



Virginia
Regulatory
Town Hall

**Final Regulation
Agency Background Document**

Agency Name:	Dept. of Medical Assistance Services; 12 VAC 30
VAC Chapter Number:	Chapter 120
Regulation Title:	Individual and Family Developmental Disability Support Waiver
Action Title:	DD Waiver
Date:	May 1, 2001; Effective July 1, 2001

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

This suggested final regulation establishes the program and provider requirements, service limitations and service coverage, and recipient eligibility standards for the new DMAS program entitled Individual and Family Developmental Disability Support Waiver.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

VAC Cite	<u>Substance of Change</u>	<u>Reason for Change</u>
Definitions	Removed requirement that person 18 and over must be able to manage own care but still restricts that cognitively impaired adults will not manage their own care. Adds/removes/modifies some needed definitions.	Now permits family member to manage care to remove this distinction between adults and children. Restricts that certain adults cannot manage their own care for safety reasons. For completeness/accuracy of regs.
	Technical corrections.	For clarity and further elaboration.
12VAC30-120-720	Adds minimum age criterion for eligibility.	Children less than 6 years of age are already covered by another waiver program.
12VAC30-120-752	Requirements for prevocational programs specified.	To clarify service limits and requirements to be met for reimbursement.
12VAC30-120-754	Modified provider requirement.	Accuracy.
12VAC30-120-756	Modified service description; provider requirements.	Accuracy; expansion of potential provider group.
12VAC30-120-762	Modified criteria to restrict service; set provider standards.	Establish parameters around provision of AT services.
12VAC30-120-764	Removed residential program as a place of crisis stabilization service delivery.	Limit locations for delivery of this service.

12VAC30-120-766, 768,	Redefined recipient’s family for purposes of establishing which family members can be reimbursed for providing personal care services/respite care; establishes requirement for specific documentation of lack of providers before a family member living in same house with recipient will be reimbursed for personal care services/respite care.	Limit the service so that close family members who should be rendering uncompensated care will continue to do so.
12VAC30-120-770	Redefined which services can be consumer directed; establishes requirement for specific documentation of lack of providers before a family member living in same house with recipient will be reimbursed for attendant/companion care services. Technical corrections to terminology.	In response to public comments from affected disability community.
12VAC30-120-776	Added qualifier to specific service for clarity.	To facilitate regulated community’s distinguishing between different service model types.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

I hereby approve the foregoing Regulatory Review Summary with the attached amended State Plan pages and adopt the action stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 9-6.14:7.1, of the Administrative Process Act.

Date

C. Mack Brankley, Acting Director
 Dept. of Medical Assistance Services

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The Code of Virginia (1950) as amended, §32.1-325, grants to the Board of Medical Assistance Services (BMAS) the authority to administer and amend the Plan for Medical Assistance. The Code of Virginia (1950) as amended, §32.1-324, grants to the Director of the Department of Medical Assistance Services (DMAS) the authority to administer and amend the Plan for Medical Assistance in lieu of Board action pursuant to the Board's requirements. The Code also provides, in the Administrative Process Act (APA) §§9-6.14:7.1 and 9-6.14:9.1, for this agency's promulgation of proposed regulations subject to the Governor's review.

Subsequent to an emergency adoption action, the agency is completing the public notice and comment process as contained in Article 2 of the APA. The emergency regulation became effective on July 1, 2000. The Code, at §9-6.14:4.1(C) requires the agency to file the Notice of Intended Regulatory Action within 60 days of the effective date of the emergency regulation if it intends to promulgate a permanent replacement regulation. The Notice of Intended Regulatory Action for this regulation was filed with the Virginia Register on July 21, 2000.

Federal provisions governing home and community based services (HCBS) waivers are found in § 1915 (c) of the Social Security Act. Under this authority, states can waive the federal requirements for statewide service coverage, comparability of services, and community income and resource rules. This waiver capability affords states the flexibility to design waivers selecting the mix of services that best meet the needs of the targeted waiver populations.

In order to develop a waiver to specifically serve persons with developmental disabilities who do not have a diagnosis of mental retardation, there must be an alternative institutional placement. 42 CFR § 435.1009 states that the institutional placement for individuals with related conditions is an institution for the mentally retarded or persons with related conditions. In Virginia, this institution is called an Intermediate Care Facility for the Mentally Retarded (ICF/MR). Although many individuals with developmental disabilities do not have mental retardation, many of the services offered in an ICF/MR are more appropriate for these individuals than standard services offered in nursing facilities. Currently, Virginia has very few institutional placements for individuals with developmental disabilities.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this action is to promulgate permanent regulations for the Individual and Families Developmental Disability Support Services (DD) Waiver. These regulations will help improve the health and welfare of families with children and adults who are affected by developmental disabilities. These regulations will provide community support services to enable these children and adults to live successfully in their homes and communities.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

The sections of the State Plan affected by this action are Case Management Services for Individuals with Developmental Disabilities (12 VAC 30-50-490) and Methods and Standards for Establishing Payment Rates-Other Types of Care: Fee-for-Service Case Management (12 VAC 30-80-110). The regulations affected by this action are Individual and Families Developmental Disability Support Waiver (12 VAC 30-120-700 through 120-800).

