



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Dept. of Medical Assistance Services 12 VAC 30
VAC Chapter Number:	12VAC30-110
Regulation Title:	Married and Institutionalized Individuals Eligibility and Patient Pay
Action Title:	Hardship Rule
Date:	7/16/01

This information is required pursuant 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*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This action will establish a more precise definition of hardship to be used in determining Medicaid eligibility for institutionalized individuals who have spouses living in the community.

This regulation is essential to protect the health and welfare of citizens and for the efficient and economical performance of an important governmental function. This revision to existing regulations is necessary because the existing regulations were promulgated in 1990 and have not been revised since that time. During the last decade, a number of cases have arisen in which circumstances have pointed to the importance of a carefully crafted hardship provision.

The regulations governing the Medicaid eligibility of married institutionalized individuals are essential to the public's health and welfare. Many elderly and disabled Virginians are unable to pay the high cost of long-term care services without assistance. In addition, when one spouse of a couple needs long-term care services, the other spouse's financial security may be seriously threatened. These regulations specify how local department of social services' eligibility workers must evaluate the income and resources owned by couples when one spouse needs long-term care.

Federal and state laws require that a portion of the couple's resources be reserved for the support of the community spouse of an institutionalized individual. Failure to correctly allot a portion of the couple's resources to the community spouse could result in the impoverishment of the community spouse and prevent him or her from having sufficient income and resources to meet basic health and maintenance needs. Because individual circumstances may present unique and compelling situations which cannot be equitably addressed by regulations, the application of a hardship provision is needed to avoid suffering and deprivation of life sustaining medical care.

Local social service agencies now have to consider hardship claims made by applicants for medical assistance and these regulations will provide clearer and more specific guidance toward that end.

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 must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed 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.

Federal law at §1924(c)(3)(C) provides that an institutionalized spouse shall not be ineligible for medical assistance because resources are available for the costs of care when the state determines that denial of eligibility would work an undue hardship.

The Governor approved the initiation of the Article 2 process for this issue on May 4, 2001. No comments were received during the comment period for the Notice of Intended Regulatory Action.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed 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.

This proposal amends the regulations governing Medicaid eligibility for married institutionalized individuals who have a community spouse to set forth the instances in which the Commonwealth will determine that a Medicaid applicant will be considered to face an undue hardship if Medicaid eligibility is denied. This revision to existing regulations is necessary because the existing hardship regulation is vague and difficult to apply.

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 providing detail of the regulatory action's changes.

Many elderly and disabled Virginians are unable to pay the high cost of long-term care services without assistance. In addition, when one spouse of a couple needs long-term care services, the other spouse's financial security may be seriously threatened. These regulations specify how local department of social services' eligibility workers must evaluate the income and resources owned by couples when one spouse needs long-term care.

Federal and state laws require that a portion of the couple's resources be reserved for the support of the community spouse of an institutionalized individual. Failure to correctly allot a portion of the couple's resources to the community spouse could result in the impoverishment of the community spouse and prevent him or her from having sufficient income and resources to meet basic health and maintenance needs. Because individual circumstances may present unique and compelling situations which cannot be equitably addressed by other regulations, the application of a hardship provision is needed to avoid suffering and deprivation of life sustaining medical care.

Local social service agencies now have to consider hardship claims made by applicants for medical assistance and these regulations will provide clearer and more specific guidance toward that end.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.

Since the Medicaid eligibility regulations governing determinations of eligibility of married institutionalized individuals first became effective in 1990, the Department has been reviewing the performance of local eligibility workers in processing applications for Medicaid. Local agencies have referred cases of unusual complexity or cases in which hardship is alleged to the Department for review and consultation. During this time, it has become apparent that there is a need for a specific rule by which allegations of undue hardship can be measured.

The Department desires to provide relief in instances in which genuine hardship may occur but not make the Medicaid program subject to manipulation or abuse by frivolous or unsubstantiated claims of hardship by individuals who desire to shift responsibility for the cost of expensive long-term care from private payment to public assistance. This proposed regulation is the result of careful evaluation of the Department's experience over the past ten years. In addition, the proposed regulation is being submitted for public comment so that additional issues and alternatives may be considered.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

The regulations are not expected to have a fiscal impact. The clarifications are intended to avoid costs, which would be incurred if the present vague regulations were to be misapplied. The clarified regulation reflects current practice. There are no localities that are uniquely affected by these regulations as they apply statewide.

