



Proposed Regulation Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12VAC30-120
Regulation title	Waiver Services: Home and Community Based Services Mental Retardation Waiver
Action title	MR Waiver Renewal
Document preparation date	November 7, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The Department of Medical Assistance Services (DMAS) was directed by the 2004 Virginia Appropriation Act to renew the Mental Retardation (MR) Waiver by submitting a home and community-based waiver application to the Centers for Medicare and Medicaid Services (CMS). DMAS formed a MR Waiver Advisory Committee consisting of family members, advocates, providers and state agencies to assist with completing the renewal process. The proposed permanent regulations reflect the changes to the MR Waiver Application as approved by CMS in July 2004. In general the changes include: reorganization of individual eligibility section to present information in chronological order; clarification of definitions, service descriptions and limitations, and individual eligibility and provider requirements; revision of criteria for crisis stabilization and the due date for submission of paperwork for preauthorization; change in the limit for individual models of supported employment to reflect an accurate limit for hourly units; clarification of education requirements for providers of day support, prevocational, and supported employment services; and, the addition of definitions of center-based and noncenter-based services under prevocational services and criteria for prevocational services at an intensive level.

Legal basis

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., the 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 the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the Board's requirements.

Subsequent to an emergency adoption action, the agency is initiating the public notice and comment process as contained in Article 2 of the APA. The emergency regulation became effective on December 1, 2004. The Code, at § 2.2-4007 requires the agency to file the Notice of Intended Regulatory Action within 60 days of the effective date of the emergency regulation if it intends to promulgate a permanent replacement regulation. The Notice of Intended Regulatory Action for this regulation was filed with the Virginia Register on November 2, 2004.

Title 42 of the *Code of Federal Regulations* § 430.25 permits states to operate, consistent with federal approval, programs that waive certain basic overarching Medicaid requirements. The broad overarching requirements that can be waived are state-wideness (the coverage of a service across the entire state), comparability of amount, duration, and scope of services (coverage of the same service for all persons within an eligibility category), and freedom of choice of providers.

This regulatory action is a response to item 326.PP of the 2004 Virginia Appropriations Act.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this regulatory action is to conform the agency's regulations to recent federally approved changes to this waiver program that have resulted from the federally required waiver renewal process. This program provides supportive services in the homes and communities of persons with diagnoses of mental retardation or children younger than the age of six years who are at risk of developmental delay. This program permits these individuals to remain in their homes and communities rather than being institutionalized in Intermediate Care Facilities for the Mentally Retarded. All federal home and community based waiver programs must be renewed every five years as required by federal law.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The regulations that are affected by this action are 12VAC30-120-211 through 12VAC30-120-249.

DMAS formed an MR Waiver Advisory Committee consisting of family members, advocates, providers and state agencies to assist with completing the renewal process. The MR Waiver Advisory Committee recommended changes to the waiver based on their experiences and input from others they represented. The waiver application submitted to CMS reflected these recommendations as agreed to by DMAS and DMHMRSAS.

The original MR Waiver application expired on September 15, 2004. In an effort to streamline processes and make all of Virginia's waivers operate on a state fiscal year, Virginia submitted a request to CMS with this renewal to make the renewal date effective on July 1, 2004.

CMS approved the renewal of this waiver and completed its review of the MR Waiver in July 2004. The renewal included required changes to the MR Waiver that were included in the currently effective emergency regulations and are now addressed in this proposed regulation.

In general, regulation changes include the following:

- 1) Added language to clarify the definitions of companion services and environmental modifications and changed the definition of "facilitator" to "services facilitator".
- 2) Added language regarding the transfer of children enrolled in the MR Waiver to the IFDDS waiver who reach the age of six but do not have a diagnosis of mental retardation.
- 3) Revised the situations that are considered at-risk for crisis stabilization services.
- 4) Added language to clarify that crisis supervision is a component of crisis stabilization:
- 5) Changed the due date for submission of the crisis stabilization individual service plan to the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) to within 72 hours of "the requested start date of authorization".
- 6) Clarified that direct care staff of personal care/respite care agencies and DMHMRSAS licensed services must pass a DMHMRSAS approved test.
- 7) Added language clarifying when modifications to an individual's work site may be approved to the service description of environmental modifications.
- 8) Added definitions of center-based and non center-based prevocational services.
- 9) Defined criteria for receiving prevocational services at the intensive level.
- 10) Changed the service description of nursing to indicate that the services to be offered through skilled nursing must be those that do not meet the home health criteria. In addition, skilled nursing through the waiver may be used as consultation for nurse delegation as appropriate and oversight of direct care staff as appropriate.
- 11) Revised the limit of individual supported employment in recognition that the service is delivered in hourly units.
- 12) Reorganized 12VAC30-120-215 to present information in chronological order.
- 13) Combined the personal care and respite sections as the requirements are similar.
- 14) Included information on the consumer-directed option under companion services and the personal assistance and respite services sections. Previously, this information had been included in a separate section.

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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The primary advantage of these proposed regulations is that they allow individuals with mental retardation to live as independently as possible in the community by providing to individuals services in their homes and communities rather than in an institution. The proposed changes in this regulation seek to improve the operations of the program by providing further clarification on available services and the necessary requirements to provide for the health, safety, and welfare of the individuals receiving services.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	The State expects this change to be budget neutral.
Projected cost of the regulation on localities	The State expects this change to be budget neutral.
Description of the individuals, businesses or other entities likely to be affected by the regulation	Medicaid recipients, their families, the providers who serve them, and DMHMRSAS will be affected by the regulations.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	There are approximately 750 MR Waiver providers and a potential for 6571 individuals to be served by the waiver this year and 6751 starting next fiscal year. The waiver regulations impact not only the 6571 individuals who may be receiving waiver services but also the families of those individuals and the providers that serve them. Another entity that is impacted by the regulations is DMHMRSAS, as DMAS works closely with them on developing changes to the regulations. Regarding supported employment only 55 individuals out of a potential 6571 currently receive supported employment through the individual model. There are 560 providers for congregate residential, day support, personal care, and skilled nursing.
All projected costs of the regulation for affected individuals, businesses, or other entities.	It is not anticipated that any of these individuals will exceed the cap of 720 that was previously placed

<p>Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>on this service in error. Therefore, DMAS does not anticipate that removing this cap will have a significant financial impact.</p>
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Alternatives

Please describe any viable 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.

As discussed previously, DMAS worked through various policy alternatives in the context of the MR Waiver Advisory Committee’s discussions. The agreed-to policies were formulated into the waiver application that was submitted to, and subsequently approved by, the Centers for Medicare and Medicaid Services (CMS).

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
DMHMRSAS	Comments regarding limits for individual supported employment and family members providing services.	Proposed permanent regulations address changes related to individual supported employment limits. Wording regarding family members providing services was not changed, as the current language is consistent with CMS approved application.
Virginia Medicaid Waiver Network and a private citizen	<p>The Virginia Medicaid Waiver Network submitted a fifteen-page document outlining the Network’s comments and proposed changes to the MR Waiver Regulations. In addition, a private citizen submitted a separate e-mail outlining similar concerns. Their recommendations include:</p> <ol style="list-style-type: none"> 1. Add new definitions and alter existing ones. 2. Change sequence of 12VAC30-120-213 and 12 VAC 30-120-215. 3. Decrease time frames for DMHMRSAS to complete assigned tasks. 4. Redefine waiting lists and emergency criteria. 5. Add language through out the regulation that an individual must be in agreement to services. 6. Add additional provider 	<p>DMAS staff in consultation with DMHMRSAS staff reviewed the Network’s recommendations. The proposed recommendations were evaluated with the following considerations: consistency with the CMS approved application for the MR Waiver; impact on individuals being served in the waiver and feasibility within the current system; budgetary impact and need for additional appropriation from the General Assembly; and, appropriateness of recommendation for regulation versus the MR Waiver Manual. Every recommendation was reviewed but did not necessarily result in a change. The following changes were made:</p> <ol style="list-style-type: none"> 1. Language was added to the definitions and/or service descriptions of assistive technology and environmental modifications. 2. Language was added regarding the transfer of children from the MR to the DD Waiver if the child turns six and does not have a diagnosis of mental retardation. 3. The term “welfare” was added to the health and safety standard.