The 1999 General Assembly, through Item 335.LL of the 1999 Appropriations Act, mandated that the Director of the Department of Medical Assistance Services (DMAS) develop a new Medicaid-funded home and community-based care waiver for persons with developmental disabilities, including persons with autism, to offer a full array of appropriate, flexible individual-and family-driven control of services to meet individuals' needs. The 2000 Appropriations Act specifically required that persons with autism be included in this waiver proposal to the federal government.

In order to comply with this mandate, DMAS convened a workgroup composed of representatives from various state agencies, consumers, families, advocates, and public and private providers to assist with the development of the waiver proposal. The members of the workgroup represented are the Brain Injury Association of Virginia; Centers for Independent Living; Consumer Representatives for Persons with Disabilities; Consumer Service Boards; the Department of Education; the Department of Medical Assistance Services; the Department of Mental Health/Mental Retardation, & Substance Abuse Services; the Department of Rehabilitative Services; the Department for the Rights of Virginians with Disabilities; the Department of Social Services; Disability Service Boards; the Epilepsy Association of Virginia;

the Epilepsy Foundation of Virginia; family representatives for persons with disabilities; UCP of Washington & Northern Virginia; the Virginia Association for Home Care; the Autism Program of Virginia (TAP-VA); the Virginia Board for People with Disabilities; and the Virginia Network of Private Providers. This waiver's design and these subsequent regulations are consistent with this work group's recommendations.

WAIVER ELIGIBILITY

“Developmentally disabled” is a term used to refer to individuals who have mental retardation, as well as a “related condition” to mental retardation. However, states distinguish between individuals with mental retardation and individuals with related conditions when developing waivers such as this one.

Since individuals up to age 6 with developmental disabilities and individuals with mental retardation are already being served through the Mental Retardation Home and Community Based Services waiver, the DD waiver will be available only to individuals age 6 and older who meet the “related conditions” requirements as defined in 42 CFR § 435.1009: “Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions:

- (A) It is attributable to
 - (1) Cerebral palsy, or epilepsy; or
 - (2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
- (B) It is manifested before the person reaches age 22.
- (C) It is likely to continue indefinitely.
- (D) It results in substantial functional limitations in three or more of the following areas of major life activity:
 - (1) Self-care.
 - (2) Understanding and use of language.
 - (3) Learning.
 - (4) Mobility.
 - (5) Self-direction
 - (6) Capacity for independent living.”

In addition to the above requirements, the individual cannot have, for purposes of this new waiver service, a diagnosis of mental retardation as defined by the American Association on Mental Retardation (AAMR). An individual must meet all of the following criteria:

1. The individual must meet the ICF/MR level of care, as established at 42 CFR § § 435.217 and 435.1009. This will be determined through a screening process conducted by qualified individuals under contract with DMAS;

2. The individual's monthly income must not exceed 300% of the SSI income level. Currently this amount is \$1,590 and increases in January of each year. The income of parents would not be deemed to a child, and;
3. No individual can be enrolled in more than one waiver at a time.

WAIVER SERVICES

All individuals determined eligible to receive services in the DD waiver will have a case manager (support coordinator). Only individuals who are also receiving other DD waiver services will receive Medicaid-funded DD support coordination. No individuals will receive only IFDDS support coordination without other waiver services as well.

Individuals will select a support coordinator who will assist them and their families with accessing needed medical, psychiatric, social, educational, vocational, and other services essential to meeting the individuals' needs. Support coordinator services will include: assessment and planning (including referrals) services; linking the individuals to services and supports specified in the Individualized Service Plan (ISP); assisting the individuals (or family) directly to develop or obtain needed resources, including crisis assistance supports; coordinating services and treatment planning with other agencies and providers; enhancing community integration; monitoring service delivery (including assessment and reassessment of program participant level of care, oversight of the cost-effectiveness of services, review of plans of care at designated intervals); and benefits counseling. Support coordination providers will not be permitted to be service delivery providers.

The services that will be offered under the IFDDS waiver include adult companion care, assistive technology, personal emergency response systems, crisis intervention/stabilization, environmental modifications, in-home residential supports, skilled nursing services, supported employment, therapeutic consultation, family and caregiver training, day support, personal care, respite care, and consumer-directed personal services (attendant and consumer-directed respite care). These services are defined and discussed in the attached Appendix D.

