Emergency Regulation
Agency Background Document

Agency Name:	Dept. of Medical Assistance Services; 12 VAC 30
VAC Chapter Number:	Chapter 120
Regulation Title:	Community Based Care for Individuals with Mental Retardation
Action Title:	MR Waiver
Date:	August 28, 2001; ACTION NEEDED BY SEPTEMBER 17

Section 9-6.14:4.1(C)(5) of the Administrative Process Act allows for the adoption of emergency regulations. Please refer to the APA, Executive Order Twenty-Four (98), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the emergency regulation submission package.

Emergency Preamble

Please provide a statement that the emergency regulation is necessary and provide detail of the nature of the emergency. Section 9-6.14:4.1(C)(5) of the Administrative Process Act states that an "emergency situation" means: (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. The statement should also identify that the regulation is not otherwise exempt under the provisions of § 9-6.14:4.1(C)(4).
Please include a brief summary of the emergency action. There is no need to state each provision or amendment.

The Code § 9-6.14:4.1(C)(5) provides for regulations which an agency finds are necessitated by an emergency situation. To enable the Director, in lieu of the Board of Medical Assistance Services, to comply with programmatic changes mandated by the General Assembly and the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration), he must adopt these changes as an emergency regulation. This issue qualifies as an emergency regulation as provided for in § 9-6.14:4.1(C)(5)(i), because it concerns an imminent threat to public health or safety. If these regulatory changes are not made, DMAS will be unable to proceed with securing federal approval of the parallel waiver changes. Such loss of federal approval of the waiver, and subsequent loss of the related federal funding, would result in the termination of these services to the individuals who have become dependent on them in order

to avoid institutionalization. As such, this regulation may be adopted without public comment with the prior approval of the Governor.

Since this emergency regulation will be effective for no more than 12 months and the Director wishes to continue regulating the subject entities, the Department is initiating the Administrative Process Act Article 2 procedures by requesting approval to submit its Notice of Intended Regulatory Action.

This action is needed to allow for regulations for the new Mental Retardation (MR) waiver and to address the following concerns: i) to add coverage of consumer-directed personal attendant and respite services (presently only agency-directed personal attendant and respite services are covered); ii) to add new coverage of personal emergency response systems; iii) to add back the prevocational service that was deleted in 1994; iv) to increase the work allowance for individuals on this waiver pursuant to the 2000 Appropriation Act; and, v) to address the Centers for Medicare and Medicaid (CMS) (formerly HCFA) concerns about the health and welfare of waiver recipients.

Basis

Please identify the state and/or federal source of legal authority to promulgate the emergency regulation. The discussion of this emergency statutory authority should: 1) describe its scope; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. Full citations of legal authority and web site addresses, if available for locating the text of the cited authority, should be provided.

Please provide a statement that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the emergency regulation and that it comports with applicable state and/or federal law.

DMAS' original home and community based care waiver for individuals with Mental Retardation first became effective in 1990. Since that time, HCFA (now CMS), has granted successive renewal approvals. In the summer of 1999, HCFA conducted an audit review of Virginia's waiver and cited numerous problems that the Commonwealth was required to address before further waiver approval would be granted. Loss of federal approval, and the concomitant loss of federal funding dollars, would mean the re-institutionalization of the individuals who have been served in the community through these waiver services. For those individuals who could be expected to refuse to enter an institution, it would mean serious threats to their health, safety, and welfare as well as significant disruptions to their families and support systems.

CMS' concerns addressed issues of health and welfare of the waiver recipients as follows:

Substance

Please detail any changes, other than strictly editorial changes, that would be implemented. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Please provide a cross-walk which includes citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes. The statement should set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of Virginians. The statement should also delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

The Governor announced in October, 2000, that the Commonwealth would develop a new MR Waiver to replace the waiver that is currently in effect. Consequently, the Secretary of Health and Human Resources appointed an MR Waiver Task Force to advise DMAS on the development of this new waiver.

