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Final Regulation
Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-120-1700 et seq.
Regulation title(s)	Waiver Services: Home and Community-Based Services for Technology Assisted Waiver
Action title	2015 Technology Assisted Waiver Updates
Date this document prepared	January 5, 2017

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The purpose of this action is to update the Department of Medical Assistance Services' (DMAS') Technology Assisted Waiver (TW) regulations (12 VAC 30-120-1700 et seq.) to accommodate changes in the home healthcare industry and provide additional flexibility to families and provider agencies when attempting to staff authorized skilled private duty nursing (PDN) hours. These options are expected to increase the availability of adequately trained skilled nurses who provide services to this medically complex population.

Recommended changes to the regulations include: (i) modifying the staff experience requirement to substitute a quality training program for nurses in place of the current six months of clinical experience; (ii) permitting families greater flexibility to use their authorized private

duty nursing hours over the span of a week rather than limiting them to 16 hours of private duty nursing services in a 24-hour period; and (iii) removing the current option of making up or rescheduling missed nursing hours.

The only changes in this final stage are technical: (i) in 12 VAC 30-120-1710(B)(5)(b) the original 180 days is changing to 181 days to prevent internal conflict with the time period in 12 VAC 30-120-1710(B)(5)(a) and (ii) in 12 VAC 30-120-1720(B)(1)(c)(1) the correct name of a form is added.

Statement of final agency action

Please provide a statement of the final action taken by the agency including:1) the date the action was taken;2) the name of the agency taking the action; and 3) the title of the regulation.

I hereby approve the foregoing Regulatory Review Summary with the attached amended regulations for *2015 Technology Assisted Waiver Updates* (12 VAC 30-120-1700 et seq.) and adopt the action stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012, of the Administrative Process Act.

__1/24/2017_____ _/s/ Cynthia B. Jones_____

Date Cynthia B. Jones, Director

Dept. of Medical Assistance Services

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Section 1915(c) of the *Social Security Act* permits states to cover an array of home and community-based services that enable qualifying individuals to live in their communities thereby avoiding institutionalization. These community services are eligible for federal matching funds. The Technology Assisted Waiver (TW) is one of DMAS' programs operating under this federal authority.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The Technology Waiver (TW) serves individuals who require some form of mechanical device, such as ventilators, to sustain life. The waiver regulations require updating to ensure that they reflect best health care practices. These changes are expected to provide greater access to waiver services while ensuring the health, safety, and welfare of all individuals receiving TW services.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both.

The Medicaid waiver regulations that are affected by this action are: 12VAC30-120-1710, 12VAC30-120-1720, 12VAC30-120-1730 and 12VAC30-120-1740.

CURRENT POLICY (1)

The TW currently requires all nurses (Registered Nurses (RNs) and Licensed Practical Nurses (LPNs), who are reimbursed for rendering skilled private duty nursing services to TW individuals, have at least six months of clinical experience that is comparable to the care needs of the assigned TW individuals. This experience must be acquired prior to providing skilled private duty nursing services or skilled private duty respite services for Medicaid reimbursement in this waiver program.

ISSUES

Nationally, as well as in Virginia, there is a nursing shortage. TW providers, such as home health agencies and nursing agencies, are having difficulty finding nurses with 6 months of specialized clinical experience in the complex care required by Tech Waiver individuals (ventilators, tracheostomies, nasogastric tubes, etc.). As more individuals with complex medical needs choose to remain in their communities, the shortage of experienced complex care nurses who can meet these individuals' service needs is further strained.

In part, this nursing shortage has occurred as a result of advances in the care of ventilator-dependent individuals who live in their communities. Individuals choosing to receive care in communities (rather than in institutions) has reduced the number of nursing facilities (NFs) and NF specialized care ventilator units where nurses may receive training and experience. Additionally, acute care hospitals have shifted many of the responsibilities for direct respiratory care and tracheostomy/ventilator maintenance from staff nurses to respiratory therapists thereby further reducing opportunities for nurses to acquire experience.

CURRENT POLICY (2)

DMAS currently requires that families provide at least 8 hours of care in every 24-hour day to TW individuals. In the past, there have been concerns about the waiver individuals' health and safety as well as these individuals' care costs exceeding, in the aggregate, institutional costs. Should this happen, the federal funding agency, the Centers for Medicare and Medicaid Services (CMS), will withdraw federal funding for this community waiver resulting in many of these waiver individuals being moved into institutions.