DMAS asked the workgroup to provide projections of the potential number of individuals who could be eligible for the IFDDS waiver. Because Virginia does not serve individuals with developmental disabilities without diagnoses of mental retardation in state funded ICFs/MR, there was no institutional population from which to determine potential numbers of eligible individuals. The projections contained in Appendix E were provided by the workgroup and DMAS. A method for initial acceptance into the waiver will include an initial application period of sixty days, beginning July 1, 2000, and ending August 31, 2000. This application period will be followed by an assessment of all applications based on established criteria. Applicants will be placed on the IFDDS waiver in accordance with available funding.

These regulations are essential to the health and welfare of developmentally disabled citizens. Prior to the onset of this waiver service, these affected individuals were either situated in their homes with little to no services or institutionalized in other states far from their families and

support systems. Because this waiver itself and the design of the service system are new, DMAS also believes that the mechanics of the program should be well established before expansion is sought. The long-term interests of the recipients of these services will be best served by a well-designed and functioning system. DMAS will work with consumers and providers to firmly establish this waiver program while maintaining cost effectiveness.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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 include a sentence to that effect.

The primary advantage for the Commonwealth's citizens will be that developmentally disabled individuals will be able to live as independently as possible in their communities. It will allow some of these individuals to live on their own and enable others to remain with their families. To the extent of their abilities, they will be able to function in their communities, attending school and obtaining employment.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

SUMMARY OF PUBLIC COMMENTS

WAIVERED SERVICES: INDIVIDUAL AND FAMILY DEVELOPMENTAL DISABILITIES SUPPORT WAIVER

12 VAC 30-120-700 through 120-800, 50-490, 80-110

DMAS' proposed regulations were published in the January 29, 2001, Virginia Register for their public comment period from January 29th through March 30th. In addition to the Register publication, DMAS provided notice about these proposed regulations to the DisAbility Advocacy website and published a notice of the comment period in the Virginia Board for People with Disabilities December 2000 newsletter. Comments were received from 19 individuals on the letterhead of the following organizations/individuals:

The Virginia Association of Centers for Independent Living; Brain Injury Association of Virginia; Consumers; Families, Advocates; LARC; Connections Plus Consulting, Inc.; Eastern

Shore Center for Independent Living, Inc.; Virginia Board for People with Disabilities; Independence Empowerment Center, Inc.; Blue Ridge Independent Living Center; Endependence Center, Inc.; Access Independence, Inc.; Department for the Rights of Virginians with Disabilities; the diAbility Resource Center, Central Virginia Independent Living Center, Inc.; and the Lynchburg Area Center for Independent Living.

Detailed comments are as follows:

SHORTAGE OF PROVIDERS

Comments: Sixteen commenters stated that personal attendants are limited in the regulations to no more than two per recipient at a given time. Recipients should be allowed to employ up to five personal attendants in a 30-day period. This commenter stated that the regulatory limit made it very difficult, and sometimes impossible, to secure adequate assistance.

In light of the severe shortage of providers, this commenter stated that recipients “should be permitted to use more than two providers for all services. Recipients should be allowed to use up to five providers of the same service in a thirty day period” across all the covered waiver services. Another recommendation aimed at addressing the provider shortage problem would be to permit recipients to direct their services to a greater degree. The commenters felt that consumer-directed services save the program resources, are preferred by many adults with disabilities and families of children with disabilities and expand the number of providers. Consumer-directed services should be expanded to include assistive technology, companion services, day support, environmental modifications, family/caregiver training, in-home residential support, supported employment, and therapeutic consultation. In addition, these services should also be available through the agency-service delivery model. They felt that the recipient should have the option of choosing consumer-directed or agency models of services.”

In addition, some commenters felt Support Coordinator agencies should be permitted to provide service coordination for all consumer-directed services. The support coordination agency must ensure that the same agency staff do not provide support coordination and service coordination. The commenters felt there was no conflict in providing these services from the same agency since service coordination does not involve any decisions about how much service a recipient receives or who will provide the service. One commenter felt Support Coordinators should be also allowed to be a service provider as long as the same staff did not provide both services.

DMAS Response: The limit to two attendants per pay period referred only to consumer-directed services and did not pertain to the rest of the waiver services. Upon review of the public comments DMAS determined that, in order to ensure the success of consumer-directed services, it would be necessary to remove the restriction of hiring two personal attendants at any given time. This reference will be removed from the regulations.

During the development of the IFDDS Waiver, DMAS worked with a work group to develop the waiver and identify what services should be offered. One of the recommendations of the workgroup was to make personal care and respite care consumer-directed services. The IFDDS

waiver application that was submitted to HCFA contained these two services. HCFA subsequently approved all of the requested waiver services. DMAS did not request and receive permission from HCFA to consumer-direct the other services listed in the waiver application, which were assistive technology, companion services, day support, environmental modifications, family/caregiver training, in-home residential support, supported employment, and therapeutic consultation.

