



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

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12VAC30-50-490, and 12VAC30-120-700 through 12VAC30-120-800
Regulation title	Individual and Family Developmental Disabilities Support (IFDDS) Waiver
Action title	Regulations Incorporating IFDDS Waiver Changes.
Document preparation date	

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(ii) as discussed below.

This regulatory action qualifies as an emergency, pursuant to the authority of the *Code of Virginia*, 1950 as amended, § 2.2-4011, because it is responding to a mandate in the 2004 Virginia Appropriations Act (Item 326.W) that “Contingent upon approval by the Centers for Medicare and Medicaid Services (CMS) to implement the renewal of the Individual and Family Developmental Disabilities Support Waiver as developed by the Department and stakeholders, the Department of Medical Assistance Services shall promulgate emergency regulations to implement this amendment within 280 days or less from the enactment date of this act. The Department shall implement the necessary regulatory changes to be consistent with federal approval of the waiver application renewal.” CMS approved the renewal of the IFDDS Waiver in February 2004. The approval included suggested changes to the waiver that are included in this emergency regulatory package.

The Governor is hereby requested to approve this agency’s adoption of the emergency regulations entitled Home and Community-based Waiver Services Under the Individual and Family Developmental Disabilities Support Waiver (12 VAC 30-12-700 through 12 VAC 30-12-800 and 12 VAC 30-50-490) 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.

Prior to the scheduled expiration of the IFDDS Waiver on July 1, 2003, DMAS formed an IFDDS Waiver Task Force, consisting of a diverse group of stakeholders (waiver recipients, family members/caregivers of individuals with disabilities, advocates, providers and state representatives) to assist the Agency in revising the Waiver for renewal. The IFDDS Waiver Task Force recommended changes to the waiver based on experience with the program from July 2000 through June 2003. The waiver application submitted to CMS reflected the efforts of DMAS through recommendations of the IFDDS Waiver Task Force to revise the waiver to better meet the needs of individuals receiving services through the waiver. These emergency regulations reflect the substantial revisions in the CMS-approved IFDDS Waiver.

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.

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 IFDDS Waiver regulations were revised: 1) to provide clarity and guidance to providers and other stakeholders; 2) to conform to the IFDDS Waiver renewal application as approved by CMS in February of 2004; 3) to comply with Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS) and Department of Social Services (DSS) provider licensing standards; 4) to follow recommendations made by the Office of the Attorney General; and 5) to support individual choice. Throughout this document there are several references made to regulation language changes made “to be consistent with the MR Waiver.” In most cases this is a reference to changing language to conform it to MR Waiver language concerning the same issue in both waivers. In other cases changes were made to conform IFDDS procedures to match the same process already being carried out in the MR Waiver. All these conforming changes were approved by the Task Force.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
12 VAC30-50-490		Targeted Case Management for individuals with developmental disabilities, including autism	This section was revised to change “support coordination” to “case management,” to reflect targeted case management provider requirements as specified in 12 VAC 30-50-450, and to reflect current federally approved provider requirements in the IFDDS Waiver application.
12 VAC30-120-700 through 12 VAC 30-120-800		All IFDDS Waiver Services	<p>The following changes were made throughout these regulations to be consistent with the current federally approved waiver application and for clarity:</p> <ul style="list-style-type: none"> 1) The word “recipient” was changed to “individual” and “consumer service plan” was changed to “plan of care.” 2) “Attendant care” was changed to “Consumer-directed personal care” and “support coordinator” was changed to “case manager.” 3) “Developmental disabilities” was changed to “related conditions.” 4) Emphasis was placed on person-centered planning and process.

<p>12 VAC30-120-700</p>		<p>Definitions</p>	<p>Definitions were added and revised to provide stakeholders with greater clarity and guidance when reading these regulations. The following definitions were added:</p> <ol style="list-style-type: none"> 1. appeal 2. case management (replaces support coordination) 3. CMS (replaces HCFA) 4. consumer-directed employee (replaces personal attendant) 5. consumer directed services (replaces attendant care, consumer-directed companion care and consumer-directed respite care) 6. direct marketing 7. entrepreneurial model 8. face to face visit 9. ICF/MR 10. IFDDS screening team (replaces screening team) 11. pend 12. plan of care (replaces consumer service plan or CSP) 13. preauthorized 14. qualified developmental disabilities professional 15. skilled nursing services (replaces nursing services) 16. slot.
<p>12 VAC30-120-710</p>		<p>General coverage and requirements for all home and community-based care waiver services</p>	<p>The following changes were made in accordance with the current federally approved waiver application and to provide greater clarity and guidance:</p> <ol style="list-style-type: none"> 1) Amended the covered services section to include pre-vocational services and clarified skilled nursing and consumer-directed services. 2) Added eligibility criteria for emergency access to services.
<p>12 VAC30-120-790</p>	<p>12 VAC30-120-710.D</p>	<p>Eligibility criteria for emergency access to the waiver</p>	<p>This section was moved at the request of stakeholders who found it difficult to locate this regulatory section.</p>
<p>12 VAC30-120-720.A</p>		<p>Individual qualifications and eligibility requirements; intake process</p>	<p>Inserted additional earned income disregard language to reflect the eligibility requirements in the IFDDS Waiver application.</p>

