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**TO:** EMILY MCCLELLAN  
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**FROM:** MICHELLE A. L'HOMMEDIEU   
Assistant Attorney General

**DATE:** March 14, 2018

**SUBJECT:** Fast-Track Regulations – Criteria for Care in Facilities for Individuals with Intellectual Disabilities (4799/7905)

I have reviewed the attached fast-track regulations regarding criteria for supports and services in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID). You have asked the Office of the Attorney General to review and determine if the Department of Medical Assistance Services (“DMAS”) has the legal authority to amend the regulations and if the regulations comport with state and federal law.

I have reviewed these regulations. Based on my review, it is my view that the Director of DMAS, acting on behalf of the Board of Medical Assistance Services, under Virginia Code §§ 32.1-324 and 325, has the authority to amend these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and has not exceeded that authority.

Pursuant to Virginia Code § 2.2-4012.1, if an objection to the use of the fast-track process is received within the 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 Virginia Department of Social Services shall (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process set out in this article with the initial publication of the Fast-Track regulation serving as the Notice of Intended Regulatory Action.

Emily McClellan  
March 14, 2018  
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It is my understanding that the proposed changes will not amend the State Plan and therefore approval by CMS is not necessary. If you have any questions, please contact me at 786-6005.

cc: Kim F. Piner, Esq.

Attachment

**Project 5099 - Fast-Track**

**DEPARTMENT OF MEDICAL ASSISTANCE SERVICES**

**VIDES Criteria for care in Intermediate Care Facilities for Individuals with Intellectual  
Disabili**

**12VAC30-60-360. Criteria for care in facilities for mentally retarded persons. (Repealed.)**

~~§ 4.0 Definitions. The following words and terms, when used in these criteria, shall have the following meaning, unless the context clearly indicated otherwise:~~

~~"no assistance" shall mean no help is needed.~~

~~"prompting/structuring" shall mean prior to the functioning, some verbal direction and/or some rearrangement of the environment is needed.~~

~~"supervision" shall mean that a helper must be present during the function and provide only verbal direction, general prompts, and/or guidance.~~

~~"some direct assistance" shall mean that helper must be present and provide some physical guidance/support (with or without verbal direction).~~

~~"total care" shall mean that a helper must perform all or nearly all of the functions.~~

~~"rarely" shall mean that a behavior occurs quarterly or less.~~

~~"sometimes" shall mean that a behavior occurs once a month or less.~~

~~"often" shall mean that a behavior occurs 2-3 times a month.~~

~~"regularly" shall mean that a behavior occurs weekly or more.~~

~~§ 4.1 Utilization Control regulations require that criteria be formulated for guidance for appropriate levels of services. Traditionally, care for the mentally retarded has been~~

~~institutionally based; however, this level of care need not be confined to a specific setting. The habilitative and health needs of the client are the determining issues.~~

~~§ 4.2 The purpose of these regulations is to establish standard criteria to measure eligibility for Medicaid payment. Medicaid can pay for care only when the client is receiving appropriate services and when "active treatment" is being provided. An individual's need for care must meet these criteria before any authorization for payment by Medicaid will be made for either institutional or waived rehabilitative services for the mentally retarded.~~

~~§ 4.3 Care in facilities for the mentally retarded requires planned programs for habilitative needs and/or health related services which exceed the level of room, board, and supervision of daily activities.~~

~~Such cases shall be combination of habilitative, rehabilitative, and health services directed toward increasing the functional capacity of the retarded person. Examples of services shall include training in the activities of daily living, task-learning skills, socially acceptable behaviors, basic community living programming, or health care and health maintenance. The overall objective of programming shall be the attainment of the optimal physical, intellectual, social, or task learning level which the person can presently or potentially achieve.~~

~~§ 4.4 The evaluation and re-evaluation for care in a facility for the mentally retarded shall be based on the needs of the person, the reasonable expectations of the resident's capabilities, the appropriateness of programming, whether progress is demonstrated from the training and, in an institution, whether the services could reasonably be provided in a less restrictive environment.~~

~~§ 4.5 Patient assessment criteria. The patient assessment criteria are divided into broad categories of needs, or services provided. These must be evaluated in detail to determine the abilities/skills which will be the basis for the development of a plan for care. The evaluation process will demonstrate a need for programming an array of skills and abilities or health care~~

~~services. These have been organized in seven major categories. Level of functioning in each category is graded from the most dependent to the least dependent. In some categories, the dependency status is rated by the degree of assistance required. In other categories, the dependency is established by the frequency of a behavior or ability to perform a given task.~~

~~§ 4.6 The resident must meet the indicated dependency level in TWO OR MORE of categories 1 through 7.~~

~~1. Two or more questions must be answered with a 4, OR~~

~~2. Question "j" must be answered "yes."~~

~~B. Communication Skills – To meet this category three or more questions must be answered with a 3 or a 4.~~

~~C. Task Learning Skills – To meet this category three or more questions must be answered with a 3 or a 4.~~

