



Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30-120
Regulation title	Waiver Programs: Elderly or Disabled with Consumer Direction
Action title	Exception Criteria for Waiver Personal Care Services
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 14 (2010) 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 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 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 waiver.

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.

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 proposed 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 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.

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 will uniformly apply standards across all of the applicable waiver individuals, and; (ii) so DMAS will be supported in appeals that Medicaid individuals may file when they 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. It is clearly written and understandable by the regulated communities.

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

Even though the Children’s Mental Health Waiver and Alzheimer’s Assisted Living Waiver are referenced in the legislative mandate, they have not been included in this regulatory action because those waivers do not cover personal care services.

The HIV/AIDS waiver was also included in this mandate but is also not included here. By action of 2012 General Assembly, in Chapter 3 of the *2012 Acts of Assembly*, Item 307 JJJ, DMAS is pursuing another regulatory action (TH 3716/6217, RIS 3218) to repeal all of this waiver's regulations. The persons who have been participating in the HIV/AIDS waiver are now receiving all of their required services via the EDCD waiver.

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 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. DMAS has conformed to the legislative directive in its proposed regulations.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
N/A	120-927	No current limits on the number of covered personal care hours.	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.

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 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 requirements of the proposal, which are more restrictive than applicable federal requirements. Include a rationale 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.

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, record-keeping 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 Melissa Fritzman, Project Supervisor, Div. of Long Term Care Services, DMAS, 600 E. Broad Street, Suite 1300, Richmond, VA 23219, 804/225-4206, fax 804/786-1680, Melissa.Fritzman@dmas.virginia.gov. 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.

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 requirements create the anticipated economic impact.

<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>DMAS estimated that it would save \$1.4 M (\$700,000 GF; \$700,000 NGF) for the new 56 hour limit for personal care services. As of SFY 2012, 37.5% of the requests for additional personal care were approved (804/2139). The majority (68%) of these approvals were for agency-directed personal care (as contrasted against consumer-directed personal care (32%). The average number of hours provided for the exception (as permitted by these regulations) was 70.6 hours per week.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There are no costs to localities as these regulations do not affect them.</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>423 providers of personal care services (home health agencies, personal care agencies) will be affected by this regulatory action.</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>DMAS does not collect information on how many of its enrolled providers are small businesses.</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. 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 real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>This regulatory action will not impose reporting, recordkeeping, or other administrative costs on providers. It also does not affect the development of real estate.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>Regulation permits persons who require more than the maximum covered amount of personal care hours (56 hours per week) to provide additional documentation to support their medical necessity and be approved for additional hours.</p>

As permitted by these proposed regulations, the primary reasons for exception authorizations for greater than the 56 soft cap hours are: members requiring a higher number of supervision hours, and documentation of extensive personal care needs based on the members' dependencies in the following Activities of Daily Living (ADLs): bathing, dressing, transferring, toileting, and eating/feeding. Some of these members were also dependent in behavior and orientation.

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 directive nature of the legislative mandate did not permit consideration of alternatives.

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.

This regulatory action is not expected to unduly affect small businesses as it requires the use of an existing prior authorization system that providers have used for years. This new requirement does not impose reporting requirements nor schedules or deadlines. Providers’ claims that exceed the new 56 hour cap on personal care services will be processed the same way that all other providers’ claims are handled. All denied claims are provided appeal rights.

Public comment

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

DMAS Notice of Intended Regulatory Action was published in the September 24, 2012, *Virginia Register of Regulations* (VR 29:2) for its public comment period from September 24, 2012, to October 24, 2012. No comments were received.

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, nor affect disposable family income.

Detail of changes

Please list 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 describe 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.

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.