DMAS is currently working on developing a consumer-directed model of service for companion care for the Mental Retardation Waiver. Therefore, on the effective date of the Mental Retardation Waiver application and pending HCFA approval of the addition of this service to the IFDDS Waiver, DMAS will offer consumer-directed companion services in the IFDDS Waiver. DMAS, however, currently does not have the necessary computer systems and infrastructure to implement the other services, such as in-home residential support, supported employment, and day support services, in a consumer-directed model. DMAS feels that a workgroup of stakeholders to include consumers, advocates, state agencies and service providers need to be involved in the development of models of consumer-direction for the other services. This has been the process for past waivers and it helps to ensure that the services are developed to best meet the needs of consumers. DMAS will be exploring consumer-direction for these services during 2001. Any changes or recommendations to making any of the above identified services consumer-directed will also be considered for the IFDDS Waiver.

DMAS agrees with the suggestions by commenters to allow Support Coordinators to also be able to provide service coordination, or Consumer-Directed Services Facilitation Services. As the regulation was originally written, support coordinators could not also be service providers for the IFDDS Waiver. DMAS revised the definition of support coordinator to stipulate that the only service they can provide in the IFDDS Waiver is consumer-directed services and that the same agency staff does not provide support coordination and service coordination.

TARGETED SUPPORT COORDINATION

Comments: In 12 VAC 30-80-110, fourteen commenters felt that this regulatory language conflicted with the description of services in the "Substance" description. The commenters stated that targeted support coordination should be made available to all individuals who have a developmental disability and who qualify for State Plan Medicaid. In addition, one commenter felt that the qualifications for Support Coordinators were unreasonable and self limiting and that the certification procedures for Support Coordinators must be unsatisfactory since there is no Support Coordinator available in Northern Virginia.

DMAS Response: When the IFDDS Waiver was developed, it was agreed by the workgroup and DMAS that all IFDDS Waiver recipients would receive support coordination (case management) services. The 2000 General Assembly Session approved Governor Gilmore's budget, which appropriated funding to cover the costs of targeted support coordination under the State Plan as well as waiver services for the IFDDS Waiver recipients. Therefore, the targeted support coordination service is limited to those individuals who are applying to receive services in the IFDDS Waiver as well as those receiving IFDDS Waiver services. In order to offer support

coordination services to all persons with developmental disabilities who qualify for the State Plan for Medical Assistance, the General Assembly will need to appropriate the additional funding required to provide this service. It would be difficult to project, however, what the cost of support coordination for all persons with developmental disabilities would be because it is unknown how many individuals would be eligible under this service if it were available. A related example is persons with mental retardation receiving State Plan targeted case management services. DMAS reimbursed providers for targeted case management services to this population during Fiscal Year 2000 a total \$12 million dollars.

The qualifications for support coordinators were written in a broad manner to help providers with specializations to enroll as providers. The description in the qualifications refers to their need for knowledge of persons with developmental disabilities. Expertise with brain injury could fall into this category.

As of April 30, 2001, there were 14 support coordination agencies enrolled with DMAS to provide services. One of these coordinators has four offices located throughout the Commonwealth. Despite the increasing number of available support coordinators for the IFDDS Waiver, there has been difficulty in finding providers in the Northern Virginia area who are willing to provide support coordination services. If there are recipients in need of a support coordinator and there are no support coordination providers available, DMAS health care coordinators will serve as support coordinators to those recipients until a provider becomes available in that area.

SERVICE DEFINITIONS

Seventeen commenters felt that some of the service definitions should be revised.

Comment: The attendant care definition should have the language removed that requires the recipient to have no cognitive impairments.

DMAS Response: DMAS revised the service definition to state that individuals who were not able to independently manage their own personal attendants would have a family caregiver serve as employer on their behalf. Individuals with cognitive impairments will not be able to manage their own care.

Comment: The crisis stabilization definition should be expanded to include services when a recipient experiences a crisis related to physical needs or lack of services.

DMAS Response: This service is intended to provide psychological intervention and support to individuals who are facing severe psychological or behavioral issues. The professionals who provide this service are mental health professionals who are trained to handle psychological crises. This would not be the appropriate service to provide "emergency" services to individuals with physical needs or who lack services unless the intervention is needed for those who also experiencing a crisis that is related to psychological or behavioral issues. This service definition was not revised by DMAS.

Comment: The commenters felt environmental modifications should be clarified to ensure that reasonable accommodation requirements of the ADA only relate to work site modifications.

DMAS Response: DMAS revised the regulatory definition of environmental modifications to reflect this.

Comment: The definition of home should allow for an apartment or single family dwelling in which no more than three individuals who require services reside. "The current limitation of no more than two individuals in a dwelling is a detriment to community living."

DMAS Response: It was identified to DMAS that there may be more than one family member living in the same home who are applying for IFDDS Waiver services. Therefore, the service definition of "home" was revised to state: "Home means, for the purposes of the IFDDS Waiver, an apartment or single family dwelling in which no more than two individuals who require services live, except when there are siblings living in the same dwelling with family. This does not include an assisted living facility or group home."