~~D. Personal Care – To meet this category~~

~~1. Question "a" must be answered with a 4 or a 5, OR~~

~~2. Question "b" must be answered with a 4 or a 5, OR~~

~~3. Questions "c" and "d" must be answered with a 4 or a 5.~~

~~E. Mobility – To meet this category any one question must be answered with a 4 or a 5.~~

~~F. Behavior – To meet this category any one question must be answered with a 3 or a 4.~~

~~G. Community Living – To meet this category~~

~~1. Any two of the questions "b", "e", or "g" must be answered with a 4 or a 5, OR~~

~~2. Three or more questions must be answered with a 4 or a 5.~~

~~§ 4.7. Level of functioning survey.~~

A. HEALTH STATUS				
How often is nursing care or nursing supervision by a licensed nurse required for the following? (Key: 1=rarely, 2=sometimes, 3=often, and 4=regularly)				
1. Medication administration and/or evaluation for effectiveness of a medication regimen?	1	2	3	4
2. Direct services: i.e., care for lesions, dressings, treatments, (other than shampoos, foot power, etc.)	1	2	3	4
3. Seizures control	1	2	3	4
4. Teaching diagnosed disease control and care, including diabetes	1	2	3	4
5. Management of care of diagnosed circulatory or respiratory problems	1	2	3	4
6. Motor disabilities which interfere with all activities of Daily Living - Bathing, Dressing, Mobility, Toileting, etc.	1	2	3	4
7. Observation for choking/aspiration while eating, drinking?	1	2	3	4
8. Supervision of use of adaptive equipment, i.e., special spoon, braces, etc.	1	2	3	4
9. Observation for nutritional problems (i.e., undernourishment, swallowing difficulties, obesity)	1	2	3	4
10. Is age 55 or older, has a diagnosis of a chronic disease and has been in an institution 20 years or more	1	2	3	4
B. COMMUNICATION				
Using the Key 1=regularly, 2=often, 3=sometimes, 4=rarely, how often does this person				
1. Indicate wants by pointing, vocal noises, or signs?	1	2	3	4
2. Use simple words, phrases, short sentences?	1	2	3	4
3. Ask for at least ten things using appropriate names?	1	2	3	4
4. Understand simple words, phrases or instructions containing prepositions: i.e., on in behind?	1	2	3	4
5. Speak in an easily understood manner?	1	2	3	4
6. Identify self, place of residence, and significant others?	1	2	3	4
C. TASK LEARNING SKILLS				
How often does this person perform the following activities (Key: 1=regularly, 2=often, 3=sometimes, 4=rarely)				
1. Pay attention to purposeful activities for 5 minutes?	1	2	3	4

-	2. Stay with a 3 step task for more than 15 minutes?	1	2	3	4	
-	3. Tell time to the hour and understand time intervals?	1	2	3	4	
-	4. Count more than 10 objects?	1	2	3	4	
-	5. Do simple addition, subtraction?	1	2	3	4	
-	6. Write or print ten words?	1	2	3	4	
-	7. Discriminate shapes, sizes, or colors?	1	2	3	4	
-	8. Name people or objects when describing pictures?	1	2	3	4	
-	9. Discriminate between one, many, lot?	1	2	3	4	
-	<b>D. PERSONAL and SELF CARE</b>					
-	With what type of assistance can this person currently (Key: 1=No Assistance, 2=Prompting/Structures, 3=Supervision, 4=Some Direct Assistance, 5=Total Care)					
-	1. Perform toileting functions: i.e., maintain bladder and bowel continence, clean self, etc.?	1	2	3	4	5
-	2. Perform eating/feeding functions: i.e., drinks liquids and eats with spoon or fork, etc.?	1	2	3	4	5
-	3. Perform bathing function: i.e., bathes, runs bath, dry self, etc.?	1	2	3	4	5
-	4. Dress self completely, i.e., including fastening, putting on clothes, etc.?	1	2	3	4	5
-	<b>E. MOBILITY</b>					
-	With what type of assistance can this person currently (Key: 1=No Assistance, 2=Prompting/Structures, 3=Supervision, 4=Some Direct Assistance, 5=Total Care)					
-	1. Move, (walking, wheeling) around environment?	1	2	3	4	5
-	2. Rise from lying down to sitting positions, sits without support?	1	2	3	4	5
-	3. Turn and position in bed, roll over?	1	2	3	4	5
-	<b>F. BEHAVIOR</b>					
-	How often does this person (Key: 1=Rarely, 2=Sometimes, 3=Often, and 4=Regularly)					
-	1. Engage in self destructive behavior?	1	2	3	4	
-	2. Threaten or do physical violence to others?	1	2	3	4	
-	3. Throw things, damage property, have temper outbursts?	1	2	3	4	
-	4. Respond to others in a socially unacceptable manner – (without undue anger, frustration, or hostility)	1	2	3	4	