<p>requirements.</p> <p>7. Lower age requirement on companions and consumer-directed assistants.</p> <p>8. Add skilled respite.</p> <p>9. Modify the role of the service facilitator.</p> <p>10. Allow respite services for individuals whose primary caregiver does not live with them and revise language regarding the focus of respite.</p> <p>11. Revise requirements for consumer-directed assistants and companions.</p> <p>12. Define units under Day Support.</p> <p>13. Allow individuals in residential services to receive personal assistance.</p> <p>14. Add a new section entitled "Procedural Safeguards"</p>	<p>4. 12VAC30-120-215 was reorganized to present information in a chronological order. Reevaluation of service need was moved from 12VAC30-120-213 to 12VAC30-120-215.</p> <p>5. The language regarding the "physical burden and emotional stress" placed on caregivers was removed from the respite sections.</p> <p>6. The units for day support and supported employment were further defined.</p>
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Family impact

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

These regulations allow for the continuing operation of the MR Waiver, a program that assists families to care for family members with mental retardation in their home and community. 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.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
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<p>12 VAC 30-120- 211</p>	<p>Not applicable (N/A)</p>	<p>Definitions</p>	<p>(1)The definition of “facilitator” was revised to “service facilitator” to provide clarity and guidance to providers and other stakeholders.</p> <p>(2) The following definitions were modified in the proposed permanent regulation:</p> <p>A) The definition of companion was revised to provide clarification that all types of hands-on care not just nursing care is prohibited by this service.</p> <p>B) Language was added to the definition of environmental modifications to clarify conditions when an individual’s work site can be modified.</p> <p>C) “Consumer-Directed Services” was changed to Consumer-Directed Option as consumer-direction is an option for several MR Waiver services and not a separate service</p> <p>D) A definition for Health Planning Region was added at the suggestion of the OAG.</p> <p>E) Language was added to further clarify the health and safety standard.</p>
<p>12VAC30- 120-213</p>	<p>N/A</p>	<p>General coverage and requirements for MR waiver services</p>	<p>(2) The following language was added in the proposed permanent regulation:</p> <p>A) Added language regarding the transfer of children enrolled in the MR Waiver who reach the age of six but do not have a diagnosis of mental retardation to the IFDDS waiver to be consistent with the CMS approved applications for these programs.</p> <p>B) Added language regarding the restriction against waiver services being provided to residents of institutions. This language was moved from 12VAC30-120-215B at the recommendation of the OAG.</p> <p>C) Added welfare to the criteria under which requests for increased services are reviewed at the request of stakeholders.</p> <p>D) Clarified the urgent criteria regarding caregivers at the request of stakeholders.</p> <p>E) Moved the language detailing reevaluation of service need to section 12VAC30-120-215 at the request of stakeholders who requested that information</p>

			<p>be presented in chronological order for clarity.</p>
<p>12VAC 30-120- 215</p>	<p>N/A</p>	<p>Individual requirements eligibility</p>	<p>(1) Added “waiver” before the word services to provide clarity and guidance to providers and other stakeholders.</p> <p>(2) The following changes were made to the proposed permanent regulation to provide stakeholders with greater clarity:</p> <p>A) Changed “inappropriate” to “other” institutional placement.</p> <p>B) Added requirement that case managers contact the individual or family/caregiver at least annually to provide the choice between institutional placement and waiver services while the individual is on the waiting list to be consistent with the CMS approved application.</p> <p>C) Added inpatient rehab facility to list of inpatient settings where individuals cannot receive waiver services and moved this language from this section to 12VAC30-120-213B at the recommendation of the OAG.</p> <p>D) Clarified that the case manager must designate a collector of Patient Pay when applicable when the DMAS-122 is updated annually.</p> <p>E) The following information was reorganized to promote clarity at the request of stakeholders who requested that information be presented in chronological order:</p> <p>1) The comprehensive assessment information was changed to an outline format and includes application of ICF/MR criteria that previously had been listed as a separate item.</p> <p>2) Section B was renamed “Assessment and Enrollment”</p> <p>3) Section B1 was expanded to include information previously included in B4.</p> <p>4) Information contained in B5 – B8 was moved under section C that was renamed authorizing and accessing services.</p> <p>5) Waiting list information was moved to section B from section C.</p>

