Adverse impact notification sent to Joint Commission on Administrative Rules, House Committee on Appropriations, and Senate Committee on Finance (COV § 2.2-4007.04.C): Yes ☐ Not Needed ☒

If/when this economic impact analysis (EIA) is published in the *Virginia Register of Regulations*, notification will be sent to each member of the General Assembly (COV § 2.2-4007.04.B).

Virginia Department of Planning and Budget

Economic Impact Analysis

12 VAC 30-50 Amount, Duration, and Scope of Medical and Remedial Care Services
12 VAC 30-120 Waivered Services
12 VAC 30-122 Community Waiver Services for Individuals with Developmental Disabilities
Department of Medical Assistance Services
Town Hall Action/Stage: 4500/7686
June 27, 2018

Summary of the Proposed Amendments to Regulation

The Board of Medical Assistance Services (Board) proposes to permanently adopt emergency regulations that redesigned three existing home and community based waivers: Individual and Family Developmental Disabilities Support Waiver (12 VAC 30-120-700 et seq.), Intellectual Disability Waiver (12 VAC 30-120-1000 et seq.), and the Day Support Waiver for Individuals with Mental Retardation (12 VAC 30-120-1500 et seq.).

Result of Analysis

The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact

Background

This action permanently implements three-waiver redesign efforts that have been underway since 2014. The overall goal is to provide alternatives to services provided in institutions and maximize the opportunities for individuals receiving community based waiver services to have access to the benefits of community living, including services in the most integrated setting.

In 1999, the U.S. Supreme Court ruled in *Olmstead v. L.C.*[1] that the Americans with Disabilities Act requires public services and supports to be furnished in the most integrated settings appropriate to each person's needs in order to prevent their exclusion from the rights of citizenship. In 2009, the U.S. Department of Justice (DOJ) Civil Rights Division launched an aggressive effort to enforce *Olmstead v. L.C.* The division was involved in more than 40 matters in 25 states including Virginia.[2] In 2012, the Commonwealth of Virginia and DOJ signed a settlement agreement as a result of the DOJ investigation of services provided to individuals with intellectual disabilities in Virginia's training centers, as well as services for individuals with intellectual and other developmental disabilities (I/DD) in the community. Supports and services for individuals in the target population defined in the Settlement Agreement are almost exclusively funded by the state's Medicaid home and community based services waivers. In 2014, the Centers for Medicare and Medicaid Services (CMS) issued a final rule among other purposes to incorporate the mandate of *Olmstead v. L.C.*[3] The rule established in federal regulation requirements for all 1915(c) waivers, authorized under 1915(c) of the Social Security Act, to enhance the quality of home and community based services and provide additional protections to individuals that receive services under these Medicaid authorities.

Meeting the requirements of the DOJ Settlement Agreement and the CMS final rule required changes to multiple policies and practices. The Virginia legislature requested[4] and the Departments of Medical Assistance (DMAS) and Behavioral Health and Developmental Services (DBHDS) convened numerous workgroups and studied plans to redesign home and community based services waivers.[5] This analysis heavily relies on that Waiver Redesign Study.

Waivers Affected

The Individual and Family Developmental Disabilities Support (DD) Waiver was originally developed in 2000 to serve the needs of individuals and their families, who require the level of care provided in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID), commonly referred to as institutions. Such individuals would have to have

[1] Olmstead v. L.C., 527 U.S. 581 (1999).

[2] Source: https://rga.lis.virginia.gov/Published/2015/RD385/PDF

[3] https://www.gpo.gov/fdsys/pkg/FR-2014-01-16/pdf/2014-00487.pdf

[4] See https://budget.lis.virginia.gov/item/2015/1/HB1400/Chapter/1/301/

[5] https://rga.lis.virginia.gov/Published/2015/RD385/PDF

been older than six years of age and have diagnoses of either autism or severe chronic disabilities identified in 42 CFR 435.1009 (cerebral palsy or epilepsy), any other condition (other than mental illness) that impairs general intellectual functioning, manifests itself prior to the individual's 22nd birthday, is expected to continue indefinitely, and results in substantial limitation of three or more areas of major life activity (self-care, language, learning, mobility, self-direction, independent living). Under the proposed regulation, the DD Waiver is changing to the Family and Individual Supports Waiver (FIS), which will support individuals living with their families, friends, or in their own homes. It will support individuals with some medical or behavioral needs and will be available to both children and adults.

