



Virginia
Regulatory
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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- 140 et seq. and 120 - 900 et. seq.
Regulation title	Waiver Programs: HIV/AIDS and Elderly and Disabled with Consumer Direction
Action title	Exception Criteria for Waiver Personal Care Services
Date this document prepared	

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 branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 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 agency may adopt regulations in an “emergency situation”: (A) upon consultation with the Attorney General after the agency has submitted a request stating in writing the nature of the emergency, and at the sole discretion of the Governor; (B) a situation in which Virginia statutory law, the Virginia appropriation act,

or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of Subdivision A.4 of § 2.2-4006; or (C) in a situation in which an agency has an existing emergency regulation, additional emergency regulations may be issued as needed to address the subject matter of the initial emergency regulation provided the amending action does not extend the effective date of the original action. This suggested emergency regulation meets the standard at COV 2.2-4011 (B) as discussed below.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Waiver Programs: Exception Criteria for Waiver Personal Care Services (12 VAC 30-120-199 and 120-990) and also authorize the initiation of the permanent regulations via the promulgation process provided for in §2.2-4007.

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 and 325, 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.

Chapter 890 of the *2011 Acts of Assembly*, Item 297 CCCCC states:

*“The Department of Medical Assistance Services shall amend certain 1915 (c) home-and community-based waivers and the Children’s Mental Health demonstration grant to cap agency and consumer directed personal care at 56 hours per week, 52 weeks per year, for a total of 2,920 hours per year. The 1915(c) waivers shall include the Alzheimer’s Assisted Living, Elderly or Disabled with Consumer Direction, and HIV/AIDS Waivers. **The Department shall provide for individual exceptions to this limit using criteria based on dependency in activities of daily living, level of care, and taking into account the risk of institutionalization if additional hours are not provided.** (emphasis added) The department shall have authority to promulgate emergency regulations to implement this amendment within 280 days or less from the enactment date of this act.”*

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.

The purpose of this action is to comply with the legislative mandate as stated above. The Department's waiver programs, prior to this mandate, did not limit personal care services. This mandate requires the Department to limit personal care services to 56 hours per week and develop criteria by which a waiver individual could qualify for more than 56 hours of personal care services in a week. DMAS has initiated the new limit of 56 hours of personal care services in a separate final exempt regulatory action.

The Children's Mental Health Waiver and Alzheimer's Assisted Living Waiver are not included in this regulatory action because those waivers do not cover personal care services. The only Medicaid waivers that are covered by this mandate that do cover personal care services are the HIV/AIDS and Elderly or Disabled with Consumer Direction waivers.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

This regulation is necessary because DMAS must set out the standards that Medicaid individuals must meet in order to be approved for additional personal care services in excess of the new 56-hours per week limit. This is essential to protect the health and safety of Medicaid individuals who demonstrate the medical necessity for these additional services. It is also essential for the citizens such that DMAS does not provide services to individuals when there is no medical necessity.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

The state regulations that are affected by this action are HIV/AIDS Waiver (12 VAC 30-120-199) and Elderly or Disabled with Consumer Direction Waiver (12 VAC 30-120-990).

Currently, there are no criteria for any exceptions to the limit on the coverage of personal care services in the affected HIV/AIDS and the Elderly or Disabled with Consumer Direction waivers. DMAS adopted the limit of 56 hours on this service effective July 1, 2011, in response to this same legislative directive (Chapter 890, Item 297 CCCCC) for these two waivers.

This mandate directed DMAS to take into consideration the following elements: (i) dependency in activities of daily living; (ii) required level of care, and; (iii) risk of institutionalization if additional hours are not provided.

DMAS has complied with this mandate in formulating its proposal.

Even though the Alzheimer’s and Children’s Mental Health Waivers are included in this mandate, they are not modified in this emergency regulation action because personal care services are not provided through these waivers.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
N/A	120-199	None.	Contains criteria for the HIV/AIDS waiver that must be met in order to be approved for more than 56 hours of personal care services in a week.
N/A	120-990	None.	Contains criteria for the EDCD waiver that must be met in order to be approved for more than 56 hours of personal care services in a week.

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. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

There are no alternatives available to the agency to respond to this specific mandate.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

The agency/board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency/board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, record-keeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Melissa Fritzman, Div. of Long Term Care Services, DMAS, 600 E. Broad Street, Suite 1300, Richmond, VA 23219, 804-225-4206; fax 804-612-0400,

Melissa.Fritzman@dmas.virginia.gov . Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public meeting will not be held pursuant to an authorization to proceed without holding a public meeting.

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The agency/board will use the participatory approach to develop a proposal if it receives at least 25 written requests to use the participatory approach prior to the end of the public comment period. Persons requesting the agency use the participatory approach and interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and their organization (if any). Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential 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; 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.