Comment: Under the definition of Personal Emergency Response System, one commenter requested that DMAS define what "alone for significant parts of the day" meant.

DMAS Response: The clarification of this statement will be further defined in the IFDDS Service Provider manual.

Comment: One commenter felt that it was very unclear as to the difference between a service coordination provider and a support coordinator.

DMAS Response: Many individuals and service providers have confused the two providers. In order to reduce confusion, the service coordination provider will be renamed "Consumer-Directed (CD) Services Facilitator" and the regulations will be revised to reflect this change.

Comment: One commenter felt that the term neuropsychology should be included along with term psychology when referring to mental health professionals.

DMAS Response: The term psychology is meant to capture all specializations of this profession, including neuropsychologists. Since this term was meant to be broad in nature as to capture these specializations, the term psychology will be used in the regulation rather than stating specializations within this profession.

RECIPIENT QUALIFICATIONS AND ELIGIBILITY REQUIREMENTS: INTAKE PROCESS

Comment: In 12 VAC 30-120-720, seventeen commenters felt this regulation should be modified to permit recipients to share services in subdivision A.3. The D.2. subdivision should be expanded to require that support coordination be provided jointly by DMAS and a support coordinator when the actual cost of the recipient's services exceeds the average annual cost of ICF/MR care. In subdivision D.3., additional services are only available for waiver recipients in budget level one if the emergency criteria are met. This commenter stated that individuals should be provided services needed to ensure their health and safety. Subdivision E.3. should include a timeline for DMAS to approve the Consumer Service Plan (CSP), including guidance to all parties of expectations and responsibilities.

DMAS Response: Individuals whose care exceeds the average annual cost of ICF/MR care will be case managed by a DMAS Health Care Coordinator. To also have a support coordinator in the community providing this service would be duplicative effort and HCFA will not permit double billing of the same service. Therefore, DMAS did not revise the regulation and the DMAS Health Care Coordinator will be the individual that provides support coordination to recipients whose cost of care exceeds the average annual cost of ICF/MR care.

The eligibility section of the regulation is the appropriate location to specify that recipients will be allowed to share services. This will be stated further in the regulation under consumer-directed services and personal care. These are the services that individuals will be allowed to "share" service hours for no more than two individuals living in the same home.

Comment: Sixteen commenters stated according to the proposed regulations that new, additional services for recipients already receiving waiver services in budget level one would only be available if the emergency criteria were met for the additional services. Individuals must be provided all services needed to ensure their health and safety. No other Medicaid waiver, other than the MR Waiver, limits services in this manner. The DD Waiver must be administered with the same integrity as the other four Virginia Medicaid Waivers.

DMAS Response: In the IFDDS Waiver, the budget levels are determined according to funding level, not by services. Therefore, the levels are limited by budget, not by services. If an individual needs additional services and they meet emergency criteria to receive services, then their care plan will be increased.

Comment: Fifteen commenters felt a timeline for DMAS to approve the CSP must be established. DMAS should have 14 days to authorize waiver services. They stated timelines already exist for recipients, screeners and support coordinators to be able to plan and react based on certain prescribed expectations. They felt the timelines were vital to ensuring that the process proceeded efficiently.

DMAS Response: DMAS agrees that there should be an established timeline for DMAS to approve authorized waiver services. DMAS, upon receipt of the individual's Consumer Service Plan and all necessary supporting documentation, will have 14 days to approve or deny a recipient for IFDDS Waiver services. This timeframe will be inserted in the regulation.

THERAPEUTIC CONSULTATION

Comment: In 12 VAC 30-120-756, sixteen commenters felt that the provider requirements should be expanded to permit other qualified vendors to provide rehabilitation engineering or home modification assessments besides vendors approved by the Department of Rehabilitative Services (DRS). One commenter felt that DMAS should make it more clear to Support Coordinators that Therapeutic Consultation is available as a tool for assessing a person's need for occupational, physical, speech therapy, and assistive technology. The commenter also wanted to see benefits counseling added under the service definition.

In addition, another commenter felt that the phrase "other than behavior consultation" in the description should be changed to "including behavior consultation" since the use of behavior consultation in combination with other waiver services should not be more restricted than the use of other types of therapeutic consultation

DMAS Response: DMAS, pending approval by HCFA, revised the regulations to allow rehabilitation engineers and certified rehabilitation specialists who are not DRS vendors to provide services.

DMAS will work to ensure that support coordinators are aware of the opportunities for consultation that therapeutic consultation offers. Since benefits counseling is currently listed as a service performed by support coordinators, however, it would be a duplicative service to also include it as a service under therapeutic consultation. Therefore, benefits counseling was not added under the therapeutic consultation service definition in the IFDDS regulation.

DMAS recognizes the importance of the use of behavioral consultation. Therefore, the phrase "other than behavior consultation" was removed from the regulation.