<p>12 VAC30-120-720.B through E</p>		<p>Assessment and Authorization of home and community-based services</p>	<p>The following changes were made to provide greater clarity and guidance:</p> <ol style="list-style-type: none"> 1. Inserted language requiring the IFDDS Screening team to obtain psychological evaluations of individuals being screened for the IFDDS Waiver and clarified that IFDDS Screening teams must refer individuals for services based on the individual's choice of institutional or home and community-based services. 2. Revised language to reflect DSS licensing terminology. 3. Revised the VAC citation from 12 VAC 30-120-790 to 12 VAC 30-120-710 because the emergency criteria was moved to 12 VAC 30-120-710. 4. Struck citation to 12 VAC 30-120-710 for definition of mental retardation; --710 no longer spells out definition, but simply refers to mental retardation as defined by the American Association on Mental Retardation. 5. Added language to clarify the percentage of available waiver funding used for emergency situations and described the process for allocating emergency slots to institutionalized individuals. These percentages reflect a 5 percent increase in slots allocated for emergencies and a subsequent 5 percent reduction in slots allocated for budget level one. The process of converting level one slots to emergency slots in order to reach the specified percentages is defined. 6. Specific timeframes were added for the Screening Team to ensure timely review of, and decisions on, waiver applications. 7. Adds requirement for face-to-face meeting between case manager and individual or caregivers. 8. Adds requirement that case manager submits the DMAS 122 form to local DSS.
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12 VAC30-120-720.B through E			9. Adds description of process for requesting a 30-day extension for initiation of waiver services.
12 VAC 30-120-780	12 VAC30-120-720.F	Authorization of home and community-based services	Relocated the reevaluation of service need and utilization review section from 30-120-780 to 30-120-720(F) per taskforce recommendation. Provider documentation requirements were expanded in this section to inform providers of these expectations.
12 VAC30-120-730		General requirements for home and community-based participating providers	<ol style="list-style-type: none"> 1. Clarified to providers that while individuals have freedom of choice to reject medical care, treatment and services, potential adverse outcomes of refusing care should be discussed with the individual and documented. 2. Clarified language regarding the date that services may be billed by providers. 3. Clarified language to identify specific confidentiality requirements. 4. Revised language to be consistent with DMHMRSAS licensing requirements for DMHMRSAS licensed providers. 5. Added a provision that prohibits providers from conducting direct marketing activities to waiver participants or their families to ensure individual choice.
12 VAC 30-120-740		Participation standards for home and community-based waiver participating providers	<ol style="list-style-type: none"> 1. Revised language to ensure provider documentation meets state and federal requirements as directed by the OAG. 2. Revised language to provide more clarity for IFDDS Waiver providers and stakeholders about individual choice of waiver service providers and the importance of involving the individual or family/caregiver with changes to the plan of care. 3. Revised language regarding termination of provider participation by DMAS to provide greater clarity to providers.

			<p>4. Added selection of new case manager by individual to the list of circumstances for which case manager must notify DMAS and DSS.</p> <p>5. Added language to clarify that DMAS will notify the individual or his family/caregiver of the right to appeal an adverse decision by DMAS. This language provides greater clarity to providers and other stakeholders.</p> <p>6. Clarified that DMHMRSAS must also be notified as required during emergency termination of services to be consistent with the MR Waiver.</p> <p>7. Provided greater clarity to stakeholders by inserting language that requires case managers to notify DMAS in the event an individual no longer meets level of care criteria for the IFDDS Waiver.</p>
12 VAC 30-120-750		In-home residential support services	<p>1. Language regarding specialized supervision was added to be consistent with the current IFDDS waiver application.</p> <p>2. A written behavioral program requirement and a supervision requirement was added to conform to DMHMRSAS licensing standards.</p> <p>3. Language regarding direct care staff was added throughout the regulation to provide clarification to providers.</p>
12 VAC 30-120-752		Day Support Services	<p>1. Added language in the service description to provide clarification to providers.</p> <p>2. Revised criteria to allow individuals to receive both Day Support and Supported Employment Services.</p> <p>3. Revised language regarding criteria for day support at the intensive level to be consistent with the MR Waiver and provide additional clarification to providers.</p> <p>4. Removed language regarding prevocational services to reflect change in the current IFDDS Waiver application which lists prevocational services as a</p>

