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Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-50-130; 12 VAC 30-120-924
Regulation title(s)	Amount, Duration, and Scope of Medical and Remedial Care Services: EPSDT; Waivered Services: Part IX. Elderly or Disabled with Consumer Direction Waiver
Action title	No Coverage of Overtime Hours for CD Personal Assistance, Respite, and Companion Services
Date this document prepared	August 14, 2017

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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 establishes that DMAS will not reimburse overtime for consumer-directed personal assistance, respite and companion services for any one provider working for any one consumer-directed employer. An attendant may exceed 40 hours of work in a week working for multiple consumer-directed employers. (Consumers may receive more than 40 hours of service, if authorized, if more than one provider delivers that care.) This change has been required by the 2017 session of the Virginia General Assembly (*Chapter 836, Item 306 PPPP*) and eliminates inconsistencies regarding pay for services in excess of 40 hours. This action applies to EPSDT-covered attendant services as well as waiver-covered attendant services.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

DMAS = Department of Medical Assistance Services
EPSDT = Early and Periodic, Screening and Diagnostic Treatment
DD Waiver = Developmental Disability Waiver
ID Waiver = Intellectual Disability
FIS = Family and Individual Supports
EDCD = Elderly or Disabled Consumer Direction Supports
CL = Community Living

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.

The *2017 Virginia Acts of Assembly, Chapter 836, Item 306 PPPP* states that, "The Department of Medical Assistance Services shall amend the state plan under Title XIX of the Social Security Act, and any necessary waivers, to reflect that no authority is provided for the payment of overtime for Medicaid-reimbursed consumer-directed personal assistance, respite and companion services. The Department shall implement the necessary regulatory changes and other necessary measures to be consistent with federal approval of any appropriate state plan and/or waiver changes, and prior to the completion of any regulatory process undertaken in order to effect such change."

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 regulatory action is to clarify that no authority is provided for the payment of overtime for Medicaid-reimbursed consumer-directed personal assistance, respite and companion services. This regulation is essential to protect the health, safety, and welfare of citizens in that it ensures that adequate funds will continue to be available to cover medically-necessary consumer directed services for Medicaid members.

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.

This action affects the Amount, Duration, and Scope of Medical and Remedial Care Services: Early and Periodic Screening, Diagnosis, and Treatment Services (EPSDT) (12 VAC 30-50-130) as well as DMAS' home and community based waiver program that offers consumer-directed services: Elderly or Disabled with Consumer Direction Supports (EDCD) (12 VAC 30-120-924).

CURRENT POLICY

Currently, EPSDT and EDCD permit individuals to obtain personal assistance and respite services through the agency-directed or consumer-directed models of service delivery or some combination of both. The agency-directed model relies on businesses whose employees provide the approved hands-on care of personal care services, respite services, and companion services. The consumer-directed model relies on the individual receiving waiver services to hire their own personal attendant and perform employer functions (as the employer of record). The waiver individual may appoint another person to serve as employer on their behalf.

The current policy in EPSDT and EDCD is silent concerning the provision of overtime pay for attendants of consumer-directed personal care, respite care, and companion services. DMAS is currently receiving a consistent number of reimbursement requests that exceed 40 hours per week for attendants who serve a single consumer. No regulatory authority exists to authorize, reimburse, or deny reimbursement to attendants who exceed the 40 hour per week limit. The General Assembly provides no authority or funding for overtime pay.

HISTORY

From January 1, 2016 to June 30, 2016, DMAS paid over \$11 million in overtime payments alone (this figure does not include the normal rate paid for these services) to approximately 7,000 consumer-directed attendants. The 2016 Appropriation Act disallowed the payment of overtime for Medicaid reimbursed consumer-directed services beginning on July 1, 2016.

RECCOMENDATION

The intent of this action is to ensure that Medicaid authorization and reimbursement for consumer-directed personal care, respite, and companion services is limited to 40 hours per week for an attendant serving a single consumer. Attendants are still permitted to serve multiple consumer directed employers and be paid for more than 40 hours per week of work.

DMAS is implementing the legislative mandate contained in the 2017 Acts of Assembly previously referenced by proposing the 40 hour per week limit for reimbursement for any one attendant serving a single employer.

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.

This regulation may create disadvantages to members of the public who are accustomed to using the same attendant for more than 40 hours per week to provide consumer-directed personal assistance, respite, and companion services.

The primary advantage of this regulation is that it will permit DMAS to ensure that funds are appropriately spent for consumer-directed services.

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 in this regulation that are more restrictive than applicable 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.

No localities will be particularly affected, as this regulation 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, 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 Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 E. Broad Street, Suite 1300, Richmond, VA 23219, telephone: (804)371-4300, fax: (804) 786-1680, or email: Emily.McClellan@dmas.virginia.gov.

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.

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	Public Partnerships, LLC (PPL) contract implementation costs to reconfigure system to deny hours over 40 and apply live-in exemption.
Projected cost of the new regulations or changes to existing regulations on localities.	\$0
Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.	Attendants employed by consumer-directed employers.
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:	Not applicable

<p>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>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>a.) Not applicable b.) \$0</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>Comply with the 2017 Acts of Assembly, Chapter 836, Item 306 PPPP.</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.

There are no alternatives that would meet the requirements of the General Assembly mandate.

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.

DMAS does not keep any records of the numbers of consumer-directed attendants who might qualify as a small business.

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 and has no effect on a family’s disposable income.

Public comment

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

Commenter	Comment	Agency response
Individual	“The 40 hour per week regulations impose great financial and logistical burdens on me during the summer months. Please consider making an exception for away camps.”	No overtime has been authorized. No exceptions have been authorized.

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.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
12 VAC 30-50-130	N/A	Currently there is not any language restricting overtime hours for consumer-directed personal care, respite, and companion services.	Establishment of action to indicate that DMAS will not reimburse overtime for consumer-directed personal care, respite, and companion services per attendant for any single employer.
12 VAC 30-120-924	N/A	Currently there is not any language restricting overtime hours for consumer-directed personal care, respite, and companion services.	Establishment of action to indicate that DMAS will not reimburse overtime for consumer-directed personal care, respite, and companion services per attendant for any single employer.