-	<b>G. COMMUNITY LIVING SKILLS</b>					
-	With what type of assistance can this person currently (Key: 1=No Assistance, 2=Prompting/Structures, 3=Supervision, 4=Some Direct Assistance, 5=Total Care)					
-	1. Prepare simple foods requiring no mixing or cooking?	4	2	3	4	5
-	2. Take care of personal belongings, room (excluding vacuuming, ironing, clothes washing/drying, wet mopping)?	4	2	3	4	5
-	3. Add coins of various denominations up to one dollar?	4	2	3	4	5
-	4. Use the telephone to call home, doctor, fire, police?	4	2	3	4	5
-	5. Recognize survival signs/words: i.e., stop, go, traffic lights, police, men, women, restrooms, danger, etc.?	4	2	3	4	5
-	6. Refrain from exhibiting unacceptable sexual behavior in public?	4	2	3	4	5
-	7. Go around cottage, ward, building, without running away, wandering off, or becoming lost?	4	2	3	4	5
-	8. Make minor purchases, i.e., candy, soft drink, etc?	4	2	3	4	5

**THE TEXT OF THIS REGULATION IS IN DRAFT FORM AND SHOULD NOT BE RELIED UPON FOR LEGAL INTERPRETATION.**

**12VAC30-60-361. Criteria for supports and services in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID).**

A. This section establishes standard criteria that shall be met by individuals in order to receive Medicaid payment for care in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID). Once the individual has been screened and found to meet these criteria, Medicaid covers the costs of care only when the individual is receiving appropriate supports and services and when active treatment, as set forth in 42 CFR 483.440(a), is being provided.

B. Supports and services that are provided in facilities for individuals with developmental or intellectual disabilities for the purpose of claiming Medicaid reimbursement requires



individualized, person-centered planned programs of supports and services to address habilitative needs or health needs, or both, as set forth in 42 CFR 483.21.

1. Such care may be a combination of habilitative, rehabilitative, and health services directed towards increasing or maintaining the highest mental, physical and psychosocial skills and abilities of the individual. Individuals with degenerative conditions shall receive supports and services designed to retain skills and functioning and to prevent further regression to the extent possible. Examples of such care include: (i) skill building in the Activities of Daily Living (ADLs); (ii) skill building in task-learning; (iii) learning socially acceptable behaviors; (iv) learning basic community living skills; (v) health care and health maintenance, and; (vi) skill building in self direction.

2. The overall objective of facility based supports and services, as set out in the person-centered plan, shall be the attainment of the optimal physical, intellectual, social, or task learning level that the individual can presently or potentially achieve.

C. Level of dependency and level of functioning criteria.

1. An individual's need for care shall meet the level of functioning criteria in the Virginia Individual Developmental Disability Eligibility Survey (VIDES) before any authorization for payment by Medicaid will be made for institutional services.

2. Dependency level. The level of dependency in each category shall be indicated from the most dependent to the least dependent. In some categories, the dependency status shall be rated by the degree of assistance required while in other categories, the dependency shall be established by the frequency of a behavior or the ability to perform a given task.

a. The adult-individual (18 years of age and older) shall demonstrate an overall total level for the VIDES assessment of dependency in three or more of the skills or

statuses; to demonstrate a skill or exhibit a status, the individual shall meet the criteria for the dependency level set out for that skill or status in DMAS Form P237.

b. Children (ages three years through 17 years old) shall demonstrate an overall total level for the VIDES assessment of dependency in two or more areas for the VIDES specific for the child's age as set forth in DMAS Form P236.

c. Infants (younger than three years of age) shall demonstrate an overall total level for the VIDES assessment of dependency in two or more areas for the VIDES specific for the infant's age as set forth in DMAS Form P235.

D. Screening process for entrance into an ICF/IID shall be coordinated through DMAS or its designee.

1. ICF/IID screening requests:

a. DMAS or its designee shall accept requests for ICF/IID screenings and ensure that, within seven calendar days of referral, those screenings are scheduled.

b. DMAS or its designee shall accept requests for ICF/IID screenings and ensure that those who need emergency access as described in 12 VAC 30-122-90 are scheduled and screened within 48 hours.

c. The screening will be provided to the chosen ICF/IID during its assessment and admission process when requested by the facility.

d. Screenings by the DMAS designee shall be completed or approved prior to admission to an ICF/IID.

2. DMAS or its designee shall also explore and review more integrated community options with the individual and family/guardian at the time of screening and through the established review recommendations and procedures with DBHDS.

E. Upon admission to an ICF/IID, the facility shall perform an assessment of the individual consistent with 42 CFR 483.440.

F. The assessment and re-assessment for determination of continued stay in the ICF/IID level of care shall be performed by the interdisciplinary team and be based on (i) the needs of the individual; (ii) the individual's capabilities; (iii) the appropriateness of services and supports to be provided; (iv) the progress the individual demonstrates from the skill building; and (v) whether the services and supports could reasonably be provided and are available in a less restrictive environment.

G. The individual assessment shall be evaluated in detail to determine the skills, abilities, and status that will be the basis for the development of an Individual Program Plan (IPP). The assessment process shall indicate a need for an IPP that addresses the individual's skills, abilities, and need for health care services which have been organized in the eight major categories set forth in subsection F of this section.