			<p>separate service and not a component of day support. Prevocational services are addressed in 12 VAC 30-120-753.</p> <p>5. Added language under service units and service limitations to provide clarification to providers.</p> <p>6. Added requirement that revisions to supporting documentation be reviewed with the individual or his caregiver.</p> <p>7. Added language under provider requirements to reflect changes in Medicaid reimbursed transportation, to make the regulation consistent with DMHMRSAS licensing requirements and to provide clarification to providers.</p> <p>8. Added requirements that providers document efforts to obtain DMAS 122s and that supervision of direct service staff be by a qualified developmental disability professional.</p>
12 VAC 30-120-753		Reserved	<p>Added section on prevocational services based on CMS requirements to list prevocational services as a separate component from Day Support.</p>
12 VAC 30-120-754		Supported Employment Services	<p>1. Added language to clarify service units and limitations for providers.</p> <p>2. Added language to reflect changes in Medicaid reimbursed transportation.</p> <p>3. Clarified provider documentation requirements regarding time spent in services, annual reviews and modifications to supporting documentation, transportation, and the DMAS-122.</p>
12 VAC 30-120-756		Therapeutic Consultation	<p>1. Revised language under the service description to be consistent with the current IFDDS Waiver Application.</p> <p>2. Added language regarding monitoring activities under the criteria section to be consistent with the current IFDDS Waiver Application.</p> <p>3. Added language to clarify service limitations and provider requirements to providers.</p>

<p>12 VAC 30-120-758</p>		<p>Environmental Modifications</p>	<ol style="list-style-type: none"> 1. Language was added to the service description and criteria sections to provide clarification to individuals and providers on covered modifications. 2. Language regarding excluded modifications was added to the service units and service limitations section to make the regulations consistent with the current IFDDS Waiver application. 3. Language regarding the role of the case manager was added to the service units and service limitations section to address issues of quality assurance. 4. A restriction was added which prohibits providers from providing services to their spouse or child.
<p>12 VAC 30-120-760</p>		<p>Skilled Nursing Services</p>	<ol style="list-style-type: none"> 1. Clarified that consultation and training to other providers is covered under this service. 2. Revised language under the provider requirements section to provide clarification on entities qualified to provide this service.
<p>12 VAC 30-120-762</p>		<p>Assistive Technology</p>	<ol style="list-style-type: none"> 1. Added language to the service description to make the regulations consistent with the current IFDDS waiver application. 2. Added language in the criteria and service units and service limitations sections to provide clarification to individuals and providers. 3. Two restrictions were added to the provider requirements section due to the potential conflict of interest: <ol style="list-style-type: none"> a. Providers may not also write the necessary professional consultation for individuals to receive the service. b. Providers may not provide services to their spouse or child.

<p>12 VAC 30-120-764</p>		<p>Crisis Stabilization Services</p>	<ol style="list-style-type: none"> 1. Added language to the service description section to provide clarification to providers and to make the regulation consistent with the current IFDDS Waiver application. 2. The professional required to conduct the assessment for this service was specified as a qualified developmental disabilities professional to make the regulation consistent with DMHMRSAS licensing requirements. 3. The language regarding the crisis supervision component was revised to specify that supervision be face-to-face and one-on-one, and to make the regulations consistent with the MR Waiver. 4. A statement specifying that assessments be conducted jointly with other appropriate professionals was added to the service units and service limitations section to make the regulations consistent with the MR Waiver. 5. Added language regarding supervision requirements in the provider requirements section to make the regulation consistent with the current IFDDS Waiver application. 6. Added language regarding documentation in the provider requirements section to provide clarification to providers and to make the regulation consistent with the MR Waiver.
<p>12 VAC 30-120-766</p>		<p>Personal Care Services</p>	<ol style="list-style-type: none"> 1. Language was added to the service description to make the regulation consistent with the current IFDDS Waiver Application. 2. Language was added to the criteria and service units and service limitations sections to provide clarification to providers. 3. Language was revised in the provider requirements section to: clarify supervision required by DMHMRSAS licensed providers; further clarify the roles of the supervisor; clarify training requirements for personal care aides;