The second waiver being redesigned is the Intellectual Disability (ID) Waiver, which was originally developed in 1991 to serve the needs of individuals and their families, who are determined to require the level of care in an ICF/IID. Such individuals would have had a diagnosis of intellectual disability or if younger than six years old, be at developmental risk of significant limitations in major life activities. The ID Waiver is changing to the Community Living Waiver (CL), which will remain a comprehensive waiver that includes 24/7 residential services for those who require that level of support. It will include services and supports for adults and children, including those with intense medical and/or behavioral needs.

The third waiver being redesigned is the Day Support (DS) Waiver, which was originally developed in 2005 to serve the needs of individuals, along with their families, who had an intellectual disability and would have been determined to require the level of care in an ICF/IID. This waiver was developed to address the overwhelming service demands of this population of individuals in the Commonwealth, because the ID Waiver operated at capacity and was not funded for the higher numbers of individuals who required the covered services. This waiver was intended to be a temporary measure while the individuals on the waiting list waited for an opening in the ID Waiver. The DS Waiver is changing to the Building Independence Waiver (BI), which will support adults 18 and older who are able to live in the community with minimal supports. This will remain a supports waiver that does not include 24/7 residential services. Individuals will own, lease, or control their own living arrangements and supports may need to be complemented by non-waiver-funded rent subsidies.

Assessment of Needs

Under the redesigned waivers, information gathered via the Virginia Individual Developmental Disabilities Eligibility Survey (VIDES) and the Supplemental Questions, are combined with the Supports Intensity Scale® (SIS®) service needs assessment instrument through the person centered planning process to develop each individual's unique Individual Service Plan.

SIS® is a nationally recognized assessment tool that measures the intensity of support required for a person with a developmental disability in their personal, work-related, and social activities. The SIS® is multi-dimensional and comprehensively evaluates the pattern and intensity of needed supports. In 2009, Virginia began using the SIS® in the person-centered planning process to help identify preferences, skills, and life goals for individuals in the ID and DS waivers. In addition, SIS® does not provide the same type of information that a person-centered planning process offers, such as information regarding the settings the person enjoys most, activities the person wishes to participate in, and life experiences the person desires. Therefore, the SIS® is used in conjunction with person-centered planning for individualized service plan development.

VIDES is the recently adopted tool used to determine institutional placements. The VIDES survey assesses individuals in the same areas as the old Level of Functioning Survey, but also includes an additional assessment on self-direction skills. Self-direction skills include making and implementing daily personal decisions regarding daily schedule and time management; making and implementing major life decisions such as choice and type of living arrangements; demonstrating adequate social skills to establish/maintain interpersonal relationships; demonstrating the ability to cope with fears, anxieties, or frustrations; demonstrating the ability to manage personal finances; and demonstrating ability to protect self from exploitation.[6] Both the VIDES and the SIS® provide for age-appropriate individual data gathering.

The SIS® assessment also includes Supplemental Questions, which are unique to Virginia. These questions are designed to identify individuals with unique needs (e.g. severe

[6] See http://townhall.virginia.gov/l/ViewStage.cfm?stageid=7905 for more details.

medical risk, severe community safety risk, severe risk of harm to self, etc.) that fall outside of the SIS® standardized instrument.

These combined tools are used to determine an individual SIS® score, which can then be used to correlate an individual's supports needs to one of seven levels. Those levels are 1) Least Support Needs, 2) Modest or Moderate Support Needs, 3) Least/Moderate Support Needs with Some Behavioral Support Needs, 4) Moderate to High Support Needs, 5) High to Maximum Support Needs, 6) Extraordinary Medical Support Needs, and 7) Extraordinary Behavioral Support Needs.

The seven levels were recommended by a study of Virginia's waiver utilization and assessment data.[7] The design of the seven supports level system has been validated through a review of a random sample of individuals' records by DBHDS and Community Services Board (CSB) staff.[8] After one year of experience with the waiver design under the emergency regulations, a study conducted pursuant to Item 310 R of the Chapter 836 of the 2017 Appropriation Act[9] found that "An analysis of data and SIS® administration procedures highlight that the distribution of supports needs levels, while not identical, are consistent with the model predictions from 2014, when the levels and reimbursement tiers were first recommended for incorporation into the DD Waivers."[10] Thus, the waiver redesign appear to be successful in identifying individual support needs.

DBHDS and DMAS also recognize that, in spite of sound research and best efforts, some individuals may have been assigned a supports level that does not align with their identified essential needs. Therefore, individuals and families are allowed to request a review of their assessment.

