



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

<b>Agency name</b>	DEPT. OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation</b>	12 VAC30-120-1000 <i>et seq.</i>
<b>Regulation title</b>	Waiver Programs: Individuals with Intellectual Disabilities Waiver
<b>Action title</b>	Exceptional Rate of Reimbursement for ID Waiver Individuals
<b>Date this document prepared</b>	

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 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Preamble

*The APA (Code of Virginia § 2.2-4011) states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the 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.*

- 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.*

Section 2.2-4011 of the *Code of Virginia* states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the 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 § 2.2-4006(A)(4). The 2014 *Acts of the Assembly*, Chapter 2, Item 307 III directed DMAS to establish a 25% higher reimbursement rate, within the Intellectual Disabilities waiver program, for individuals with complex medical or behavioral needs who are currently residing in an institution and are unable to transition to

integrated settings, such as congregate residential settings, in the community. This inability to transition, in compliance with the Department of Justice (DOJ) settlement agreement with the Commonwealth, is due to these individuals' need for exceptional services. Such exceptional services cannot be provided within the current maximum allowable rate of reimbursement. For individuals residing in communities, these individuals have medical or behavioral service needs which present imminent risk of institutionalization in the absence of these services. Enhanced waiver services are required beyond those currently provided within the maximum allowable reimbursement rate.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Exceptional Rate for ID Waiver Individuals (12 VAC 30-120-1000, 1012, 1062, 1072, and 1082) and also authorize the initiation of the promulgation process provided for in § 2.2-4007 or § 2.2-4012.1 *et seq.*, as may be appropriate.

### 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, 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 2 of the *2014 Acts of the Assembly*, Item 301 III stated "Effective July 1, 2013, the Department of Medical Assistance Services shall have the authority, to establish a 25 percent higher reimbursement rate for congregate residential services for individuals with complex medical or behavioral needs currently residing in an institution and unable to transition to integrated settings in the community due to the need for services that cannot be provided within the maximum allowable rate, or individuals whose needs present imminent risk of institutionalization and enhanced waiver services are needed beyond those available within the maximum allowable rate. The department shall have authority to promulgate regulations to implement this change within 280 days or less from the enactment of this act. "

In addition, Section 2.2-4011 of the *Code of Virginia* states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the 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.

**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.*

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The purpose of this action is to enable providers of congregate residential support services, currently covered in the Intellectual Disability Waiver (ID Waiver), to render, in a more fiscally sound manner, services to individuals who have complex medical and behavioral care needs. Such individuals, who may have long been institutionalized in the Commonwealth's training centers, will transition into community settings over the next several years in response to the investigation brought, in 2008, against the Commonwealth by the Department of Justice. These affected individuals have exceptional medical and behavioral support needs that cannot be paid for under the current maximum reimbursement rate for congregate residential services. For providers to render services for such individuals, it is requiring substantially more staff time and skills than for individuals who do not have exceptional care needs thus the need for the exceptional reimbursement rate.

**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.*

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As the DMAS' regulations for the Intellectual Disability Waiver, specifically for congregate residential services, now stand, there is no alternate reimbursement mechanism to ensure that the extensive support needs of these individuals are in place. Providers are not able, within the current reimbursement structure, to render the supports that these individuals require to safely and successfully live in the community. Providers cover enhanced services out of their own funds or these individuals become vulnerable to institutionalization or re-institutionalization. Such re-institutionalization would jeopardize the Commonwealth's agreement with DOJ.

The criteria for these individuals and the provider standards/requirements are intended to ensure the health, safety, and welfare of these affected individuals in the waiver as well as protect providers' staff and property from injury and damage. The need for this change derives from these exceptional individuals' medical and behavioral needs, such as: (i) their need for a higher level of staff expertise (staff must have additional qualifications, either medical or behavioral), and; (ii) their need for a higher staff-to-individual ratio (some of these individuals require 1:1 or even 2:1) than is supported by the current rate of reimbursement.

This action does not have a direct affect on the Commonwealth's other citizens.

## Substance

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

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The regulations affected by this action are the Waiver Programs: Intellectual Disability Waiver (12 VAC 30-120-1000 *et. seq.*)

### CURRENT POLICY

The current ID waiver regulations became effective July 4, 2013, and constituted major revisions jointly agreed to between DMAS and the Department of Behavioral Health and Developmental Services (DBHDS). The revised waiver and regulations represented several years of work between the two agencies. This waiver is funded through Title XIX of the *Social Security Act* and administered daily by DBHDS.