			<p>clarify restrictions related to family members providing care; clarify the responsibilities of an agency transferring a case; and, to address issues of quality assurance.</p> <p>4. The requirement that all DMAS utilization review forms be kept in the individual's record was removed from the provider requirements section, as it is not expected that the provider will have information related to a utilization review in individual charts. A duplicative statement requiring reassessments to be located in the individual's charts was also removed from this section because this requirement is already addressed in the section.</p>
12 VAC 30-120-768		Respite Care Services	<p>1. A documentation requirement regarding special tasks performed by aides was added to be consistent with the MR Waiver.</p> <p>2. Addition of requirement that respite care aides be able to read/write English to the extent necessary to accomplish the tasks associated with respite care services.</p> <p>3. The responsibility of the agency to ensure that services continue was removed to reflect current practice; also, LPNs are no longer authorized to provide supervision of respite care aides.</p> <p>4. The requirement that all DMAS utilization review forms be kept in the individual's record was removed from the provider requirements section as it is not expected that the provider will have information related to a utilization review in individual charts. A duplicative statement requiring reassessments to be located in the individual's charts was also removed from this section because this requirement is already addressed in this section.</p>
12 VAC 30-120-770		Consumer-Directed Services	<p>1. Added language to the service definition and criteria sections to provide clarification to providers and to be consistent with the current IFDDS Waiver application.</p>

<p>12 VAC 30-120-770</p>		<p>Consumer-Directed Services</p>	<p>2. Added language to the service units and service limitations section to reflect changing role of service facilitator consistent with the current IFFDDS Waiver application.</p> <p>3. Removed requirement that an attendant be willing to be listed in a personal attendant registry in response to concerns expressed by IFDDS Waiver task force that individuals may lose attendants who do not wish to be listed in the registry.</p> <p>4. Clarified role and duties of service facilitator in provider qualifications section to make consistent with current IFDDS Waiver application. The responsibility of doing assessments, reassessments, and developing and monitoring plans has been shifted to case managers at the request of the stakeholders.</p> <p>5. Removed RN consultation requirement and clarified that these services may be obtained through the individual's physician's office.</p> <p>6. Removed documentation requirements that relate to change in role of service facilitator and also removed requirement for DMAS utilization review forms as it is not expected for providers to have these forms in individual charts.</p>
<p>12 VAC 30-120-772</p>		<p>Family/Caregiver Training</p>	<p>Expanded the listing in this regulation of providers who may provide family/caregiver training.</p>
<p>12 VAC 30-120-774</p>		<p>Personal Emergency Response System (PERS)</p>	<p>The following changes were made to provide clarification to providers and to be consistent with the MR Waiver:</p> <p>1. A statement was added to the service description to include medication monitoring devices.</p> <p>2. The exclusions related to individuals with caregivers who operate a home business were removed.</p> <p>3. Added a 30-day limit to requirement for written report following any action in response to an emergency signal.</p>

			4. A prohibition against direct marketing by a PERS provider was added.
12 VAC 30-120-776		Companion services agency-directed model of care	The following information was added to provide clarification to providers and to make the regulation consistent with the MR Waiver regulations: 1. A list of appropriate providers. 2. Restrictions regarding family members providing services. 3. Provider requirements. 4. Documentation requirements.
12 VAC30-120-780	12 VAC30-120-720.F	Reevaluation of service needs and utilization review	This section was moved for reading ease at the request of stakeholders who found it difficult to locate this regulatory section.
12 VAC30-120-790	12 VAC30-120-710.C and D	Eligibility criteria for emergency access to the waiver	This section was moved for reading ease at the request of stakeholders who found it difficult to locate this regulatory section.

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.

No other feasible alternatives are available as the emergency regulations are required so the regulations can be in compliance with other state and federal laws and requirements.

Family impact

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

The emergency regulations should have a positive impact on individuals and families receiving IFDDS Waiver services. The changes require increased communication with and involvement of the individual and the family/caregiver in the planning and delivery of services. The regulations demonstrate commitment to the family institution by emphasizing a person-centered planning process. Medicaid Home and Community-Based Care services are designed and funded to assist individuals to remain in their homes and community and avoid institutional placement. This intent supports the concept of family and family stability.