



townhall.virginia.gov

Exempt Action Final Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-60-70
Regulation title(s)	Utilization Control: Home Health Services
Action title	Face-to-Face Encounter Requirement for Home Health
Final agency action date	July 1, 2017
Date this document prepared	February 7, 2017

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Virginia Administrative Process Act (APA) or an agency's basic statute, the agency is not required, however, is encouraged to provide information to the public on the Regulatory Town Hall using this form. Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

On February 2, 2016, U.S. Centers for Medicare and Medicaid Services (CMS) issued final regulations to amend the process for authorizing Home Health Services for Medicaid beneficiaries. These changes include a requirement for physicians or certain approved non-physician practitioners to conduct and document face-to-face encounters with Medicaid beneficiaries (within specific timeframes, required documentation components, and the allowance for telehealth as permitted by each state) for the payment and delivery of Home Health Services under Medicaid. The final rule modifies requirements on the delivery of Home Health Services, broadening it beyond the home setting but excluding hospitals, nursing facilities, intermediate care facilities for individuals with intellectual disabilities (ICF/IID) or

settings in which “payment is or could be made under Medicaid for inpatient services that include room and board.”

CMS intends for the changes to 42 CFR 440.70 to promote program integrity, encourage service delivery in the community rather than institutions, and align processes with Medicare, to the degree feasible.

In order to comply with the federal final rule, 12VAC30-60-70: Utilization Control: Home Health Services needs to be amended. The CMS Final Rule, regarding Face-to-Face Requirements for Home Health Services, is attached to the end of this document.

This regulatory change is expected to be non-controversial. It is non-discretionary and required in order to comply with amended federal regulations. The final rule does not apply to managed care.

Statement of Final Agency Action

Please 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 Agency Background Summary with the attached amended regulations, entitled Face-to-Face Encounter Requirement for Home Health (12 VAC 30-60-70), and adopt the action stated therein. I certify that this final exempt regulatory action has completed all the requirements of the Code of Virginia § 2.2-4006(A), of the Administrative Process Act.

/February 7, 2017/

/Signature/

Date

Cynthia B. Jones, Director

Dept. of Medical Assistance Services

Legal Basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’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 amended regulatory text is necessary as a result of changes to Federal Regulations at 42 CFR 440.70, which now requires physicians or certain approved non-physician practitioners to conduct and document face-to-face encounters with Medicaid beneficiaries (within specific timeframes) for the authorization of home health services. The changes to 42 CFR 440.70 implement section 6407 of the U.S. Patient Protection and Affordable Care Act of 2010 and are, to the degree feasible, in line with similar requirements from the Medicare Access and CHIP Reauthorization Act of 2015 for Medicare beneficiaries.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.) Please be sure to define any acronyms.

The section of the State Plan for Medical Assistance affected by this action are related to Home Health Services.

CURRENT POLICY

Current Home Health Services regulations require services to be ordered by a physician. Documentation is submitted using the CMS-485 form. Home Health Services must be provided in the individual's place of residence, which cannot be a hospital or nursing facility. Prior to the start of Home Health Services, a comprehensive assessment is required. A detailed written plan of care must be developed and reviewed periodically by the physician, including a recertification every 60 days for ongoing service delivery. Qualified personnel are required for the delivery of Home Health Services. DMAS performs utilization review to "determine if services are appropriately provided and ensure that the services provided to Medicaid beneficiaries are medically necessary and appropriate." Current regulations also define visits for the purposes of service limits.

ISSUES

The federal regulations continue to require Home Health Services be ordered by a physician. The amended federal regulations, however, no longer require that the Home Health Services be provided in the individual's place of residence, but rather Home Health Services shall be permitted in settings in which "normal life activities take place." Those settings cannot include an intermediate care facility for individuals with intellectual disabilities (ICF/IID) or settings in which "payment is or could be made under Medicaid for inpatient services that include room and board." A large portion of the amended federal regulations also detail the requirements for a

face-to-face encounter prior to ordering Home Health Services. The face-to-face encounter, which must be related to the primary reason the individual requires Home Health Services, must occur within the 90 days before the start of services or the 30 days after the start of services. The face-to-face encounter may be performed by the physician, a nurse practitioner or clinical nurse specialist or a certified nurse midwife, and such encounter shall be documented in the record and communicated to the ordering physician (if an approved non-physician practitioner performed the face-to-face encounter). The face-to-face encounter may be performed using telehealth as permitted by DMAS policy.

RECOMMENDATIONS

In order to comply with the amended federal regulations, the following changes to Virginia regulations on Home Health Services are needed:

- Remove the requirement for Home Health Services to be performed in the individual's residence and replace it with federal language allowing for Home Health Services in settings in which "normal life activities take place."
- Add "ICF/IID and any setting in which payment is or could be made under Medicaid for inpatient services that include room and board" to the prohibitions on the locations of Home Health Services delivery, which already includes hospitals and nursing facilities.
- There is no mention of a face-to-face encounter prior to the order being issued. Add the federal requirements that state that the face-to-face encounter:
 - Must be related to the primary reason the individual requires Home Health Services;
 - Must occur within the 90 days before the start of services or the 30 days after the start of services;
 - May be performed by the physician, a nurse practitioner or clinical nurse specialist or a certified nurse midwife;
 - Must be documented in the record and communicated to the ordering physician if an approved non-physician practitioner performed the face-to-face encounter; and
 - May be performed using telehealth.
- Current Virginia requirements around the following aspects of Home Health Services will remain untouched by these amendments:
 - The comprehensive assessment;
 - The detailed written plan of care and recertification;
 - Qualifications for personnel;
 - DMAS' role in utilization review; and
 - The definition of visits for service limits.

DMAS has shared the proposed amendments to the regulatory section as well as the draft updates to the DMAS forms with stakeholders. Stakeholders concurred with the DMAS recommendations for both regulations and forms.

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.