This waiver program covers: (i) assistive technology; (ii) companion services (both consumer-directed and agency-directed); (iii) crisis stabilization; (iv) day support; (v) environmental modifications; (vi) personal assistance services (both consumer-directed and agency-directed); (vii) personal emergency response systems (PERS); (viii) prevocational services; (ix) residential support services; (x) respite services (both consumer-directed and agency-directed); (xi) services facilitation (only for consumer-directed services); (xii) skilled nursing services; (xiii) supported employment, (xiv) therapeutic consultation, and (xv) transition services.

This waiver program currently serves 8,621 individuals with intellectual disabilities and has a list of 6,512 individuals waiting to be served. It has 1,573 providers enrolled with DMAS to render all of this waiver's covered services.

DMAS and DBHDS estimate, based on DBHDS' data, that approximately 250 individuals will need and qualify for the additional support services that are to be covered by this exceptional reimbursement rate. The total additional expenditures estimated for this reimbursement expansion is \$7.3 M, with approximately \$3.6 M being General Funds.

### ISSUES

In 2008, the Department of Justice (DOJ) began an investigation, pursuant to the Civil Rights of Institutionalized Persons Act, in the Commonwealth and in 2010 expanded it to examine the Commonwealth's compliance with the Americans with Disabilities Act and the U.S. Supreme Court *Olmstead* ruling (<http://www.law.cornell.edu/supct/html/98-536.ZS.html>). This expansion covered Virginia's entire system of services for citizens with intellectual and developmental disabilities, including all five state training centers and community services serving these individuals. The *Olmstead* decision requires that individuals with disabilities be served in the most integrated settings possible. The DOJ investigation concluded that Virginia was not providing services in the most integrated and appropriate setting, not developing a sufficient

quantity of community services, and that Virginia's training centers' discharge process was flawed.

The agreement reached between DOJ and the Commonwealth directly ties to this regulatory action. According to DBHDS, the individuals, who have exceptional medical care and behavioral health issues and are being discharged from training centers, require additional supports in order to successfully transition into their communities and remain there safely. Residential support services providers, who will be accepting many of these exceptional care individuals, are facing significant challenges in rendering services for such individuals within the existing rate structure. They are consistently providing services and staff time in excess of the waiver's service maximum reimbursement limits.

RECOMMENDATIONS

This action recommends an increase of 25% in the reimbursement rate to residential support services providers to better compensate them for caring for these exceptional care individuals.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, and likely impact of proposed requirements
1000		Includes definitions applicable to the ID waiver program.	New definitions added for terms needed for the exceptional reimbursement rate change.
	1012		Sets out specific medical care and behavioral criteria that individuals in the waiver will have to meet in order for qualify for exceptional support services.
	1062		Sets out provider requirements for exceptional rate of reimbursement.
	1072		Sets out exceptional rate of reimbursement.
	1082		Sets out utilization review requirements for DMAS and DBHDS.

**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.*

Virginia's home and community based waivers serving individuals with developmental disabilities (DD) are the subject of a major study supported by DMAS and DBHDS. The study will address the future structure and service delivery system required to meet the future needs of individuals with DD. A key component of the study includes a review of the Medicaid provider rates for the Intellectual Disability, Developmental Disabilities and Day Support Waivers. Outcomes from the rate review portion of the study will include recommendations for

strengthening the Medicaid rate setting process to support community services at sufficient reimbursement levels to meet the needs of individuals with developmental disabilities receiving waiver services. The study, Phase I and Phase II of Virginia's Systems Transformation for Individuals with Intellectual Disability/Developmental Disabilities (ID/DD), will report preliminary recommendations in November of 2013 with final recommendations in July 2014. Implementation of the exceptional rate in the ID Waiver is viewed as a "short-term" strategy to meet an immediate need to serve individuals with ID and having complex medical and behavioral need until Virginia can modify the waivers serving individuals with DD to accomplish a cost-based rate structure to more fully achieve community integration.

### 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.*

*Please also indicate, pursuant to your Public Participation Guidelines, whether a Regulatory Advisory Panel or a Negotiated Rulemaking Panel has been used in the development of the emergency regulation and whether it will also be used in the development of the permanent regulation.*

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The agency is seeking comments on the regulation that will permanently replace this emergency regulation, including but not limited to 1) ideas to be considered in the development of the permanent replacement regulation, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) the potential impacts of the regulation.

The agency 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) the probable effect of the regulation on affected small businesses, and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to William Lessard, Director, Division of Provider Reimbursement, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219; (804) 225-4593; (fax—(804) 786-1680); [William.Lessard@dmas.virginia.gov](mailto:William.Lessard@dmas.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

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

## 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.*

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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.