary supportive services that are designed to assist the individual in his employment duties.

## Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.*

The regulations that are affected by this action are: the Amount, Duration, and Scope of Services Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) (12 VAC 30-50-130) and Waiver Services for the Elderly or Disabled with Consumer Direction (EDCD) waiver (12 VAC 30-120-900 and 12 VAC 30-120-935).

## CURRENT POLICY

Individuals enrolled in certain home and community-based waivers or who receive personal care through EPSDT may choose between receiving services through a Medicaid enrolled provider agency or by using the consumer-directed model. Individuals who prefer to receive their personal care services through an agency are the beneficiaries of a number of administrative type functions, the most important of which is the preparation of an individualized service plan (ISP) and the monitoring of those services to ensure quality and appropriateness. This ISP sets out all the services (types, frequency, amount, duration) that the individual requires and that his physician has ordered.

The consumer-directed (CD) model differs from agency-directed (AD) services by allowing the Medicaid-enrolled individual to develop his or her own service plan and self-monitor the quality of those services. To receive CD services, the individual or another designated individual must act as the employer of record (EOR). The EOR hires, trains, and supervises the attendant(s). A minor child (younger than age 18) is required to have an EOR. Services facilitation is a service that assists the individual (and the individual's family or caregiver, as appropriate) in arranging for, directing, and managing services provided through the consumer-directed model.

## ISSUES

Currently, there is no process to verify that potential and/or enrolled services facilitators are qualified to perform or possess the knowledge, skills, and abilities related to the duties they must fulfill as outlined in current regulations. Consumer-directed services facilitators are not licensed by any governing body, nor do they have any degree or training requirements established in regulation. Other types of Virginia Medicaid-enrolled providers are required by the Commonwealth to have degrees, meet licensing requirements, or demonstrate certifications as precursors to being Medicaid-enrolled providers.

## RECOMMENDATIONS

The regulations are needed to provide the basis for the Department to ensure qualified services facilitators are enrolled as service providers and receive reimbursement under the EDCD waiver and through EPSDT. These regulations are also needed to ensure that enrolled services facilitator providers employ staff who also meet these qualifications. The regulations will ensure that services facilitators have the training and expertise to effectively address the needs of those individuals who are enrolled in home and community-based waivers who direct their own care. Services facilitators are essential to the health, safety and welfare of this vulnerable population. As part of the process, the Department used the participatory approach and has obtained input from stakeholders into the design of these regulations.

The regulations are intended to positively impact those choosing to direct their own care under the home and community-based waiver and through EPSDT by ensuring the services facilitators are qualified and can be responsive to the needs of the population.

For both the Elderly or Disabled with Consumer Direction (EDCD) waiver as well as personal care services covered under the authority of the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program, the Director proposes to require that: 1) SFs complete DMAS-approved consumer-directed SF training and pass the corresponding competency assessment with a score of at least 80%, and 2) new SFs possess a) a minimum of either an associate's degree or higher from an accredited college in a health or human services field or be a registered nurse currently licensed to practice in the Commonwealth and possess a minimum of two years of satisfactory direct care experience supporting individuals with disabilities or older adults or b) possess a bachelor's degree or higher in a non-health or human services field and have a minimum of three years of satisfactory direct care experience supporting individuals with disabilities or older adults.

For the EPSDT program, the Director proposes to require that: 1) there be SFs for all consumer-directed personal care services, 2) if the SF is not a registered nurse (RN), that the SF inform the primary health care provider for the individual who is enrolled in the waiver that services are being provided and request consultation with the primary health care provider, as needed, 3) the SF have a satisfactory work record as evidenced by two references from prior job experiences from any human services work, 4) the SF submit to a criminal background check, and 5) the SF submit to a search of the Virginia Department of Social Services (VDSS) Child Protective Services Central Registry. These five items are already required under the EDCCD waiver. Additionally, the proposed regulation includes amendments that improve the clarity of current requirements.

### 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 there are no disadvantages to the public or the Commonwealth, please indicate.*

Currently, there is no process to verify that potential and/or enrolled services facilitators are qualified to perform or possess the knowledge, skills, and abilities related to the duties they must fulfill as outlined in current regulations. Consumer-directed services facilitators are not licensed by any governing body, nor do they have any degree or training requirements established in regulation. The primary advantage to Medicaid individuals is that services facilitators will now have to meet established criteria and demonstrate specific knowledge, skills, and abilities in order to be reimbursed by Medicaid for services facilitation. Other types of Virginia Medicaid-enrolled providers are required by the Commonwealth to have degrees, meet licensing requirements, or demonstrate certifications as precursors to being Medicaid-enrolled providers. There are no disadvantages to the Commonwealth in the establishment of these standards and criteria as citizens will receive better care.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which is 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.*

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There are no requirements that exceed the applicable federal requirements.