The MR Waiver Task Force is comprised of family members and consumers, as well as, staff of DMAS, DMHMRSAS, and other state agencies and advocacy groups. The work of this Task Force resulted in a new waiver application to CMS on April 30, 2001, for which federal approval is expected to be effective September 17, 2001. The recommended changes are enumerated as follows:

i) Personal care and respite services, covered in the current MR waiver, are now offered only by personal care agencies. For a variety of reasons, it has become difficult for such agencies to provide these needed services to waiver recipients. As a result, many recipients who need personal and respite services are not receiving them at risk to their personal welfare, leaving such recipients at increased risk for institutionalization in Intermediate Care Facilities for the Mentally Retarded (ICF/MR). The Task Force recommended that caregivers be permitted to hire the needed attendants themselves, thereby making services more readily available. Due to the current success of this care model in the Consumer-Directed Personal Assistant Services and the Developmentally Disabled waiver programs, DMAS supports this Task Force recommendation.

ii) The increased work allowance for waiver recipients, mandated for implementation by the 2000 General Assembly in the 2000 Acts of Assembly, Item 319 #24c, is also contained in these emergency regulations. This provision permits those waiver recipients who are capable of paid employment to retain more of their earnings, rather than having to contribute more to their costs of care, to defray some of the costs of such employment (clothing, transportation, food expenses, etc.) Employment of such disabled individuals greatly enhances self esteem and generally contributes to their overall sense of well being.

iii) The additional coverage of personal emergency response systems (to promote improved safety in situations of reduced supervision in order to encourage community integration consistent with the federal *Americans with Disabilities Act*), enhanced utilization review procedures, and the change in licensure of group homes (also known as Adult Living Facilities (ALFs)) from licensure by the Department of Social Services to the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) are the result of the MR waiver review by CMS and recent conversations with CMS. CMS has clearly indicated that the new waiver would not be approved unless these group home providers' licensure status is changed by the Commonwealth.

DMAS has proposed to CMS in its waiver application that these affected ALFs be required to initiate the DMHMRSAS licensing process effective with the date of these emergency regulations. Without these regulations, DMAS lacks the regulatory authority to require this action by these providers. This new licensing action is to be complete within one year from its initiation in order for these providers to continue to receive Medicaid reimbursement for these waiver individuals. ALFs failing to secure this new licensing within this time period will lose its provider agreement with DMAS and the affected residents will be moved to other facilities.

Alternatives

Please describe the specific alternatives that were considered and the rationale used by the agency to select the least burdensome or intrusive method to meet the essential purpose of the action.

Consumer direction of personal attendant and respite care services and the personal emergency response systems are the least intrusive methods of providing these services under the MR waiver. Because of the federal health and welfare concerns, DMAS is not permitted to continue to offer services and to conduct

utilization reviews in the previous manner. DMAS is faced with changing the way services are provided and monitored or not having the federal authority (and dollars) to provide the waiver services at all.

To date, the Commonwealth has been very successful in serving people in the community as opposed to institutions, at less than half the institutional cost per person. Currently, far more people are receiving services from the waiver than are in institutions. Indeed, the community programs have been so successful that the Commonwealth does not even have the bed space that would be required were all of the waiver program recipients to be institutionalized. With over 5,000 recipients depending on the MR waiver **alone** for needed services, not providing services would result in far greater health and welfare concerns, as well as huge increases in the numbers of individuals in the Commonwealth's training centers. Such cost increases for the Commonwealth would be astronomical.

Family Impact Statement

Please provide a preliminary analysis of the potential impact of the emergency action on the institution of the family and family stability including to what extent the 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.

Consumer-directed services will strengthen the authority and rights of parents and caretakers to direct the care of their family members. Consumer-directed services and the increase in the amount of earned income that waiver recipients can keep will encourage self-sufficiency, self-pride, and the assumption of responsibility to the greatest levels possible. It has been DMAS' experience that individuals who use consumer-directed services require no more services than they were offered by an agency and sometimes use fewer hours because they can tailor the services to their individual needs.

By providing services to families to help care for their child, waiver services could help strengthen the marital commitment. About 40 percent of all individuals with **developmental disabilities** live in households headed by a single parent. Individuals with developmental disabilities are twice as likely to live in a single parent household than is true for the general population (Fugiara, 1998). The households of individuals with developmental disabilities who live with their families are more likely to have incomes below the poverty line than is the case for other households. This poverty rate is three times higher than in households that do not have a family member with a developmental disability (Larson, 1999). It is well known that caring for a child with a developmental disability can put undue stress on a marriage.