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Final Regulation Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-120
Regulation title(s)	Waiver Programs: Elderly or Disabled with Consumer Direction
Action title	Exception Criteria for Waiver Personal Care Services
Date this document prepared	February 25, 2015

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 of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

The proposed amendment establishes criteria that Medicaid individuals must meet in order to be approved for personal care service hours which exceed the maximum limit of 56 hours per week. Prior to July 1, 2011, DMAS did not limit personal care services in its waiver programs. Effective July 1, 2011, DMAS was required, by action of the 2011 General Assembly in Chapter 890, Item 297 CCCCC of the *2011 Acts of the Assembly*, to implement the 56 hours per week limit on the provision of personal care services in some of its home and community based care services waiver programs. This action only affects the Elderly or Disabled with Consumer Direction (EDCD) waiver.

Statement of final agency action

Please provide a statement of the final action taken by the agency including:1) the date the action was taken;2) the name of the agency taking the action; and 3) the title of the regulation.

I hereby approve the foregoing Regulatory Review Summary with the attached amended regulations regarding Waiver Services: Elderly or Disabled with Consumer Direction Exception Criteria for Waiver Personal Care Services (12 VAC 30-120-927) and adopt the action stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012, of the Administrative Process Act.

3/24/2015

/s/ Cynthia B. Jones

Date

Cynthia B. Jones, Director

Dept. of Medical Assistance Services

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person'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 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.

Chapter 890, Item 297 CCCCC of the *2011 Acts of Assembly* mandated the imposition of a limit on the number of hours of personal care services (at 56 hours per week) that will be covered for Medicaid individuals who participate in the EDCD Waiver. This same mandate also directed DMAS to develop criteria to provide for individual exceptions to this limit using criteria based on dependency in activities of daily living, level of care, and taking into account the risk of institutionalization if additional hours are not provided. This final stage action intends to promulgate the criteria that DMAS adopted via an emergency regulation (VR 29:2).

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.

The purpose of this action is to promulgate permanent regulations which establish criteria by which EDCD waiver individuals may establish the medical necessity for personal care services in excess of the maximum allowed 56 hours per week. The criteria are needed for two reasons: (i) so that DMAS may uniformly apply standards across all of the applicable waiver individuals, and; (ii) to provide objective standards for deciding appeals filed by Medicaid individuals who have been denied personal care hours in excess of 56 per week. This regulatory action responds to a statutory mandate and is necessary to interpret the law.

These regulations are not expected to affect the health, safety or welfare of citizens of the Commonwealth.

While the Alzheimer's Assisted Living Waiver was referenced in the legislative mandate, it has not been included in this regulatory action because this waiver does not cover personal care services. The HIV/AIDS and Children's Mental Health Waivers were also referenced in this mandate but are also not included here because DMAS phased out these waivers. The persons who have been participating in the HIV/AIDS Waiver are now receiving all of their required services via the EDCD Waiver. Only a small number of children remain in the Children's Mental Health Waiver.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both.

The state regulations that are affected by this action are Elderly or Disabled with Consumer Direction Waiver (12 VAC 30-120-927).

Other than the current emergency regulation, there are no criteria for any exceptions to the limit on the coverage of personal care services in the affected Elderly or Disabled with Consumer Direction Waiver. DMAS adopted the limit of 56 hours on this service effective September 4, 2012, in response to this same legislative directive (Chapter 890, Item 297 CCCCC) for this waiver.

This mandate directed DMAS to take into consideration the following elements: (i) dependency in activities of daily living, such as bathing, dressing, eating, toileting, ambulating; (ii) required level of care, and; (iii) risk of institutionalization if additional hours are not provided.

DMAS has complied with this mandate in formulating its proposal and is recommending the same standards as recommended in the previous emergency regulations. Given the legislatively mandated elements that DMAS was directed to consider, its latitude in crafting these suggested criteria was focused by the legislation.

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.

There are no advantages or disadvantages to the citizens of the Commonwealth in these regulations. The advantage to Medicaid individuals who use this affected waiver is that those individuals who require more than the maximum covered personal care hours (56 hours) have a way to demonstrate their needs and be approved for the additional hours. Furthermore, small businesses which render personal care services will now have a way to secure agency approvals of additional hours for those clients that they serve. The advantage to the Commonwealth is that this new limit will save a modest expenditure for the agency.

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.

There are no requirements more restrictive than 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.

These suggested regulations will apply uniformly statewide once they become final, effective regulations.

Family impact

Please assess the impact of this 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, nor affect disposable family income.

Changes made since the proposed stage

*Please list all changes that made to the text of the proposed regulation and the rationale for the changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. *Please put an asterisk next to any substantive changes.*

There are no changes in this final stage regulation over those which were proposed for public comment.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

DMAS submitted its proposed stage regulatory action to the Registrar of Regulations for publication on December 15, 2014 (VR 31:8). No comments were received.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
N/A	120-927	No criteria currently exist that must be demonstrated by Medicaid individuals, via their personal care providers, in order to be approved for personal care services in excess of the 56 hours per week.	Contains criteria for the EDCD waiver that must be met in order to be approved for more than 56 hours of personal care services in a week.