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Fast-Track Regulation Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) citation(s)	12 VAC 30 – 60- 360 (REPEAL); 12 VAC 30-60-361 (ADD)
Regulation title(s)	Criteria for care in facilities for mentally retarded persons
Action title	VIDES Criteria for Care in ICFs/IID
Date this document prepared	February 1, 2018

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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 proposes to replace the current Level of Functioning survey standards with the new Virginia Individual Developmental Disabilities Eligibility Survey (VIDES) standards for individuals seeking care in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID). The Commonwealth has recently adopted the VIDES standards for the comparable level of functioning for waiver services in communities. By using the VIDES standards for institutional care in this action, the Commonwealth is restoring the consistency of functional standards for individuals regardless of whether they obtain their care in their communities or in ICF/IID institutions.

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 Regulatory Review Summary entitled VIDES Criteria for Care in ICFs/IID (12 VAC 30-60-360 (repeal); 12 VAC 30-60-361 (add)) and adopt the action stated therein. I certify that this fast track regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012.1, of the Administrative Process Act.

February 1, 2018

/Signature/

Date

Jennifer S. Lee, M.D., 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.

This regulatory action permits DMAS to replace the current Level of Functioning survey instrument with the more current VIDES assessment.

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 action is to implement the same screening standard to be applied to individuals for admission to an Intermediate Care Facility for Individuals with Intellectual

Disability as is being used for screening such individuals to home and community based Developmental Disability waiver services. Using the same screening standard for all individuals, regardless of whether they seek institutional care or community care, ensures the uniformity and consistency of evaluation and treatment to protect the health and welfare of these vulnerable citizens.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

This regulatory action is being promulgated as a non-controversial fast track action since the use of the VIDES assessment instrument for waiver services, under the authority of a current emergency regulation, has been well received by the affected provider and citizen communities.

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.

The section of the State Plan for Medical Assistance that is affected by this action is Standards Established and Methods Used to Assure High Quality of Care: Criteria for care in facilities for mentally retarded persons (12 VAC 30-60-360).

CURRENT POLICY

This section of the State Plan for Medical Assistance/Virginia Administrative Code was implemented after the 1987 Omnibus Budget Reconciliation Act required that states specify standards for a level of functioning (LOF) that individuals were required to meet in order for Medicaid to reimburse for Intermediate Care Facilities for the Mentally Retarded (ICF/MR) services. With the exception of specifying that the LOF also applied to individuals seeking waiver services in their communities, this section of the State Plan has not been substantially revised since it was originally promulgated.

The LOF survey assessed individuals in the following areas:

- (i) Health status, as in medication administration, seizures control, handling diagnoses for disease control and care, direct service care for lesions/wound dressings, motor disabilities that interfere with activities of daily living, nutritional issues (undernourishment, swallowing problems, obesity);
- (ii) Communication, as in how often does the individual indicate wants by pointing/vocalization, use simple words/phrases, understand simple words/phrases, identify at least 10 things using the appropriate word, speak in an understandable manner;

- (iii) Task learning skills, as in paying attention to purposeful activities for 5 minutes, staying with a three-step task, telling time to the hour and understanding time intervals, counting more than 10 objects, writing or printing 10 words, naming people or objects;
- (iv) Personal/self-care, as in performing activities of daily living (eating, toileting, bathing, dressing);
- (v) Mobility, as in moving around the environment, rising from sitting/lying down positions, turning/re-positioning in bed;
- (vi) Behavior, as in engaging in self-destructive behavior, threatening physical harm to others, throwing things, damaging property, responding in socially unacceptable manners;
- (vii) Community living skills, as in preparing simple foods, caring for personal belongings and living space, performing laundry functions, counting money, using the telephone, be in the community without wandering off, refraining from exhibiting unacceptable sexual behaviors in public.

The individual's level of functioning in each category indicated his areas of dependency. In some categories, dependency is rated by the degree of assistance required by the individual. In other categories, dependency is established by the frequency of a particular behavior or the individual's ability to perform a given task.

The formal name for ICF/MR facilities was changed, by the U.S. Department of Health and Human Services' Health Care Financing Administration (the Medicaid federal funding agency that preceeded the current Center for Medicare and Medicaid Services (CMS)), to Intermediate Care Facilities for Individuals with Intellectual Disability (ICF/IID).