			<p>6) Information on ISP development was moved prior to extension requests in section C.</p> <p>7) Information contained in previous sections C5 and C6 were moved under the newly created section D.</p> <p>8) Language detailing reevaluation of service need was relocated to this section under a newly created section D from 12VAC30-120-213.</p>
12VAC30-120-217	N/A	General requirements for home and community-based participating providers.	<p>(2) The following changes were made to the proposed permanent regulation:</p> <p>A) Revised wording for consistency in language.</p> <p>B) Changed requirement of record retention by providers to six years to be consistent with HIPAA requirements.</p>
12VAC30-120-219	N/A	Participation standards for home and community-based waiver services participating providers.	<p>(2) The following language was added to provide clarification in the proposed permanent regulation:</p> <p>(A) Clarified instances when a provider can appeal the termination of the provider agreement by DMAS.</p> <p>(B) Clarified that 72 hours means three business days.</p> <p>(C) Revised the language regarding provider appeals to refer providers to the regulations regarding appeals.</p>
12VAC30-120-221	N/A	Assistive Technology	<p>(2) The following changes were made to the proposed permanent regulation to provide stakeholders with greater clarity:</p> <p>A) Clarified that all assistive technology must be preauthorized.</p> <p>B) Clarified that labor related to assistive technology items may be included under this service and that reimbursement for labor is included in the \$5000 limit per CSP.</p> <p>C) Clarified that assistive technology must be provided in the least expensive, most cost-effective manner.</p>
12VAC30-120-223	N/A	Companion services (agency-directed model)	<p>(2) The following changes were made to the proposed permanent regulation to provide clarification to stakeholders and providers:</p> <p>A) Revised section to include both agency-directed and consumer-directed options for this service. Information on companion services provided through the consumer-directed option was moved from 12 VAC 30-</p>

			<p>120-225 into this section.</p> <p>B) Removed the term “nursing” from criteria as all types of hands-on care are excluded from this service.</p> <p>C) Clarified that the criminal history records check must be submitted within five days from the date of employment.</p> <p>D) Removed reference to parents of minor children as minor children are not eligible for this service.</p> <p>E) Listed the elements of an ISP.</p>
<p>12VAC30-120-225</p>	<p>N/A</p>	<p>Consumer-directed services: personal assistance, companion, and respite</p>	<p>(1) The following changes were made to provide stakeholders with greater clarity and to make the regulations consistent with the federally approved waiver application for this program:</p> <p>A) Removed the word “companion” when referring to the provision of special tasks, as companions are not able to provide assistance with special tasks.</p> <p>B) Added the word “Central” when talking about the Child Protective Registry.</p> <p>C) Identified the provider as “Services Facilitator” when referring to documentation requirements such as quarterly reports.</p> <p>D) Clarified that skilled nursing is a type of consultation that can be requested as needed.</p> <p>E) Text removed from subsection C because it duplicated the same language in subsection B.</p> <p>(2) The following changes were made to the proposed permanent regulation to provide providers and stakeholders with greater clarity:</p> <p>A) Revised the section to include only general information on the consumer-directed model of services and service facilitation provider requirements.</p> <p>B) Specific information on companion services provided through the consumer-directed model was moved to 12VAC30-120-223.</p>

			<p>C) Specific information on personal assistance and respite services provided through the consumer-directed model was moved to 12VAC30-120-233.</p> <p>D) Clarified that services will discontinue if the individual is without service facilitation services for more than sixty consecutive days.</p> <p>E) Added language to provide further clarification on service facilitation visits.</p>
12VAC30-120-227	N/A	Crisis stabilization services	<p>(1) The following changes were made to provide stakeholders with greater clarity and to make the regulations consistent with the federally approved waiver application for this program:</p> <p>A) Changed the situations that an individual must be in to be considered at risk of needed crisis stabilization services.</p> <p>B) Added language to clarify that crisis supervision is an optional component of crisis stabilization.</p> <p>C) Changed the due date of submission of the crisis stabilization individual service plan to the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS).</p>
12VAC30-120-229	N/A	Day support services	<p>(1) New language clarifies the limit on this service in combination with other services to prevent potential misinterpretation.</p> <p>(2) The following language was added to the proposed permanent regulation to provide clarification to providers:</p> <p>A) Clarified that there are two levels of day support.</p> <p>B) Defined units.</p> <p>C) Further clarified the limit on this service when used in combination with supported employment.</p> <p>D) Clarified education requirements of day support providers.</p> <p>E) Reorganized the provider requirements section.</p>
12VAC30-120-231	N/A	Environmental Modifications	<p>(2) The following changes were made:</p> <p>(A) Removed a statement under section A</p>