ISSUES

Families have stated that, while remaining within their weekly authorized number of private duty nursing hours, it should not matter when the nursing hours are used: whether the hours are consolidated over just a few days in the week (assuming that home health/nursing agencies can provide enough nursing staff) or spread out over the entire week. These families and caregivers have argued that it is difficult for them to find employment when they cannot commit to regular, consistent work schedules for their employers.

In addition, CMS is generally requiring Medicaid programs to have person-centered approaches for all service delivery. DMAS believes that keeping this waiver's expenditures below the institutional care costs can be maintained while permitting these individuals and their families greater flexibility in when authorized skilled private duty nursing services are used.

CURRENT POLICY (3)

When a skilled private duty nurse cancels their scheduled work shift (due to illness or family issues) with the TW individual, it is considered to be 'missed' nursing hours. DMAS currently allows TW individuals to "make up" missed authorized private duty nursing (PDN) hours within the same week (Sunday through Saturday) of the missed shift. The total number of provided PDN hours and made up hours cannot exceed 16 hours per day.

ISSUES

With the change in the policy allowing families greater flexibility in scheduling their authorized hours per week, a policy to make up missed hours is no longer required. If previously scheduled hours are not covered by the skilled private duty nurse, the family still has those hours available within their weekly total authorized hours to schedule on another day during that same week. This rescheduling of the “missed" coverage hours falls within their ability to “flex” their schedule and would not be considered make-up.

RECOMMENDATIONS

(1) DMAS recommends permitting providers to employ nurses (both RNs and LPNs) who have either six months of related clinical experience or who have completed a relevant provider training program. The regulations stipulate the required elements of the training. The trainer may be either a licensed Registered Nurse or a licensed Respiratory Therapist who has at least 6 months hands-on experience in the area of care to be provided (such as ventilator, tracheostomy, peg tube, nasogastric tube, etc.). A satisfactory training program will include classroom time as well as direct hands-on demonstration of skills by trainees. Training must include the following subject areas related to the care to be provided: (i) human anatomy and physiology; (ii) frequently used medications for this population of individuals; (iii) emergency management; and, (iv) operation of equipment. The provider must ensure competency of staff.

Allowing providers to substitute a quality/relevant nurse training program in lieu of the current six months of clinical experience is expected to increase the pool of potential nurses (RNs/LPNs) eligible to provide TW services.

(2) DMAS recommends changing the policy that families/caregivers provide at least 8 hours of care in a 24-hour day to permit them to use DMAS-approved hours across a week. Such flexibility allows TW individuals' schedules to include longer work days to accommodate physician appointments, community activities, caregiver work schedules, etc. A sample schedule for a TW individual that allows caregiver coverage for work but also extended hours for community involvement may be, for example:

Week	Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Week Total
Agency	8	16	20	16	20	16	16	112
Family	16	8	4	8	4	8	8	56

(3) DMAS recommends deleting the current wording related to make up or re-scheduling of missed hours as it is no longer germane.

These recommendations do not expand the existing service coverage limits for skilled private duty nursing or private duty respite services.

Other recommended text changes update language to improve readability and comprehension.

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

The advantages to the public include allowing the Technology Waiver program to accommodate changes in the industry and provide additional options to agencies for staffing of skilled private duty nursing/respite services while preserving the health, safety and welfare of individuals who receive TW waiver services. In response to providers' requests, DMAS is considering permitting the substitution of training for private duty nurses in place of clinical experience. In response to families' requests, DMAS is also considering permitting families to use their authorized private duty nursing hours over the span of a week rather than limiting them to 16 hours of private duty nursing services in a 24-hour period.

There are no disadvantages to the agency, the public, or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no requirements more restrictive than existing federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities that are uniquely affected by this action as these changes will apply statewide.

Family Impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; nor encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's

children and/or elderly parents. It does not strengthen or erode the marital commitment, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.