### 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.*

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These changes have no particular effect on any locality; they apply equally across the state.

### 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.*

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In addition to any other comments, DMAS is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, DMAS 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 for the public comment file may do so by mail, email or fax to Nichole Martin, RN, Manager, Div of Long Term Care, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219, (804) 371-5016; (804) 786-1680; [Nichole.Martin@dmas.virginia.gov](mailto:Nichole.Martin@dmas.virginia.gov). Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of this stage of this regulatory action.

### 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><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b><br/> <b>a) fund source / fund detail; and</b><br/> <b>b) a delineation of one-time versus on-going expenditures</b></p>  | <p>There will be no additional cost to the state to implement the proposed regulation. Current regulation contains the framework for the qualifications for new and renewing Medicaid enrolled services facilitator. The training required by the regulatory change has been developed by DMAS in collaboration with the Partnership for People with Disabilities at Virginia Commonwealth University; the training modules have been tested and are currently being used, on a voluntary basis, by Medicaid enrolled services facilitators. Enforcement of the proposed regulation will required no additional cost to the state as enforcement will be incorporated into the Medicaid provider enrollment and process.</p> |
| <p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>   | <p>There will be no cost impact on localities with the implement of the new regulations.</p>   |
| <p><b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>  | <p>Those individuals and businesses that will be impacted by the addition of required training are individuals or agencies currently enrolled as Medicaid providers of services facilitation.</p>  |
| <p><b>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.</b> Small business means a business entity, including its affiliates, that:<br/> a) is independently owned and operated and;<br/> b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>   | <p>As of February 1, 2016 there are 540 Medicaid enrolled services facilitators and agencies. Most of these businesses are independently owned or have fewer than 500 full-time employees.</p>   |
| <p><b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</b><br/> <b>a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and</b><br/> <b>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p> | <p>Projected costs of the changes to existing regulations for the above affected individuals should be minimal. Specifically, the training is an on-line, web based curriculum containing five modules. There is no cost associated with enrolling or completing the training; the training is available 24/7 and may be taken at any location that has access to the internet. DMAS and the Partnership for People with Disabilities will track and produce training certificates for each services facilitator successfully completing the training. The only record keeping requirement is the retention of the training certificates and documented education,</p>   |

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|   | knowledge, skills, and abilities in each services facilitator’s personnel record and submission of the certificate at the time of application for enrollment or renewal as a Medicaid provider.   |
| <b>Beneficial impact the regulation is designed to produce.</b> | The beneficial impact of this regulatory change will be to: 1) ensure that all Medicaid enrolled services facilitators have minimal competencies that include knowledge of basic program policies, understanding of the populations served, and basic health and safety practices; 2) provide all services facilitators with access to the training material for reference throughout their enrollment as a Medicaid SF provider when questions arise during the provision of services. |

### 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.*

Due to the nature of the legislative mandates, policy alternatives were not permitted to DMAS.

### Regulatory flexibility analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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.*

The regulatory changes proposed in this action have no impact on small businesses as managed care organizations do not meet the definition of small businesses.

### 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; nor 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, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.

**Public comment**

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

| Commenter | Comment | Agency response |
|-----------|---------|-----------------|
| N/A       | N/A     | N/A             |

**Detail of changes**

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the **pre-emergency** regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.*

| Current section number | Proposed new section number, if applicable | Current requirement  | Proposed change, intent, and likely impact of proposed requirements  |
|------------------------|--|--|--|
| 12 VAC 30-50-130       |  | EPSDT provides for all services that are medically necessary for individuals younger than 21 years of age. | Proposes that services facilitators be required for individuals who are receiving consumer-directed personal care services and incorporates all of the educational and training requirements of 12 VAC 30-120-935. |
| 12VAC30-120-900        |  | Definitions for EDCD waiver  | Revises definition of consumer directed model of service and services facilitation for consistency across all HCBS waivers. Updates other terms (MR, DMHMRSAS,   |

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|                 |  |   | etc.) as technical changes.  |
| 12VAC30-120-935 |  | Participation standards for specific covered services | Establishes the same criteria for Consumer-Directed Services Facilitators across all waivers that SFs must meet to be qualified to receive Medicaid reimbursement. |

Sections 12VAC30-120-700, 770, 1020, and 1060 (governing the Individual and Family Developmental Disabilities Support Waiver (now called the Family and Individual Supports Waiver) and the Intellectual Disabilities Waiver (now called the Community Living Waiver) have been removed from the proposed stage of this regulation, as they are being addressed in a separate regulatory project called the "Three Waiver Redesign."

There are no other differences between the emergency regulation text and the current text.