Eligibility

Prior to 2016, Virginia was one of a few states to still operate a bifurcated ID/DD waiver system. Under the bifurcated system, the eligibility for a specific waiver and access to specific services depended on diagnosis of intellectual or developmental disability. For example, an

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7 http://www.dbhds.virginia.gov/library/developmental%20services/dds%20final%20revised%20validation%20study%20summary%206-21-15.pdf

8 Source: https://rga.lis.virginia.gov/Published/2015/RD385/PDF

9 https://budget.lis.virginia.gov/item/2017/1/HB1500/Chapter/1/310/

10 https://rga.lis.virginia.gov/Published/2017/RD370/PDF

individual with a diagnosis of autism, but no specific diagnosis noting an intellectual disability, would only be eligible to receive services under the DD waiver but not the ID waiver. The previous system had limited service options and did not include group home services or sponsored residential services. Waiver redesign modernized Virginia's approach eliminating this bifurcation. Under the proposed redesign, all three waivers will serve individuals with a diagnosis of DD of which ID is included. The three waivers' target populations are being merged under the single definition of developmental disability. Common definitions of intellectual disability and developmental disability are proposed.

Under the waiver redesign, all three waivers serve individuals with a diagnosis of ID or DD. All three waivers are open to all eligible individuals with a developmental disability, creating a unified system for individuals to access a full array of waiver services. All individuals seeking DD waiver services have diagnostic and functional eligibility confirmed by their local CSB and have their names placed on a single, statewide waiting list.

Service Coverage

The proposed regulation expands services available in each waiver. The originally covered services in the DD Waiver were: in-home residential support; day support; prevocational services; supported employment services; therapeutic consultation; environmental modifications; skilled nursing; assistive technology; crisis stabilization; personal care and respite (both agency directed and consumer directed); family/caregiver training; personal emergency response systems; and companion services (both agency directed and consumer directed). The proposed FIS Waiver adds the following services: shared living; supported living residential; community coaching; community engagement; workplace assistance services; private duty nursing; crisis support services; community-based crisis supports; center-based crisis supports; and electronic home based supports.

The services covered in the ID Waiver were: assistive technology; companion services (both agency-directed and consumer-directed); crisis stabilization; day support; environmental modifications; personal assistance and respite (both agency-directed and consumer-directed); personal emergency response systems; prevocational services; residential support services; services facilitation (only for consumer-directed services); skilled nursing services; supported employment; therapeutic consultation; transition services. The proposed CL Waiver will add

following services: crisis support services; supported living residential; shared living; electronic home based support; community engagement; community coaching; community-based and center-based crisis supports; individual and family/caregiver training; private duty nursing; and workplace assistance services.

The services covered in the DS Waiver were: day support; prevocational services; and supported employment. The proposed BI Waiver will add following services: assistive technology; community- and center-based crisis supports; environmental modifications; Personal Emergency Response Systems and electronic home based supports; transition services; shared living; independent living supports; community engagement; and community coaching services.

Expansion of services in each waiver will be beneficial to the recipients in that they will have access to a broader array of services and more flexibility in the use of those services.

The proposed redesign also discontinues currently provided prevocational services (defined as preparing an individual for paid/unpaid employment such as accepting supervision, attendance, task completion, problem solving, and safety) in all three waivers as the service has been ineffective, according to DMAS, in achieving its intended goals.

Reimbursement/Utilization

In Fiscal Year (FY) 2015, the DD Waiver served 913 individuals/families with expenditures of $28,747,525. In FY 2017, the FIS Waiver served 1,193 individuals/families with expenditures of $36,808,172. The cost per person per year declined slightly from $31,487 in FY 2015 to $30,853 in FY 2017. Currently, there are 1,859 individuals enrolled in the FIS waiver.

In FY 2015, the ID Waiver served 10,174 individuals/families with expenditures of $693,861,042. In FY 2017, the CL Waiver served 11,091 individuals/families with expenditures of $801,729,999. The cost per person per year increased slightly from $68,199 in FY 2015 to $72,287 in FY 2017. Currently, there are 11,733 individuals are enrolled in the CL waiver.

In FY 2015, the DS Waiver served 271 individuals/families with expenditures of $3,806,006. In FY 2017, the BI Waiver served 263 individuals/families with expenditures of $3,388,436. The cost per person per year declined slightly from $14,044 in FY 2015 to $12,884 in FY 2017. Currently, there are 321 individuals enrolled in the BI waiver.