ENVIRONMENTAL MODIFICATIONS: FUNDING OF LAST RESORT

Comment: In 12 VAC 30-120-758, fifteen commenters stated that the IFDDS Waiver is not a fund of last resort. The felt that current regulatory language that prohibits coverage for items "through another program" (e.g., DRS, Consumer Services Fund). should be removed.

DMAS Response: According to The Code of Virginia, 32.1-35, DMAS is "the payer of last resort to any insurer, including a group health plan as defined in § 607(1) of the Employee Retirement Income Security Act of 1974, a health services plan, a service benefit plan and a health maintenance organization, which contracts to pay health care costs for persons eligible for medical assistance in the Commonwealth." However, DMAS removed the reference to DRS and the Consumer Services Fund in the regulation.

PERSONAL CARE SERVICES

Comment: Seventeen commenters felt 12 VAC 30-120-766, for personal care services, should require that the establishment of an emergency back-up plan is the responsibility of the provider not the recipient. The commenter points out that other critical waiver services do not place this burden on the recipient. Subsection D in this section prohibits the members of a recipient's family from being employed as their aide. This prohibition should be eliminated. The commenter argues that HCFA permits family members to be employed as the aide except "for services furnished to a minor by the child's parent (or stepparent), or to an individual by that person's spouse." The commenter states that this regulation and the § 1915 waiver should be amended to permit the most flexible method of providing services and permit personal care providers to be members of the recipient's family with the exception stated above. "This change will help to address the severe shortage of providers in Virginia." The commenter further adds, about this subdivision, that services must continue regardless of the availability of the regular provider and suggests that "with no lapse in services" be added to the end of the first sentence.

DMAS Response: The establishment of an emergency back-up plan remains the responsibility of the recipient. Other critical services, such as attendant care, also have this requirement. Providers cannot be forced to provide a service if they do not have the staff to perform the service. That is why it is critical that recipients have an emergency back-up plan in case the aide cannot provide services on a particular day. This is also critical in demonstrating to HCFA that recipient's health and safety needs will be met.

DMAS recognizes that it is difficult for recipients to find individuals to provide personal care services. Therefore, pending HCFA approval, the IFDDS waiver application and regulations will be revised to state: "Each aide must not be a member of the recipient's family (family is defined as parents of minor children, spouses, legally responsible relatives, or family members living in the same home with the individual. Payment can only be made to a relative living in the same home with the individual when there is objective, written documentation as to why there are no other providers available to provide the care." This will also be the standard for who can provide services in attendant care, agency and consumer-directed respite care, and agency and consumer-directed companion services.

DMAS feels that the regulation already establishes the provider's responsibility to provide care. The regulation, which states "When a personal care aide is absent and the agency has no other aide available to provide services, the provider agency is responsible for ensuring that services continue to recipients. The agency may either obtain a substitute aide from another agency if the lapse in coverage is to be less than two weeks in duration, or transfer the recipient to another agency."

CONSUMER-DIRECTED SERVICES

Comment: Twenty commenters felt, in 12 VAC 30-120-770, that cognitive function should be added to the end of the third sentence. There are individuals who may need services due to their loss of cognitive abilities as well as physical function who should not be denied services. The requirement that attendant care and consumer-directed respite services should not be restricted to persons who are mentally alert and have no cognitive impairments. Children with cognitive impairments should have access to attendant care and consumer-directed respite services. Their

parents would assume responsibility as employer of the services. Adults who have cognitive impairments should be allowed to direct their care if it can be determined that the individual has the ability to direct their care to delegate a guardian or other individual to direct their care. Subsection C “prohibits members of a recipient’s family from being employed as their (sic) aide.” HCFA permits this except for parents (stepparents) of minor children and the spouse of an individual. One commenter requested that DMAS define "cognitive impairment."

In addition, one commenter felt that the "service coordinator" qualifications were inadvertently inserted into this section of the regulation.

DMAS Response: In response to comments submitted to DMAS, the Attendant Care service definition, service description, and criteria were revised to allow individuals of all ages to have a family caregiver act as employer on their behalf if they are unable to independently manage their personal attendants. However, recipients with cognitive impairments will not be able to manage their own care. In no case will individuals under age 18 be able to independently manage their own attendants.

As was discussed in the personal care section, the definition of who can provide consumer-directed services was revised. The definition states each attendant must "not be a member of the recipient's family (family is defined as parents of minor children, spouses, legally responsible relatives, or family members living in the same home with the individual. Payment can only be made to a relative living in the same home with the individual when there is written, objective documentation as to why there are no other providers available to provide the care."

The provider qualifications for service coordinators, now called "Consumer-Directed (CD) Service Facilitators", were meant to be placed within this section of the regulation. This provider is exclusive to providing services to recipients of consumer-directed services.

