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Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	_12_ VAC_30__ -_120__
Regulation title(s)	Waiver Services: Intellectual Disability Waiver
Action title	Exceptional Rate for ID Waiver Individuals
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 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

This action enables 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, are transitioning into community settings over the next several years. These affected individuals have exceptional medical and behavioral support needs that cannot be adequately paid for under the current maximum reimbursement rate for congregate residential services. This action increases the reimbursement for congregate residential support services for the qualifying individuals.

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.

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. " With the Governor's approval, DMAS adopted its emergency regulation effective November 1, 2014.

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 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 settlement agreement between the Commonwealth and 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.

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 affected by this action are the Waiver Programs: Intellectual Disability Waiver (12 VAC 30-120-1000; -120-1012; 120-1062; 120-1072; 120-1082)

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 \$7.4 M, with approximately \$3.7 M being General Funds, per year.

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 needed to improve service provision to better integrate community services, and that Virginia's training centers' discharge process required improvement.

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.

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 this regulatory action.

The greatest advantage is expected to be to the affected individuals, who have complex medical and behavioral care needs and who also reside in training centers, in enabling them to transition to community living. This additional reimbursement will also be an advantage to the congregate residential providers who agree to accept these individuals with complex care needs.

The disadvantage to the Commonwealth of not enabling these individuals to transition into community living would be the failure to implement the settlement agreement with DOJ.

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 for this service.

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.

No individual locality is uniquely affected by this action as this change will apply statewide.

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 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 for the public comment file may do so by mail, email or fax to Helen Leonard, Div. of Long Term Care Services, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219; Helen.Leonard@dmas.virginia.gov ((804-786-2153) (fax: 804-786-1609)). 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.

<p>Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures</p>	<p>The source of the funds for this change will be the GF appropriation to DMAS and the companion federal financial participation. DMAS estimates an additional expenditure of \$7.4 M total funds (\$3.7 M GF). These expenditures will be ongoing as these individuals, once successfully transitioned into their communities, will continue to have complex health and behavioral care needs.</p>
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<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>These regulatory changes will have no impact on localities.</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>The ID waiver individuals, who are currently institutionalized in one of Virginia's training centers, will be affected because these regulations will make a difference in how quickly they can transition to their communities and what quality of care they will receive. This action will affect 363 providers of congregate residential services who will agree to accept these high needs individuals.</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: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>DBHDS has estimated that approximately 250 individuals will need and qualify for the payment of the exceptional rate established by this action. There are currently about 8,621 individuals being served in this waiver and another 6,512 individuals on the waiting list. For all of the services covered by this waiver, there are 1,573 providers who participate. The number of congregate residential services providers is 363.</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 include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and 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.</p>	<p>DMAS estimates that these additional expenditures will total \$7.4 M (\$3.7 M GF). There will be no additional costs to affected businesses related to these regulations. The high need individuals will be enabled to live more successfully in their communities when the congregate residential providers provide better care. The congregate residential providers will be required to document the additional services in support of their exceptional claims for reimbursement.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>These regulations will reimburse the congregate residential support providers who care for these high need individuals a higher rate of reimbursement for the extra 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.

Virginia's home and community based waivers serving individuals with developmental disabilities (DD) including intellectual disability (ID), 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.

Implementation of the exceptional rate in the ID Waiver is viewed as a 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 rate structure to more fully achieve community integration.

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.

This action will not have an adverse impact on small businesses because it is not requiring new reporting requirements, it is not establishing deadlines or schedules or performance standards but is paying such businesses higher rates to care for ID waiver persons who have complex medical and behavioral health care needs.

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. These regulations may better support the families of these high need individuals when a congregate residential provider which is closer to where the family lives accepts the individual as a resident.

Public comment

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

DMAS submitted its emergency/NOIRA stage to the *Registrar of Regulations* on October 15, 2014. The Notice of Intended Regulatory Action was published on November 3, 2014, for its comment period from November 3rd through December 17, 2014. No comments were received.

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.

This proposed stage regulatory action is almost identical to the previous emergency stage. The only two differences are:

12 VAC 30-120-1012 D: The emergency regulation required that the SIS® form be completed no more than six months prior to submission of the exceptional rate service authorization request. The proposed regulations permit the SIS® form to be up to 12 months old. The impact of this change will be to allow DBHDS new SIS contractor to complete pending SIS® actions.

12 VAC 30-120-1062 B: The emergency regulation barred providers with provisional and conditional licenses from being eligible for the exceptional rate. The proposed regulations remove the conditional restriction, thereby allowing new providers (all of which receive a conditional license for the first six months of operation) to be eligible to request the exceptional rate. The impact of this change will be to allow effective, quality providers, who operate outside the Commonwealth, to apply for this exceptional rate.

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.