According to the Waiver Redesign Study, a hallmark of waiver redesign is the development of proposed reimbursement rates based on a methodology developed and implemented by nationally-recognized consultant Burns & Associates, Inc. This rate-setting methodology, required by CMS, builds rates to cover most all the components of costs for providers to meet the service requirements (e.g., wages, benefits, travel, training, documentation, program support and administration). This methodology allows the Commonwealth to adjust the assumptions for each service based on current data.

To establish rate methodologies for services, a statewide rate study of I/DD waiver providers and services was conducted. The study used Bureau of Labor Statistics data and reviewed market costs, service definitions, and provider requirements. The subsequent rate calculations were disseminated for public comment in late 2014, and adjustments were made. The final proposed rates were published on April 23, 2015.

Various "congregate" residential services (e.g., group home and sponsored residential), as well as other services (e.g., group day, community engagement, and group supported employment) require a tiered reimbursement schedule based on the expected number of hours of direct supervision and support that an individual may need. The reimbursement tiers are tied to individuals' support levels, so that service providers are reimbursed at a higher amount for supporting individuals with greater needs. The rate structure also reflects higher reimbursement for more integrated and/or smaller settings.

The Waiver Redesign Study projected decreased payments to group supported employment (-3.7%), supported living (-1.1%), and sponsored residential (-0.4%), and increased payments to therapeutic consultation (+43.8%), skilled nursing (+40%) DD case management (+38.4%), in-home residential (+23.7%), day support (+9.1%), group homes (+2.8%), and all other congregate (+2.7%). The original net estimated impact was an increase of $19.2 million. The updated estimates are an increase of $26.3 million in total funds in FY 2017 and $46 million in FY 2018. The increased expenditures are a result of higher rates as well as expansion of services in each waiver. Impact to the general fund however is one-half of those amounts in each year respectively because of the federal matching funds.

As mentioned before, the study conducted pursuant to Item 310 R of Chapter 836 of the 2017 Appropriation Act[11] found that the distribution of support needs levels are consistent with the model predictions from 2014. Therefore, the distribution of tiers of rates should be aligned with difficulty of the service provided because the adjusting rates for the level of difficulty was one of the goals of the redesign efforts.

Furthermore, Item 306 CCCC.3 of Chapter 836 of the 2017 Appropriation Act[12] required DMAS and DBHDS to study the impact of the Sponsored Residential (SR) payment rates on providers in the redesigned waivers. SR services are a DBHDS licensed service. A licensed provider agency contracts with individuals or couples to provide Medicaid home and community based waiver services in their own homes for up to two individuals with I/DD. The licensed provider agency screens these sponsors and provides them with required training and ongoing oversight. The licensed agency bills Medicaid for waiver services and pays the sponsors. In other states, this is commonly known as a "host home" model. It is distinct from a foster home or group home. DBHDS collected data from its systems and surveyed sponsors regarding financial impact and challenges to supporting individuals in their homes. The study concluded that "[w]hile the a few individuals in the high range of monthly reimbursement experienced changes in reimbursement, most respondents did not experience a change in revenue."

According to the Waiver Redesign Study, the proposed needs assessment model has been employed in a number of other states and is found to lead overtime to the same level of spending for individuals with the same level of needs. Under the previous system in Virginia, funding and payment for services were only broadly related to individual support needs, and different amounts of funding were associated with people who have similar support needs. An individual's level of need for resources and support were not often correlated to waiver expenditures in the past. Implementing the SIS® assessment process and assignment of a support level is a critical step toward more equitable resource distribution in the waiver redesign. Over time, the Commonwealth anticipates the waiver redesign will bring a higher degree of correlation, aligning individuals' support level with the cost of their services.

[11] https://budget.lis.virginia.gov/item/2017/1/HB1500/Chapter/1/310/
[12] https://budget.lis.virginia.gov/item/2017/1/HB1500/Chapter/1/310/

Finally, CSBs and Behavioral Health Authorities (BHAs) also take an active role in provision of waiver services, particularly providing case management services. They receive approximately 16% of the total waiver expenditures.

Waiting List

Resource limitations have long been a significant barrier to access to waiver services. Generally, each year the Virginia Legislature grants a number of additional slots on waivers to address the unmet needs of this population. While almost 14,000 individuals served at a total cost over $840 million in FY 2017, over 13,000 additional individuals remain on the waiting list.