REEVALUATION OF SERVICE NEED AND UTILIZATION REVIEW

Comment: Fifteen commenters, in 12 VAC 30-120-780, had comments regarding reevaluation of service need and utilization review. “Examinations, evaluations, and assessments should only be conducted after written consent from the recipient or their parent or guardian has been obtained by the Support Coordinator or other Waiver provider.” Commenters felt these procedures can be intrusive and invasive and the recipient should be able to decline the procedure. If the recipient refuses to consent to the procedure, DMAS could establish a fair hearing process to determine if the recipient should be compelled to consent to the procedure.

DMAS Response: HCFA mandates, through federal regulation (Title 42, Code of Federal Regulation, 441.302), that states assure that evaluations and reevaluations of each waiver beneficiary and utilization review of services provided by service providers will be performed. While DMAS recognizes that some individual's care needs may not change in the course of 12 months, in order to have continued approval for the waiver, HCFA mandates reevaluations to occur at a minimum of every twelve months.

Medical examinations and psychological exams may be a necessary component of reevaluation for some waiver recipients as to determine whether they continue to remain eligible for IFDDS Waiver services. For example, if it were determined that an individual had a diagnosis of mental retardation, that individual would not be eligible for the IFDDS Waiver. DMAS would need to obtain consent from a recipient or the parent/guardian in order to authorize a medical examination or psychological. If an individual refuses to consent to examinations, however, their eligibility for the IFDDS Waiver could not be determined.

ADDITION OF ELIGIBILITY CRITERIA FOR INDIVIDUALS RESIDING IN NURSING FACILITIES, LONG-STAY HOSPITALS AND ICFS-MR.

Comment: Seventeen commenters stated that a new section (to be numbered 12 VAC 30-120-800 to be entitled Eligibility criteria for individuals residing in nursing facilities, long-stay hospitals and ICF/MR) be added to provide for “services and choice of services for people who choose to leave an institutional setting. Individuals residing in institutional settings that choose to receive home and community based services must be provided immediate access to home and community based waiver services.”

DMAS Response: All IFDDS Waiver applicants will be treated with equal consideration, and will have equal access to the IFDDS Waiver, regardless of where the applicant lives. This was decided with the workgroup when the IFDDS Waiver was developed.

ADDITION OF ELIGIBILITY CRITERIA FOR CHILDREN RECEIVING SERVICES AT THE AGE OF SIX.

Comment: Seventeen commenters suggested that another new section (to be numbered 12 VAC 30-120-810 entitled Eligibility criteria for children receiving services at the age of six) should be added as follows: “Children who are receiving MR Waiver services that do not have a diagnosis of MR, who are eligible for the DD waiver will be automatically transferred into the DD waiver upon their sixth birthday.”

DMAS Response: As the current structure of Medicaid-funded home and community-based services exists in Virginia, children who are under six years of age, who are at developmental risk, and who meet criteria for an ICF/MR are eligible for services under the Mental Retardation (MR) Waiver. If an individual reaches six years of age and does not have a diagnosis of mental retardation, then the individual is no longer eligible for the MR Waiver. The individual could meet the criteria for the IFDDS Waiver. DMAS is currently exploring the feasibility of transferring individuals from the MR Waiver into the IFDDS Waiver once they reach six years of age and do not have a diagnosis of mental retardation. This process will involve stakeholders representing the MR and IFDDS Waivers.

RESIDENTIAL SETTINGS

Comment: Two commenters stated that they were informed that the "prohibition" against group home was presented to them as being a requirement of federal law, and therefore necessary for Virginia to include in its regulation. One commenter stated this was not true and that HCFA representatives informed her there was no federal requirement that precludes waiver benefits to those in group living situations. The commenter felt precluding DD Waiver benefits to eligible individuals in a group living situation was discriminatory and that this setting might be the most appropriate residential setting for an individual.

In addition, two commenters noted that 12 VAC 30-120-720 (6) and 12 VAC 30-120-764 conflict because the later citation states that crisis stabilization services may be provided to individuals in a community-based residential program.

DMAS Response: DMAS recognizes that it is not a restriction of federal law to provide waiver services to individuals living in group home situations. DMAS currently provides congregate residential services to individuals who are eligible for the MR Waiver and who live in group homes licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS.)

DMAS currently has six home and community-based waivers. The only waiver to provide services to individuals residing in group home situations is the MR Waiver. States are allowed to determine what settings in which waiver services will and will not be provided in. It was determined for the IFDDS Waiver that individuals who are eligible for IFDDS Waiver services could receive services in their own homes and in the community. For the purposes of this regulation, "home" will not include individuals residing in group homes or in assisted living facilities.

DMAS agrees the two VAC citations noted by the commenters should remain consistent. Since services for the IFDDS Waiver will not be provided in an assisted living facility or group home residence, the crisis stabilization section was revised to remove reference to community-based residential programs.

