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Fast-Track Regulation Agency Background Document

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) Chapter citation(s)	12 VAC 30-50-130, 12 VAC 30-50-226, 12 VAC 30-60-143, 12 VAC 30-130-5160, 12 VAC 30-130-5170 12 VAC 30-130-5190
VAC Chapter title(s)	Skilled nursing facility services, EPSDT, including school health services and family planning Community mental health services Mental health services utilization criteria; definitions Peer support services and family support partners: definitions Peer support services and family support partners: service definitions Peer support services and family support partners: provider and setting requirements
Action title	CMHRS and Peers Updates
Date this document prepared	July 23, 2019

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

This regulatory package contains three different updates: First, references to the Behavioral Health Services Administrator (or BHSA) are stricken and replaced with references to “DMAS or its contractor.” The BHSA contract was extended for one year, and will end in 2020, and these references are being updated in anticipation of that change. Second, clarifications are

being made to the Peers regulations, including changes to correct the inadvertent omission of LMHP-Resident, Resident in Psychology, and Supervisee in Social Work so that they may perform appropriate functions within Peer Recovery Support Services. Individuals with these licenses may provide these services in accordance with regulations established by: 1) the Board of Counseling for LMHP-Residents at (i) 18VAC115-20-10 for licensed professional counselors; (ii) 18VAC115-50-10 for licensed marriage and family therapists; (iii) 18VAC115-60-10 for licensed substance abuse treatment practitioners; 2) the Board of Psychology for "Residents in Psychology" at 18VAC125-20-10; and 3) the Board of Social Work for Supervisees in Social Work at 18VAC140-20-10. Finally, the package includes changes that remove the annual limits from certain community mental health services. These limits are prohibited because they conflict with mental health parity requirements under federal law. (See 42 CFR 438, Subpart K.) CMS required DMAS to remove the service limits from the State Plan, and, as a result, DMAS instructed the BHSA to use medical necessity criteria rather than enforcing the service limits that appeared in the regulations.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

ARTS = Addiction and Recovery Treatment Services
CMHRS = Community Mental Health Rehabilitative Services
DMAS = Department of Medical Assistance Services

Statement of Final Agency Action

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 entitled "CMHRS and Peers Updates" 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.

July 23, 2019
Date

/signature/
Jennifer S. Lee, M.D., Director
Dept. of Medical Assistance Services

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

These regulatory changes were initiated to update DMAS regulations to ensure that they remain current.

These changes are expected to be non-controversial and appropriate for the fast-track process for several reasons. First, replacing the references to the Behavioral Health Services Administrator (or BHSA) with references to “DMAS or its contractor” do not affect providers, Medicaid members, or members of the public. The BHSA contract was extended for one year, and will end in 2020, and these references are being updated in anticipation of that change.

Second, clarifications are being made to the Peers regulations, including changes to correct the inadvertent omission of LMHP-Resident, Resident in Psychology, and Supervisee in Social Work so that they may perform appropriate functions within Peer Recovery Support Services. Individuals with these licenses may provide these services in accordance with regulations established by: 1) the Board of Counseling for LMHP-Residents at (i) 18VAC115-20-10 for licensed professional counselors; (ii) 18VAC115-50-10 for licensed marriage and family therapists; (iii) 18VAC115-60-10 for licensed substance abuse treatment practitioners; 2) the Board of Psychology for "Residents in Psychology" at 18VAC125-20-10; and 3) the Board of Social Work for Supervisees in Social Work at 18VAC140-20-10. Fixing this omission will benefit providers and members by ensuring that the rules match current practice.

Supervision requirements for Peer Recovery Specialists have also been added to these regulations. These requirements have been in DBHDS guidance documents since June 29, 2017, and are now included in DMAS regulatory text. These changes are non-controversial because they replicate supervision requirements that have been in place for several years. Neither DHBDS nor DMAS have received concerns or complaints about these requirements from providers, Medicaid members, or members of the public.

Finally, DMAS is complying with federal mental health parity rules to remove the annual limits from certain community mental health services. CMS required DMAS to remove the service limits from the State Plan, and, as a result, DMAS instructed the BHSA to use medical necessity criteria rather than enforcing the service limits that appeared in the regulations. DMAS is now amending the regulations to match the State Plan. Therefore, these changes do not impact providers, Medicaid members, or members of the public.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Section 32.1-325 of the Code of Virginia authorizes the Board of Medical Assistance Services to administer and amend the State Plan for Medical Assistance and to promulgate regulations. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the State Plan for Medical Assistance and to promulgate regulations according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

These regulatory changes are essential to protect the health, safety, and welfare of citizens in that they ensure that the regulations reflect current practices (i.e. the end of the BHSA contract); they ensure a broader employee pool for Peer Recovery Support Services, and therefore greater member access to these services; and they ensure continued federal financial participation for Peer Recovery Support Services by eliminating outdated annual limits that are in violation of federal regulations under the Mental Health Parity and Addiction Equity Act. (The federal regulations may be found in the Federal Register, Volume 81, Number 61, March 30, 2016, pages 18390 through 18445.)

Substance

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.

This regulatory package contains three different updates. First, references to the Behavioral Health Services Administrator (or BHSA) are stricken and replaced with references to "DMAS or its contractor." The BHSA contract was extended for one year, and will end in 2020, and these references are being updated in anticipation of that change.