As of October 9, 2015, the waitlist for the ID Waiver was 8,143, with 4,966 individuals on the urgent needs list. As of June 18, 2018, those numbers have increased to almost 13,000 for the three waivers. In contrast to the needs-based ID Waiver waiting list, the DD Waiver waiting list was maintained in chronological order, so that individuals were offered slots on a first come, first served basis. The chronological waitlist for the DD waiver was 2,109. Approximately 70 percent of the individuals on the waiting list were under age 25.

CMS permits an individual to be on a waiting list for a waiver and receive services under another waiver if they are eligible for both. Approximately 3,500 of those on DD Waiver waiting lists were being served in the Commonwealth Coordinated Care Plus (CCC plus) Waiver. These individuals, accounting for more than one-third of the waiting list, have full access to Medicaid benefits, including acute and primary care services. However, the CCC plus Waiver does not provide the full range of services an individual with I/DD may need; therefore, they remain on the DD Waivers waiting list. These individuals were waiting for DD Waiver services to more effectively meet their needs.

An important aspect of waiver redesign is the transition to a single statewide waitlist for all three waivers. This wait list is based on need and individuals are grouped into one of three "priority needs" categories. During the transition, approximately 200 individuals from the chronologically based DD Waiver waiting list were assigned slots before the remaining waiting list individuals were shifted to the new needs based waiting list. Since the new list is needs based, it will be dynamic and change as individuals needs change. DBHDS has in place five regional SIS® specialists who are working directly with each CSB and assisting with each regional waitlist. These staff also support waiver slot assignment committees (WSACs) within

each region, comprised of community members recommended by CSBs. As required by CMS, the redesigned waivers separate the entity that determines eligibility for the waiver (CSB support coordinators/case managers) from the entity, which makes recommendations for allocating slots (WSACs). Final approval for allocation and slot assignment remains the responsibility of DBHDS.

Consistent with CMS guidance, the Commonwealth needs to have the capacity to address emergencies; this is accomplished by maintaining a reserve pool of slots for each waiver each fiscal year.

Summary

The proposed permanent waiver redesign accomplishes multiple goals: it provides compliance with the DOJ Settlement Agreement and the CMS final rule; it successfully identifies individual support needs; it modernizes eligibility determination models that did not distinguish between individual and developmental disabilities; it expands access to a wider spectrum of services for any individual who used to be in one of the previous waivers; it sets a rate structure that is more closely correlated with the difficulty of service levels; it results in increased expenditures due to providing more services at higher rates, albeit, the Commonwealth pays only half of the increases expenditures because of the matching federal funds; and establishes a needs based waiting list rather than a chronological one.

Businesses and Entities Affected

In FY 2016, there were 554 providers of waiver services. Of them 37 were CSB/BHAs. Many providers are likely to be small business. As of June 2018, enrollment in CL Waiver is 11,733; FIS Waiver is 1,859; BI Waiver 321, for a total of 13,913. This list grows approximately by 75 people each month.

Of these entities, CSBs are particularly affected. Impacts include 1) CSBs assuming an expanded role with eligibility determination as the single point of entry; 2) CSBs need to expand their knowledge and expertise with eligibility determination and service planning for individuals with a developmental disability other than intellectual disability; 3) A bi-product of waiver redesign is CSBs assuming the responsibility of case management for both ID and DD individuals. This resulted in CSBs entering into contractual relationships with entities providing DD case management prior to waiver redesign in order to ensure continuity and individual

choice; 4) In coordination with state partners, educating individuals and families in localities about the new process for eligibility determination and the process for being placed on the statewide waiting list.

Localities Particularly Affected

The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment

No impact on employment is expected upon promulgation of this permanent regulation as the emergency regulation has been in effect since September 1, 2016. However, the waiver redesign likely had a positive impact on employment as it led and continues to lead to more services being provided.

Effects on the Use and Value of Private Property

Since more services are provided and reimbursements to Medicaid providers increased, there should be a positive impact on their asset values.

Real Estate Development Costs

No impact on real estate development costs is expected.

Small Businesses:

Definition

Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "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."

Costs and Other Effects

The proposed regulation does not impose costs on small businesses.

Alternative Method that Minimizes Adverse Impact

There is no adverse impact on small businesses.

Adverse Impacts:

Businesses:

The proposed redesign does not adversely affect businesses.

Localities:

According to DMAS, the proposed redesign does not adversely affect localities.

Other Entities:

The proposed redesign does not adversely affect other entities.

Legal Mandates

General: The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order Number 17 (2014). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5)the impact on the use and value of private property.

Adverse impacts: Pursuant to Code § 2.2-4007.04(C): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.