SCREENING PROCESS

Comment: One commenter felt that the screening procedures and questionnaire were inappropriate for older teens or young adults by asking them, for example, to "count to ten." Another commenter was concerned that the communication section of the Level of Functioning did not adequately reflect the difference between a person's ability to communicate mechanically and intellectually, leaving individuals who would ordinarily qualify to be disqualified from the Waiver. The commenter recommended using the Uniform Assessment Instrument (UAI) as an assessment tool.

DMAS Response: The assessment instrument used for the IFDDS Waiver is the Level of Functioning (LOF) Form. This document is used to determine level of care eligibility for ICF/MR placement. Since the MR and IFDDS Waivers are alternatives to institutional placement, the same screening instrument must be used when determining eligibility for the parallel Waivers. The UAI is the assessment instrument used to determine nursing home

eligibility and would therefore not be the appropriate assessment instrument for this waiver. The LOF Form does contain some questions that might appear to be inappropriate due to an individual's cognitive capacity and age, but they are used to help determine whether an individual will or will not meet criteria for an ICF/MR. For example, if a young adult could not count to ten, that would demonstrate to the assessor that the individual may be dependent in task learning skills.

SUPPORTED EMPLOYMENT

Comment: One commenter felt that the requirement for a waiver recipient to demonstrate the need for assistance in paid employment was unnecessarily restrictive where the recipient may only be participating in volunteer work or is still in training.

Another commenter wanted to know if the IFDDS Waiver documentation requirement for lack of availability of supported employment services referred to an individual school system's services or was it based on the IDEA? The commenter also stated due to the fact that the DRS contract does not allow its vendors to receive a rate for supported employment lower than its contracted rate, these providers are not available to provide Medicaid-funded supported employment services.

An additional commenter noted that 12 VAC 30-120-754(2) should be revised to state recipient ineligibility for supported employment services through DRS or Special Education must be documented. As it is currently written, a recipient would have to be ineligible for all DRS services in order to receive DMAS funded supported employment services.

DMAS Response: Individuals who are "employed" but are not paid (e.g., volunteer work) can participate under supported employment as a component of prevocational services. The IFDDS Regulation and the IFDDS Waiver application will be revised to reflect prevocational services. Currently, these service providers bill for this service as a form of day support.

The required documentation to show a lack of availability of supported employment services refers to the IDEA and the Department of Rehabilitative Services.

During 2001, DMAS will be examining the current rate structure for services, including supported employment services. The workgroup will make recommendations on revising the rate structures of these services with the hopes of increasing provider participation.

The citation for 12 VAC 30-120-754(2) will be revised to reflect that documentation needs to be made of ineligibility for DRS funded supported employment services, not all DRS funded services.

ASSISTIVE TECHNOLOGY

Comment: One commenter expressed concern that the specialized computer adaptations and software that can be used by persons with developmental disabilities will not be able to be purchased because the current provider requirements are durable medical equipment providers. The commenter recommended changing the provider requirements.

DMAS Response: There are providers enrolled as durable medical equipment and supply providers who do provide these items in their inventories. There have been several IFDDS Waiver recipients who have requested this software and have found providers who will provide the software to them. Therefore, the provider requirements will not be changed.

FAMILY/CAREGIVER TRAINING

Comment: One commenter felt in 12 VAC 30-120-772 that the family/caregiver training service is too restrictive because providers must be Medicaid certified family/caregiver training providers.

DMAS Response: In order to provide a waiver service, DMAS must assure HCFA that providers of these services meet a set of established provider requirements. IFDDS Waiver workgroup members helped DMAS establish the provider training requirements for this service. This service requires individuals to provide documentation of appropriate licensure or certification as required for the specific professional field associated with the training area. These requirements do not specify that the providers have to have specific-disability training; rather, they are required to have demonstrated knowledge of the training topic and be enrolled as a provider with DMAS.

COMPANION CARE

Comment: One commenter noted in 12 VAC 30-120-776 that there seems to be a contradiction as to who would qualify for this service. One section says the services are appropriate "only when the recipient cannot be left alone at any time due to mental or severe physical incapacitation." The other section noted that is appropriate to receive services when the individual has "severe agitation and physically wandering behavior."

DMAS Response: The reference to the first section is for the general criteria for an individual to be eligible to receive these services. The second section of the regulation describes when companion services would be approved for a family member to sleep. The requirements are more restrictive because the companion would be providing services while someone else was in the home.

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

This entire regulation is new and varies substantially from the current emergency regulations.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.

This regulatory action will not have any negative effects on the institution of the family or family stability. It will not increase or decrease disposable family income or erode the marital commitment. It will not discourage economic self-sufficiency, self-pride, or the assumption of family responsibilities. The IFDDS Waiver will offer families the choice of keeping their loved ones at home and in the community rather than in an institutional setting. The IFDDS Waiver will also offer supportive services to families and caregivers, such as family and caregiver training, companion care, and respite care in an effort to ease their care giving burdens and prevent or delay institutional placement of their loved ones.