



Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) citation	12 VAC 30-120
Regulation title	Waivered services
Action title	Money Follows the Person Program Changes
Date this document prepared	

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an “emergency situation” as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The Administrative Process Act (Section 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a

regulation to take effect no later than 280 days from its effective date. This suggested emergency regulation meets the standard at *COV 2.2-4011(i)* as discussed below.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Waivered Services: Money Follows the Person Program Changes (12VAC 30-120-70, *et seq.*) and also authorize the initiation of the promulgation process provided for in § 2.2-4007. Item 302 HHH of the 2008 Appropriations Act directed DMAS to implement the Money Follows the Person program within 280 days of the Act.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

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.

As noted above, Item 302 HHH of the 2008 Appropriations Act provided as follows:

Contingent upon approval by the Centers for Medicare and Medicaid Services as part of the Money Follows the Person demonstration grant, the Department of Medical Assistance Services shall seek federal approval for necessary changes to home and community-based 1915(c) waivers to allow individuals transitioning from institutions to receive care in the community. The Department of Medical Assistance Services shall promulgate any necessary emergency regulations within 280 days or less from the enactment date of this act.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

This regulation is required in order to establish the regulatory structure for the successful implementation of the Money Follows the Person (MFP) Demonstration. This regulation must be promulgated and the regulations must be in effect in order to receive CMS approval to begin the MFP Demonstration in July 2008.

The purpose of the MFP Demonstration is to strengthen Virginia's long-term services and supports using available funds to "follow the person" by supporting individuals who choose to

transition from long-term care institutions into the community. The MFP Demonstration is one of the Governor's set priorities for community integration of persons who reside in institutions. This Initiative also reflects a strong collaborative approach with this Administration and the Legislature to coordinate and continually build upon rebalancing efforts of the Commonwealth's long-term support system (i.e., increasing the use of home- and community-based care services (HCBS) rather than institutional long-term care services). This collaborative approach has enabled the Commonwealth over the past several years to be resourceful in balancing the state's budget without cutting Medicaid long-term support services.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

The Demonstration's vision is to create a system of long-term services and supports that enables available funds to "follow the person" by supporting individuals who choose to transition from long-term care institutions into the community. This regulation implements changes to existing regulations in order to implement the new services being added to each Waiver program pursuant to MFP; new sections are also being added that address only those new services, such as Transition Coordinator and Transition Services, which are being added under the MFP grant.

Much of the preliminary work to develop the MFP regulatory language was completed by a regulatory review team of DMAS staff. Other individuals involved with the MFP Demonstration regulation include representatives from the Department of Mental Health, Mental Retardation and Substance Abuse Services, and key external stakeholders involved with the DMAS Waiver program population.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

These emergency regulations reflect the needed changes to the following five HCBS waivers to support individuals who choose to transition from long-term care institutions into the community. They are the Technology Assisted (Tech), HIV/AIDS, Elderly or Disabled with Consumer Direction (EDCD), Mental Retardation (MR) and Individual and Family Developmental Disabilities Support (IFDDS) Waivers.

The changes to these five waivers include: 1) adding the services of Personal Emergency Response System (PERS), Medication Monitoring, and Transition Services to the Tech Waiver; 2) adding the services of Transition Coordination, Environmental Modifications, Assistive Technology, and Transition Services to the EDCD Waiver; 3) adding the services of PERS and

Medication Monitoring, Environmental Modifications, Assistive Technology, Transition Services to the HIV/AIDS Waiver; and 4) adding Transition Services to the MR and IFDDS Waivers.

Two of these services, Transition Coordination and Transition Services, are new waiver services. Language has been developed based on CMS guidelines and a review of how other states define and utilize these services. In addition, existing waiver services (PERS, Medication Monitoring, Environmental Modifications and Assistive Technology) are being expanded to other waivers in an effort to facilitate the transition from institutional living to community living. The new services mentioned above are being added as follows: Transition Services is being added to the AIDS, EDCD, IFDDS, MR and Tech Waivers to provide one-time funding (up to \$5,000 per person, per lifetime) to assist with costs incurred by individuals who are transitioning into the community. Examples of expenses include rent and utility deposits and necessary furniture. One other service, Transition Coordination, is added to the EDCD Waiver to assist institutionalized transitioning into the EDCD Waiver because a case management service currently does not exist in this program. This service will be time-limited and the Coordinator will assist the individual up to three months prior to leaving the institutional setting and up to nine months following the individual's discharge into the community. All other HCBS waivers already have a case management service that can assist institutionalized individuals with transitioning into these programs.

Finally, this regulation addresses changes to units of service for provider billing purposes. DMAS is currently being directed by the federal Medicaid authority, the Centers for Medicare and Medicaid Services (CMS), to no longer use preset units of service for Medicaid Waiver reimbursement. DMAS is working with CMS to establish time-based billing for the DMAS fee schedule for Waiver services, and this is reflected in the MFP regulations.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

There are no alternatives to meeting the CMS requirements for the MFP Demonstration. If these regulatory changes are not made, CMS will not approve Virginia's MFP Demonstration program to begin in July 2008.

DMAS initially sought to combine the MFP changes with a consolidation of the Waiver program regulations. Based upon public input DMAS received regarding this approach, the Agency decided to move forward with the MFP as a freestanding regulatory package, and initiate the Waiver program regulatory consolidation at a later time. In addition, the Agency is still in the process of sorting out the logistics of another new service, Consumer-Directed Supported Employment. Initially DMAS intended to include this service as part of this emergency regulation, but due to concerns about the employment classification and tax status of consumer-

directed supported employment workers, the Agency is delaying the implementation of this new service pending resolution of several outstanding issues on this question.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

DMAS has already extensively involved the public in the development of this regulation, but will continue to seek comments on this action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. DMAS is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Jason Rachel, Policy & Research Division, 600 E. Broad St, Suite 1300, Richmond, VA 23219. Jason's phone number is 804-225-2984, and his fax is 804-786-1680. His e-mail address is: Jason.Rachel@dmas.virginia.gov

Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period. Public meetings will be held and notice of the meeting will be available in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

DMAS is using the participatory approach to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). Any persons who want to be involved in the ongoing public meetings on this issue are encouraged to attend the public meetings mentioned above. The

primary function of these meetings is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential 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; or 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.