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

<b>Agency name</b>	DEPT. OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation</b>	12 VAC 30-120-1500 through 12VAC30-120-1599
<b>Regulation title</b>	Day Support Waiver for Individuals with Mental Retardation (MR)
<b>Action title</b>	Regulations to establish a day support waiver for individuals with Mental Retardation.
<b>Document preparation date</b>	

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 review ([www.townhall.state.va.us/dpbpages/apaintro.htm#excreview](http://www.townhall.state.va.us/dpbpages/apaintro.htm#excreview)) and the Virginia Registrar of Regulations ([legis.state.va.us/codecomm/register/regindex.htm](http://legis.state.va.us/codecomm/register/regindex.htm)), pursuant to the Virginia Administrative Process Act ([www.townhall.state.va.us/dpbpages/dpb\\_apa.htm](http://www.townhall.state.va.us/dpbpages/dpb_apa.htm)), Executive Orders 21 (2002) and 58 (1999) ([www.governor.state.va.us/Press\\_Policy/Executive\\_Orders/EOHome.html](http://www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html)), and the *Virginia Register Form, Style, and Procedure Manual* ([http://legis.state.va.us/codecomm/register/download/styl8\\_95.rtf](http://legis.state.va.us/codecomm/register/download/styl8_95.rtf)).

### Preamble

*The APA (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.*

- 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(ii)* as discussed below.

The Department of Medical Assistance Services was directed in Chapter 951 of the *2005 Acts of the Assembly*, Item 326 LLL to develop a Day Support Waiver for persons with mental retardation:

“Out of this appropriation, \$2,918,700 from the general fund and \$2,918,700 from nongeneral funds the second year shall be provided for 300 slots for a 1915(c) Medicaid waiver for day support services, to include a continuum of day services, including day support and prevocational services. Contingent upon approval by the Centers for Medicare and Medicaid Services (CMS), the Department of Medical Assistance Services (DMAS) is directed to develop such waiver in coordination with the Department of Mental Health, Mental Retardation, and Substance Abuse Services, and affected constituents. The Department shall have the authority to enact emergency regulations under [§2.2-4011](#) of the Administrative Process Act to effect this provision.”

The Governor is hereby requested to approve this agency’s adoption of the emergency regulations entitled Waivered Services: Day Support Waiver for Individuals with Mental Retardation and also authorize the initiation of the permanent rule promulgation process provided for in § 2.2-4007 of the *Code of Virginia*.

### 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.*

The purpose of this action is to establish a new program, the Day Support Waiver for Individuals with Mental Retardation (“Day Support Waiver”) to provide day support and prevocational services for individuals who are waiting to receive services under the Mental Retardation Waiver (“MR Waiver”). In 2004 there were over 1100 individuals on the urgent waiting list and over 1300 individuals on the non-urgent waiting list for the MR Waiver. Individuals in the Day Support Waiver program will receive services until they are no longer eligible for Day Support Waiver services.

### 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, and § 1915 (c) of the *Social Security Act* provides for home and community based waiver programs such as the Day Support Waiver for Individuals with Mental Retardation.

## Substance

*Please detail any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons why the regulation is essential to protect the health, safety, or welfare of Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.*

New regulations containing the policy and procedures for the Day Support Waiver were developed in consultation with members of the General Assembly and in collaboration with DMHMRSAS and the MR Waiver Advisory Committee. The regulations are contained in six new sections under 12VAC30-120, Department of Medical Assistance Services, Waivered Services. The six sections are: 12VAC30-120-1500 which contains definitions of Day Support Waiver terms; 12VAC30-120-1510 which contains general coverage and requirements for Day Support Waiver services; 12VAC30-120-1520 which outlines individual eligibility requirements; 12VAC30-120-1530 which defines general requirements for home and community-based participating providers; 12VAC30-120-1540 which defines participation standards for home and community-based waiver services participating providers; and 12VAC30-120-1550 which further defines the covered services and outlines requirements for providers of these services.

This Waiver covers only those individuals who have a diagnosis of mental retardation. Currently, individuals can pay privately for services but few can afford the cost. Localities are also paying for day support but funding is limited. The services offered are those that are appropriate and necessary to maintain the individual in the community. Day support services include training, assistance, and specialized supervision in the acquisition, retention, or improvement of self-help, socialization, and adaptive skills, which typically take place outside the home in which the individual resides. Day support services shall focus on enabling the individual to attain or maintain his maximum functional level. Prevocational services are those services aimed at preparing an individual for paid or unpaid employment. They do not include activities that are specifically job-task oriented but focus on concepts such as accepting supervision, attendance, task completion, problem solving and safety. Compensation, if provided, is less than 50% of the minimum wage.

The regulations are necessary to have operational authority for the waiver which is projected to start July 1, 2005. The effective date is contingent upon CMS approval of Virginia's application for the waiver.

## 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.*

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These regulations were developed by DMAS in concert with a MR working group that included parents of children served by the MR Waiver. Many of the choices made regarding various aspects of this program were based upon input by this recipient group.

### Family impact

*Please assess the impact of the emergency regulatory action on the institution of the family and family stability.*

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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 increase disposable family income by providing services often paid for by families. The MR Day Support Waiver will have a positive impact on families. By providing day support services, the waiver will help to maintain family stability and reduce the need for institutional placement.