RECOMMENDATIONS

Beginning in 2013, DMAS, in collaboration with the Department of Behavioral Health and Developmental Services, began a major overhaul of its waiver programs for intellectually and developmentally disabled citizens, partially in response to the DOJ Settlement (court approved in 2012). These waived programs were originally called the Individuals and Families with Developmental Disabilities (DD), the Intellectual Disabilities Waiver (ID), and the Day Support Waiver (DS). The DD waiver is being replaced with the Family and Individual Supports (FIS) waiver; the ID waiver is being replaced with the Community Living (CL) waiver, and; the DS waiver is being replaced with the Building Independence (BI) waiver. (see Town Hall 4500/7686)

During the course of revamping these three waivers, DMAS and DBHDS replaced the outdated Level of Function (LOF) survey with the Virginia Individual Developmental Disability Eligibility Survey (VIDES). Adopting the use of the VIDES standards for individuals seeking institutional care in ICFs/IID, as set out in this regulatory action, restores consistency to the standards applied to such individuals regardless of whether services are to be received in communities or institutions. The result will be that all such affected individuals will be evaluated by the same criteria.

(In addition to the change in the survey tool, a new single point of referral for the screening process has been added to address concerns from the DOJ Settlement Agreement about consistency in screening and availability of community options.)

The Virginia Individual Developmental Disabilities Eligibility Survey has three age-appropriate versions: VIDES for infants (children up to three years of age); VIDES for children (ages three through 18), and; VIDES for adults (individuals 18 years of age and older).

The adult form assesses individuals' abilities, for example, in these areas:

- (i) Health status, as in how often does the individual require support for medication administration, monitoring of seizures, learning a prescribed regimen for a diagnosed chronic health care condition;
- (ii) Communication, as in how often does the individual effectively share information, effectively communicate wants or needs, use at least simple words/phrases/short sentences, ask for things using appropriate names, engage in purposeful activities, complete a multi-step task without reminders, count more than 10 objects;
- (iii) Task learning, as in how often does the individual engage in purposeful activities for at least 5 minutes, complete a multi-step task without reminders, tell time to the hour and understand time intervals, count more than 10 objects;
- (iv) Personal/self care, as in with what type of assistance can the individual perform personal hygiene tasks, perform dining/eating functions, perform bathing/showering functions, perform grooming tasks;
- (v) Motor skills, as in with what type of assistance can the individual move safely about his environment, safely get in and out of bed, demonstrate fine motor control or eye-hand coordination;
- (vi) Behavior, as in how often does this individual engage in behavior that results in harm or injury to himself, demonstrate aggressive or threatening behavior toward other persons, engage in property destruction, respond to others in socially inappropriate manner;
- (vii) Community living skills, as in with what type of assistance is the individual able to prepare simple foods, perform housecleaning and laundry tasks, identify and calculate the value of money, use the telephone, recognize and respond appropriately to dangerous situations, remain safely in the community without wandering off;
- (viii) Self direction skills, as in making and implementing daily personal decisions regarding daily schedule, 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; demonstrating ability to protect self from exploitation.

The primary difference between the old LOF and the new VIDES is the addition of the Self-direction section. This addition has resulted from recent federal emphasis on providing for and encouraging person-centered planning, activities, and program focus. Agencies that are charged with serving these individuals are now required to promote individuals' participation in developing their own plans of care that must incorporate the individuals' goals and objectives for their lives.

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.

The advantages to the public and the Commonwealth are that consistent, person-centered functional standards will be applied to individuals who obtain care in their communities, or in ICF/IID institutions. There are no disadvantages to the public or the Commonwealth in this action. Private businesses will only be affected to the degree that they are privately operated ICFs/IID facilities.

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 more restrictive than federal contained in these recommendations.

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.

There will be no localities that are more affected than others as these requirements will apply statewide.

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.

This regulatory action is not expected to affect small businesses as it does not impose compliance or reporting requirements, nor deadlines for reporting, nor does it establish performance standards to replace design or operational standards.

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.

<p>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</p>	<p>N/A</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>This regulatory action will not have any impact on localities.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Individuals seeking services from ICF/IIDs will be screened using the VIDES tool DBH may perform screenings in house, or may assign screenings to CSBs, depending on the volume</p>
<p>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: 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>There are approximately 57 ICF/IIDs enrolled with DMAS. Some of these may be small businesses. These facilities have a total of approximately 530 beds. It is not possible to estimate how many individuals will be screened for ICF/IID placement per year.</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>There are no additional costs for the affected entities because they are simply substituting one assessment form for a previous one that has been in use for years. This action will not affect any real estate costs.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>This action permits individuals applying for either community based care or institutional care to be evaluated by the same standardized instrument.</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 permit DMAS to establish consistency in screenings for individuals who obtain services in their communities and individuals who obtain services in ICF/IIDs.

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.

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 30-60-360	12 VAC 30-60-361	Requires the use of the Level of Functioning (LOF) survey instrument to assess individuals' dependency levels in major life areas to determine appropriate placement in	Replaces the LOF survey instrument with the VIDES instrument. Major life areas that are evaluated are highly similar with the exception of the addition of the Self direction category.

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