Changes made since the proposed stage

*Please list all changes that made to the text of the proposed regulation and the rationale for the changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. *Please put an asterisk next to any substantive changes.*

Section number	Requirement at proposed stage	What has changed	Rationale for change
12VAC30-120-1710(B)(5)(b)	Screening timeframes were broken into categories, including zero to 180 days and 180 days to 12 months.	The overlap at 180 days has been removed, so the timeframes are now zero to 180 days and 181 days to 12 months.`	To clarify and avoid conflict at 180 days.
12VAC30-120-1720(B)(1)(c)(1)	The old form name was used.	The new form name and number were added.	To update the form name and number.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

DMAS submitted its proposed stage action on October 7, 2016, to the Registrar of Regulations for publication in the October 31, 2016, *Virginia Register* (VR 33:5) for their comment period from October 31st through December 30, 2016. No comments were received by the agency.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
12VAC30-120-1710 A9		Caregivers are responsible for providing care for the TW individual a minimum	Change: Change requirement of caregivers to provide at least 8 hours of care per day to authorization of skilled

		of 8 hours per 24 hour period as well as any hours not staffed by the nursing agency	PDN hours on a weekly basis. Caregivers will continue to provide care during any hours not authorized or staffed by the nursing agency. **Likely impact:** will provide for increased flexibility in usage of nursing hours by TW individual.
12VAC30-120-1710B5		Time frames for PAS screenings not included in regulations.	Change: Adds information on how long a PAS is valid, as well as requirements for breaks in service. **Likely impact:** Greater clarity for providers on the timeframes for PAS screenings.
12VAC30-120-1720 B1c		TW individuals may not have a Plan of Care (POC) or multiple POCs that authorize more than 16 hours of PDN in a 24 hour period per household	Change: Remove maximum of 16 hours of skilled PDN per 24-hour period and add maximum coverage of 112 hours of skilled PDN per week. **Likely impact:** TW individuals/ families will be able to coordinate the usage of their approved weekly skilled PDN hours with their nursing agency without being limited to a maximum number of hours per day.
12VAC30-120-1720 B1c(2)		TW pediatric individuals' authorized hours per day of skilled PDN is determined by their total on the Pediatric Criteria (DMAS-109) form and LOC designation.	Change: Pediatric individuals' hours per week will be determined by their total score on the DMAS-109 form and their LOC designation. **Likely impact:** This will provide pediatric TW individuals/caregivers greater flexibility and control over usage of their skilled PDN hours.
12VAC30-120-1720 B1c(3)(a)(b)(c)		TW pediatric individuals' maximum authorized hours per day of skilled PDN are based on 3 levels: (a) 50-56 points = 10 hours per day (b) 57-79 points = 12 hours per day (c) 80 points or greater = 16 hours per day	Change: Total points tallied on the Pediatric Criteria Form (DMAS 109) will determine approved hours per week instead of hours /day. (a) 50-56 points = 70 hours per week (b) 57-79 points = 84 hours per week (c) 80 points or greater = 112 hours per week

			Likely impact: This will provide TW individuals/caregivers with greater flexibility and control over usage of their skilled PDN hours.
12VAC30-120-1720 B1c(4)		Minor TW individuals may be authorized for up to 24 hours/day of PDN during the first 15 calendar days following initial admission. After this initial 15 day period, PDN may be reimbursed up to a maximum of 16 hours per 24-hour period per household based on the total score on the DMAS 109 and cost effectiveness.	Change: Following the initial 15 calendar day period, ongoing hours for minor individuals will be authorized up to a maximum of 112 hours per week based on their total on the DMAS-109 form and cost effectiveness. **Likely impact:** Change made to continue consistency of skilled PDN authorizations per week instead of per day.
12VAC30-120-1720 B1c(5)		Missed hours may be made up within the same week of the scheduled missed shift but the total of regularly scheduled hours and make-up hours cannot exceed 16 per day	Change: Delete wording related to make up of missed hours. **Likely impact:** The flexibility provided by authorizing hours per week will allow missed hours to be used at a later time within the same week as long as the total weekly authorization is not exceeded.
12VAC30-120-1720 B1c(6)		For TW adult individuals, whether living separately or in a congregate setting, skilled PDN may be reimbursed for a maximum of 16 hours/24 hour period per household based on the individuals' technology, medical justification, and cost effectiveness.	Change: For adult individuals, whether living separately or in a congregate setting, skilled PDN shall be reimbursed for up to 112 hours per week per TW individual in the household based on medical justification and cost effectiveness. **Likely impact:** Allows greater flexibility for TW adults to schedule nursing hours to meet their needs
12VAC30-120-1720 B1f(3)		In a congregate setting, the primary caregiver shall be shared and must provide at least 8 hours of care per 24 hours period as well as when nursing coverage is not available.	Change: Remove requirement of caregiver to provide at least 8 hours of care per 24 hour period. **Likely impact:** The requirement will be for caregivers to provide care whenever an agency nurse is not in the home, not a required number of hours per day.