The Department of Medical Assistance Services is established under the authority of Title 32.1, Chapter 10, of the Code of Virginia and submits, amends and implements the State Plan for Medical Assistance under the authority of Title XIX of the Social Security Act (42 U.S.C. §§ 1396 through 1396v). The Virginia Medicaid Program is funded with both federal and state funds. The current federal funding participation (FFP) for medical assistance expenditures is 51.85% effective October 1, 2000.

This regulation clarifies requirements already in effect. Therefore, no new costs are anticipated. There is no expected impact on local entities.

Detail of Changes

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 cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

12VAC30-110-720 The definition of undue hardship is amended to remove the requirement that an applicant must have exhausted all legal means to access a resource. This requirement is confusing and difficult to apply. The definition is amended solely to define when an applicant's circumstances can be said to reach the level of undue hardship.

12VAC30-110-831 A regulation is added to provide an alternative approach that may be followed when for some reason beyond the couple's control, the actual value of the resources the couple owned on the first day of the first continuous period of institutionalization cannot be verified because the records no longer exist or because they cannot be obtained. For example, during bank mergers, old records of deposits and balances in the far past may no longer be maintained by the new banking entity. This regulation permits the substitution of the spousal resource standard for the spousal share. This approach ensures that an amount of the couple's resources may be protected for the support of the community spouse even though a resource assessment cannot be completed. It prevents ineligibility due to circumstances over which the couple has no control.

A regulation is added to clarify that an applicant may not claim that he has an undue hardship simply because he does not know the current status of his marriage. It should be the responsibility of any individual who knows that he has been married to determine his marital status rather than ask the Commonwealth to grant him public assistance as if he had no spouse.

A regulation has been added to clarify that an applicant cannot claim undue hardship in instances in which his community spouse cannot be located or when his community spouse fails or refuses to disclose or verify the value of resources he owns. An individual spouse has legal recourse through family and domestic relations court to seek support from his spouse. It is the applicant's responsibility to avail himself of such legal recourse before requesting public assistance. In cases in which a spouse has abandoned him and cannot be located, an individual still has legal recourse to resolve the status of his marriage. These legal recourses should be utilized before public assistance is sought.

Alternatives

Please describe the specific 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.

Since the Medicaid eligibility regulations governing determinations of eligibility of married institutionalized individuals first became effective in 1990, the Department has been reviewing the performance of local eligibility workers in processing applications for Medicaid. Local agencies have referred cases of unusual complexity or cases in which hardship is alleged to the Department for review and consultation. During this time, it has become apparent that there is a need for a specific rule by which the local eligibility worker can handle allegations of undue hardship. The Department desires to provide relief in instances in which genuine hardship may occur but not make the Medicaid program subject to manipulation or abuse by frivolous or unsubstantiated claims of hardship by individuals who desire to shift responsibility for the cost of expensive long-term care from the private payment to public assistance. This proposed regulation is the result of careful evaluation of the Department's experience over the past ten years. In addition, the proposed regulation is being submitted for public comment so that additional issues and alternatives may be considered.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

No comments were received during the comment period for the Notice of Intended Regulatory Action which ended July 5th.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

DMAS has examined these regulations and, in so far as is possible, has ensured that they are clearly written and easily understandable by the individuals and entities affected.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable

regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The regular review of this regulation will occur in conjunction with the review of all agency regulations according to the schedule approved by the Secretary of Health and Human Resources under Executive Order Twenty-five (98).

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential 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.

Many elderly and disabled Virginians are unable to pay the high cost of long-term care services without assistance. In addition, when one spouse of a couple needs long-term care services, the other spouse's financial security may be seriously threatened. These regulations specify how local eligibility workers must evaluate the income and resources owned by couples when one spouse needs long-term care.

In developing these regulations the DMAS has reviewed the impact that the regulations will have on families and their ability to remain self-sufficient and maintain personal responsibility. The regulations will encourage self-sufficiency and personal responsibility by ensuring that individuals use their resources to support themselves in their old age rather than shifting to the Commonwealth the responsibility to provide long-term care services.

On the other hand, the regulations will ensure that spouses are not reduced to poverty by the illness or incapacity of the institutionalized individuals. Sometimes, couples have been forced to consider divorce in order to avoid impoverishment when a spouse's health fails and he or she requires expensive long-term care. This regulation will reduce the hardship experienced by the community spouse and prevent the desperation that could erode the marital commitment. The regulations will protect a portion of the couple's income and resources for support of the community spouse.