Second, clarifications are being made to the Peers regulations, including changes to correct the inadvertent omission of LMHP-R, RP, and S so that they may perform appropriate functions within Peer Recovery Support Services.

Finally, the package includes changes that remove the annual limits from certain community mental health services. These limits are prohibited because they conflict with mental health parity requirements under federal law. There is no cost to this change, because these limits have not been enforced since the Magellan BHSA was brought on to administer these services. The Magellan BHSA has approved requests for community mental health services when the individual meets medical necessity criteria for the service, even if the amount of service will exceed these outdated annual limits.

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

The primary advantages of these changes are that: 1) they will update regulations to remove references to the BHSa (that will soon be out of date); 2) they will permit individuals who are working toward their LMHP, and are appropriately registered with the Department of Health Professions as an LMHP-R, RP, or S, to perform certain functions within Peer Recovery Support Services, which will increase the pool of individuals who are available to perform this service, and therefore increase member access to this service; and 3) that they will ensure that DMAS complies with the federal regulations under the Mental Health Parity and Addiction Equity Act.

There are no disadvantages to the public, the agency, or the Commonwealth.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.

There are no requirements in this regulation that are more restrictive than applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

No state agencies, localities, or other entities are particularly affected by this change.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>No costs, savings, fees, or revenues for the agency.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>No costs, savings, fees, or revenues for other state agencies.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The regulatory change will update current regulations to reflect changes that are coming soon (end of BHSA contract), to clarify staff requirements, and to remove outdated annual limits.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>No costs, savings, fees, or revenues for localities.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The regulatory change will update current regulations to reflect changes that are coming soon (end of BHSA contract), to clarify staff requirements, and to remove outdated annual limits.</p>

Impact on Other Entities

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>Providers of Peer Recovery Support Services</p>
<p>Agency's best estimate of the number of such entities that will be affected. 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>As of 2/10/2019 there are 59 Peer Recovery Support Services providers. Most (if not all) of these providers are small businesses.</p> <p>As of 2/10/2019 there are 3938 Community Mental Health Services providers. (Some providers may be counted twice in this figure if they provide more than one service.) Most (if not all) of these providers are small businesses.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:</p>	<p>There are no costs for affected businesses.</p>

<p>a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.</p>	
<p>Benefits the regulatory change is designed to produce.</p>	<p>The regulatory change will update current regulations to reflect changes that are coming soon (end of BHSA contract), to clarify staff requirements, and to remove outdated annual limits.</p>

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

No alternatives will modify existing regulations to reflect upcoming changes, clarify existing requirements, or eliminate outdated requirements.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

The change from BHSA to “DMAS or its contractor” has no effect on providers of Peer Recovery Support Services or Community Mental Health Services. The change to permit LMHP-R, RP, and S to perform functions within Peer Recovery Support Services is beneficial to those providers in that they increase the pool of available employees. The change to eliminate outdated annual limits has no effect on providers of Peer Recovery Support Services or Community Mental Health Services.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

As required by § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

DMAS is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Emily McClellan, DMAS, 600 E. Broad Street, Richmond, VA 23219, 804-371-4300, or emily.mcclellan@dmas.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
12VAC30-50-130			Definition of BHSA is removed. Definition of “peer recovery specialist” is updated to point to (and match) DBHDS definition. Definition of “peer recovery support services” is added. References to “peer support service” are removed or updated to “peer recovery support services”. LMHP-R, RP, and S are added where LMHPs are mentioned. Cross references to documentation requirements are corrected. Missing text about the LMHP recommendation is added.
12VAC30-50-226			Definition of BHSA is removed.

			<p>Definition of “peer recovery specialist” is updated to point to (and match) DBHDS definition. Definition of “peer recovery support services” is added.</p> <p>Outdated references to annual limits are removed.</p> <p>References to BHSA are updated to “DMAS or its contractor.”</p> <p>LMHP-R, RP, and S are added where LMHPs are mentioned. The Boards of Counseling, Psychology, and Social Work allow residents/supervisees to provide these services</p> <p>Cross references to documentation requirements are corrected.</p> <p>Clarifies that a recommendation for peer support services means that a medical necessity determination has been made.</p> <p>Supervision requirements that were inadvertently omitted due to an incomplete cross reference (to 12 VAC 30-130-5160) are included in the text in B 7 I for clarity.</p>
12VAC30-60-143			<p>References to BHSA are updated to “DMAS or its contractor.”</p> <p>A reference to annual limits is removed.</p> <p>References to Level A and B group homes are updated to Therapeutic Group Homes. A reference to Level C facilities is updated to psychiatric residential treatment centers.</p> <p>Paragraph J, which contains outdated references to annual limits, has been removed.</p>
12VAC 30-130-5160			<p>A phrase limiting the definition of “direct supervisor” to clauses (i) through (xii) has been removed, in case additional clauses are added.</p> <p>Definition of “peer recovery specialist” is updated to point to (and match) DBHDS definition. Definition of “peer recovery support services” is added.</p>
12VAC30-130-5170			<p>References to “peer support service” are updated to “peer recovery support services.”</p>

12VAC30-130-5190			A phrase limiting the definition of "direct supervisor" to clauses (i) through (xii) has been removed, in case additional clauses are added.
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