			<p>regarding federal state and local building codes and laws as this statement is included under section D.</p> <p>(B) Clarified the conditions when an individual's worksite may be modified under this service.</p> <p>(C) Provided further clarification on the criteria for environmental modifications.</p>
12VAC30-120-233	N/A	Personal assistance services (agency-directed model)	<p>(1) Renumbered the provider requirements to indicate the requirements apply to both DMHMRSAS licensed and other DMAS enrolled personal care providers to give providers and other stakeholders greater clarity.</p> <p>(2) The following reorganization changes were made to the proposed permanent regulation:</p> <p>A) Respite services were moved from 12VAC30-120-243 into this section as these services have similar requirements.</p> <p>B) Revised section to include both agency-directed and consumer-directed options for this service. Information on personal assistance and respite services provided through the consumer-directed option was moved from 12 VAC 30-120-225 into this section.</p>
12VAC30-120-237	N/A	Prevocational services	<p>(1) The following changes were made to give providers and other stakeholders with greater clarity:</p> <p>A) Clarified the definition of center-based and non center-based prevocational services.</p> <p>B) Provided criteria for receiving prevocational services at the intensive level.</p> <p>(2) The following language was added to the proposed permanent regulation to provide clarification to providers:</p> <p>A) Defined units.</p> <p>B) Added language to clarify the limit on this service when used in combination with supported employment.</p> <p>C) Clarified education requirements of prevocational providers.</p> <p>D) Reorganized the documentation section.</p> <p>E) Added language to further clarify</p>

			<p>documentation confirming an individual's attendance.</p> <p>F) Added language to clarify documentation requirements for intensive services.</p>
12VAC30-120-241	N/A	Residential support services	<p>(1) Clarified that the test direct care staff of licensed providers have to take is "approved" by DMHMRSAS.</p> <p>(2) Removed a statement in the proposed permanent regulation regarding supervision being provided by a DMHMRSAS licensed provider as not all residential providers are licensed by DMHMRSAS.</p>
12VAC30-120-243	N/A	Respite services (agency-directed model)	<p>(1) Renumbered provider requirements to indicate appropriate requirements for both DMHMRSAS licensed providers and providers enrolled with DMAS to give providers and other stakeholders with greater clarity.</p> <p>(2) Information contained in this section in the proposed permanent regulation was combined with information on personal assistance located in 12VAC30-120-233 as these services have similar requirements.</p>
12VAC30-120-245	N/A	Skilled nursing services	<p>(1) The following changes were made to give providers and other stakeholders with greater clarity and to make the regulations consistent with the federally approved waiver application for this program:</p> <p>A) Definition of skilled nursing changed to indicate that the services to be offered through skilled nursing must be those that do not meet the home health criteria.</p> <p>B) Clarified that skilled nursing services through the waiver, may be used as consultation for nurse delegation and oversight of direct care staff to other providers as appropriate.</p>

<p>12VAC30-120-247</p>	<p>N/A</p>	<p>Supported employment services</p>	<p>(1) Clarified the limitation for individual supported employment to give providers and other stakeholders clarity.</p> <p>(2) The following language was added to the proposed permanent regulation to provide clarification to providers:</p> <p>A) Clarified the limits for individual supported employment that are different than group models as the units for group models of supported employment are calculated differently. Deleted language regarding the limit of this service when used with prevocational and day support services as the units for these services are also calculated differently and cannot be compared.</p> <p>B) Defined units for group models of supported employment.</p> <p>C) Clarified education requirements of supported employment providers.</p> <p>D) Reorganized the documentation section and added requirement that functional assessment be included in the documentation.</p>
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