12VAC30-120-1720 B5d(2)		The total number of combined skilled PDN and personal care hours reimbursed by DMAS in a 24-hour period cannot exceed 16.	Change: The total number of combined skilled PDN and personal care hours reimbursed by DMAS shall not exceed 112 hours per week. **Likely impact:** None, wording is consistent with proposed change to authorize skilled PDN hours per week
12VAC30-120-1720B6a and c		Transition services are referenced in relation to the Money Follows the Person program.	Change: Transition services are not exclusive to MFP and some language is stricken to clarify this. **Likely impact:** None. Wording change only.
12 VAC 30-120-1720 C 7		Individuals who are hospitalized for more than 30 days must be discharged from the waiver per federal Medicaid eligibility rule. They must be re-determined as meeting the federal income and resource eligibility standards before being re-admitted to waiver services.	This same limit appears in 1710 B 5 in the individual eligibility section. This limit is not a change over existing and long-standing Medicaid policy. **Likely impact:** None. Wording change only.
12VAC30-120-1730 A27c-d		c. Nurses providing skilled PDN must be validly licensed to practice nursing in the Commonwealth and have at least 6 months related clinical experience. LPN's shall be under the direct supervision of a RN. d. RN supervisors shall be licensed to practice nursing in the Commonwealth and have at least one year of related clinical nursing experience	Change: Current section A27c-d is revised to be A27c-f. Option of provider training in lieu of experience is added with training elements required by DMAS. c. RNs and LPNs providing skilled PDN shall be licensed to practice nursing in the Commonwealth. LPNs must be directly supervised by an RN. d. RNs and LPNs providing skilled PDN must have at least six months of related clinical experience **or** complete a provider training program related to the care and technology needs of the TW individual. e. Training programs established by the provider must include at a minimum the following elements: (1) Trainer must have at least 6-

			months hands on experience in area they are training (2) Training must include classroom time and hands on demonstration of skills mastery by the trainee. (3) Training program must include the following subject areas: (a) Human anatomy and physiology (b) Frequently used medications (c) Emergency management (d) Operation of Equipment (4) Providers must assure competency of nurses prior to assignment to a TW individual. Competency documentation must be kept in personnel record. f. RN supervisor shall be licensed to practice nursing in the Commonwealth and have at least one year of related clinical nursing experience **Likely impact:** Allowing providers to establish training courses for nurses who do not meet TW's six months experience requirement will increase the availability of knowledgeable nurses to be employed for TW cases.
12VAC30-120-1740 B4		Providers must employ or subcontract with and supervise RNs and LPNs who are currently licensed to practice nursing in the Commonwealth. Prior to assignment to TW individuals these nurses must have at least six months of related clinical nursing experience.	Change: Prior to assignment to TW individuals, RNs and LPNs must have at least six months of related clinical nursing experience **or** complete a provider training program related to the care of the TW individual as defined in 12VAC30-120-1730 A27e. Providers are responsible for assuring job skills mastery and competency of nurses assigned to TW individuals. **Likely impact:** Increases availability of knowledgeable, trained nurses for TW individuals. Maintains consistent wording of proposed change throughout regulations.

Changes made between proposed and final stage:

Section number	Requirement at proposed stage	What has changed	Rationale for change
12VAC30-120-1710(B)(5)(b)	Screening timeframes were broken into categories, including zero to 180 days and 180 days to 12 months.	The overlap at 180 days has been removed, so the timeframes are now zero to 180 days and 181 days to 12 months.`	To clarify and avoid conflict at 180 days.
12VAC30-120-1720(B)(1)(c)(1)	The old form name was used.	The new form name and number were added.	To update the form name and number.