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

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30-120
Regulation title	Waiver Services
Action title	Elderly/Disabled Combined with Consumer Direction Waiver
Document preparation date	NEED GOV APPROVAL BY 01/28/05

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#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (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), and the *Virginia Register Form, Style, and Procedure Manual* (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(i) as discussed below.

The *Code of Virginia* § 2.2-4011, allows a state agency to promulgate emergency regulations “in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment. The combining of the Elderly and Disabled (E&D) Waiver with the Consumer Directed Personal Attendant Services (CDPAS) Waiver was mandated by the 2003 General Assembly in Chapter 460. This provision directed DMAS to secure federal approval of the combined E&D and the CDPAS Waivers and then to promulgate emergency regulations to become effective within 280 days. These changes are not otherwise exempt under the provisions of the *Code* § 2.2-4006.

The Governor is hereby requested to approve this agency’s adoption of the emergency regulations entitled Amount, Duration, and Scope of Services: Prior Authorization of Pharmacy Services and Preferred Drug List (12 VAC 30-50-210 and 130-1000) and also authorize the initiation of the promulgation process provided for in § 2.2-4007.

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.

This regulatory action combines the E&D Waiver (12 VAC 30-120-10 et seq.) with the CDPAS Waiver (12 VAC 30-120-490 et seq.). The new combined waiver (12VAC30-120-900 et seq.) will offer agency-directed personal assistance, agency-directed respite, consumer-directed personal assistance, consumer-directed respite, adult day health care, and personal emergency response systems.

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.

Since this emergency regulation will be effective, beginning February 1, 2005, for no more than 12 months and the Director wishes to continue regulating the subject entities, the Department is initiating the Administrative Process Act § 2.2-4007 procedures. Therefore, the agency is also requesting the Governor’s approval to file its Notice of Intended Regulatory Act for these regulatory changes.

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.

The sections of the regulations affected by this action are: 12VAC30-120-10 through 12VAC30-120-60 (E&D Waiver regulations) and 12VAC30-120-490 through 12VAC30-120-550 (CDPAS Waiver regulations) are being repealed. DMAS will use the 12VAC30-120-900, *et seq.* for the new waiver program.

Elderly and Disabled Waiver

The Elderly and Disabled Waiver was DMAS' first waiver program beginning in the early 1980's. At its outset, it provided coverage in the community for adult day health care, respite care, and personal care services to consumers who, in the absence of these support services, would otherwise have required institutionalization in nursing facilities. More recently, the coverage of Personal Emergency Response Systems (PERS) was added to this waiver.

The adult day health care provided for waiver consumers to attend group activities at adult day care facilities while their family members were otherwise employed. Personal care services provided support for the basic activities of daily living (ADLs) such as bathing, eating, toileting, transferring, and dressing. Respite care provided temporary relief for the primary care persons so they could take vacations and otherwise have brief breaks from their primary care responsibilities. PERS places personal emergency response systems (emergency call systems) into the homes of consumers, who must remain alone for long periods each day, and reduces the need for on-site aide or assistant care. All of these services have been rendered by home health agencies and personal care providers. Annually, approximately 10,000 to 12, 000 persons have been served by this waiver.

Consumer-Directed Waiver

The Consumer-Directed waiver program was developed in 1997 in response to community requests. This waiver allowed consumers to have greater control over the receipt of personal care services by permitting them to hire/fire their attendants and determine attendants' work hours within the approved number of hours. This enabled disabled adults to set their own work schedules and fostered the pursuit of careers and educational opportunities. This waiver program has typically served only a small population, approximately 100 persons.

Since its implementation, there has been a tremendously positive impact on, and response from, consumers. This positive impact is important because, during the waiver's development, health care industry professionals raised several significant concerns regarding these regulations. Some consumers have reported that by utilizing consumer-directed services, there has been less personal care staff turnover, greater flexibility in meeting their schedules and preferences, and greater satisfaction with the way the personal assistants perform their duties.

Concerns, raised when DMAS began developing this consumer-directed program, focused on personal assistant standards and qualifications, and appropriate and adequate supervision of the plan of care. There were concerns that using assistants, who would not be required to have formal nurse aide training, would engage in fraudulent, abusive, and neglectful behaviors. Another concern was that a Registered Nurse (RN) would not complete the assessment, develop the plan of care, or be involved in the assistant's supervision. Consumers argued that such RN oversight was not needed and that they (the consumers) are aware of their own needs and are capable of addressing these needs. Some critics also predicted more hospitalizations for these consumers due to the absence of RN care. None of these concerns have materialized.

Combined Waiver

Under the former E&D waiver, in order for an individual to be eligible for services they had to be at imminent risk of being placed in a nursing facility. The combined waiver does not have this criterion; it is replaced under the new waiver with the requirement that the individual require a nursing facility level of care.

All waiver programs must meet the federal cost effectiveness standard -- the cost of the individual participant's community care, in the aggregate, cannot exceed their institutional costs of care. This same standard applies to services under the combined waiver. Under the new combined waiver all services are available to all clients. Because all services are still limited by medical necessity under the new combined waiver, DMAS projects no cost increase for services. Combining the two waivers simplifies waiver administration and is more cost effective for DMAS. Therefore, while remaining cost effective, the new waiver enables all clients greater freedom to choose to direct their own personal care and respite services, to choose agency-directed care for all their services, or a combination of the two.

With the implementation of this regulatory change, the E&D Waiver services (agency-directed personal care, agency-directed respite, adult day health care, and personal emergency response systems) will be combined with the CD-PAS Waiver services (consumer directed personal assistance and consumer directed respite). This new regulation outlines the requirements for the services the providers must follow in order to receive reimbursement from the DMAS.

The combining of these two waivers is resulting from the specific request of consumers and family/caregivers. With the combining of these two waivers, recipients will have more options of service delivery models for their care. Recipients will now be able to choose consumer directed (service delivery model) personal assistance services for more than 42 hours of care each week if their needs indicate more hours of service are required. A consumer may also choose to receive consumer-directed and agency-directed care simultaneously as long as the service hours do not exceed the approved care plan hours.

No consumers or family/caregivers will be forced to use one service-delivery model over the other. There are no disadvantages to the public or the Commonwealth with these regulations.

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.

These two waiver programs could be continued separately yielding the same situation as currently exists. Eliminating these two waiver programs would force the consumers who are currently served to make other arrangements, much of which would have to be more expensive institutionalization.

Discontinuing all consumer-directed services altogether would be a disservice to those consumers who prefer, and live quite successfully, with this service delivery model. Forcing all consumers to use the consumer-directed model of services, especially those consumers having cognitive impairments, would endanger their health and safety. The alternative chosen is the most effective combination of consumer choice and cost-effectiveness. Permitting consumers their choice of these two service delivery models for personal assistance and respite care is the least intrusive way of covering these services under this new waiver. Those who will benefit most from the new waiver are individuals currently enrolled in the CD-PAS waiver, and those individuals in the E&D waiver who prefer greater consumer direction in choosing their service providers.

Family impact

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

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. The affect on disposable family income of this change is unknown.