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

<b>Agency name</b>	DEPT. OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation(s)</b>	12 VAC 30-50-130; 12 VAC30-120-700, 120-770, 120-900, 120-935, 120-1020, 120-1060
<b>Regulation title(s)</b>	Amount, Duration, and Scope of Services: Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services; Waiver Services: Individual and Family Developmental Disabilities Services (DD); Elderly or Disabled with Consumer Direction (EDCD), and Intellectual Disabilities (ID)
<b>Action title</b>	Consumer Directed Services Facilitators
<b>Date this document prepared</b>	

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to eighteen months), 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 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

These changes will affect the Individual and Family Developmental Disabilities Services (DD), Intellectual Disabilities (ID), and Elderly or Disabled with Consumer Direction (EDCD) waivers as well as personal care services covered under the authority of the Early and Periodic Screening,

Diagnosis and Treatment (EPSDT) program for persons 21 years of age and younger. These changes require that services facilitators (SFs) be required for all persons in the EDCD waiver. These changes propose the same qualifications, education, and training for SFs across all three of these waivers, such as: (i) SFs who are not licensed nurses are required to advise, with the permission of the waiver individuals, the primary healthcare provider that services are being provided; (ii) SFs are required to have sufficient knowledge, skills, and abilities to perform the activities that are required of them; (iii) SFs must have a satisfactory work record and submit to a criminal background check; (iv) SFs must submit to a check of the Department of Social Services Child Protective Services Central Registry; (v) SFs must not be debarred, suspended, or otherwise excluded from participating in this Federal health care program; (vi) new SFs, must have, at a minimum, an associate's degree in a health or human services field or be a registered nurse currently licensed in the Commonwealth and possess a minimum of two years of satisfactory direct care experience or hold a bachelor's degree or higher in a non-health or human services field and have at least three years of satisfactory direct care experience; (vii) SFs must complete the DMAS-approved Consumer Directed Services Facilitator training and pass the corresponding competency assessment with at least a score of 80%; and, (viii) SFs must have access to a computer with secure internet access. The documented knowledge, skills, and abilities set out in the regulations are the same as are currently required in these waivers' regulations. This regulatory action makes these requirements consistent across all of the waivers that offer consumer-directed personal care services.

The General Assembly also recognized the need to address this situation and strengthen the requirements for and qualifications of consumer directed services facilitators. See Item 307 XXX of Chapter 806 of the *2013 Acts of the Assembly*.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Consumer Directed Services Facilitators (12 VAC 30-50-130, 12 VAC 30-120-700, 120-770, 120-900, 120-935, 120-1020, and 120-1060) and also authorize the initiation of the promulgation process provided for in § 2.2-4007.

### Emergency Authority

*The APA (Code of Virginia § 2.2-4011) states that agencies may adopt emergency regulations in situations 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, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006. Please explain why this is an emergency situation as described above, and provide specific citations to the Code of Virginia or the Appropriation Act, if applicable.*

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Section 2.2-4011(A) of the *Code of Virginia* states that "[r]egulations that an agency finds are necessitated by an emergency situation may be adopted upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor."

DMAS certifies an emergency exists to the health, safety, and welfare of Medicaid individuals who are electing to use the consumer-directed model of service delivery but who may not be adequately or appropriately supported by services facilitators. The result is that individuals are not receiving services, as ordered in their plans of care; individuals are suffering lapses in necessary services, which places them at risk for abuse, neglect or exploitation; attendants' hours are not being paid in a timely manner so they are refusing to show up for work; and, persons lacking sufficient training are performing inadequate care. This is affecting individuals in several home- and community-based waivers (EDCD, ID, and IFDDS) as well as children receiving personal care services through the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program.

The Governor is hereby requested to authorize the regulatory promulgation process provided for in the *Code of Virginia* § 2.2-4011(A) for the emergency regulations entitled 'Consumer Directed Services Facilitators' (12 VAC 30-50-130, 12 VAC 30-120-700, 12 VAC 30-120-770, 12 VAC 30-120-900, 12 VAC 30-120-935, 12 VAC 30-120-1020 and, 12 VAC 30-120-1060).

### 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) the promulgating entity, i.e., agency, board, or person.*

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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.

Section 2.2-4011(A) of the *Code of Virginia* states that "[r]egulations that an agency finds are necessitated by an emergency situation may be adopted upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor." DMAS certifies an emergency exists affecting the health, safety, and welfare of Medicaid individuals who are electing to use consumer directed personal care services but who are not being adequately or appropriately supported by services facilitators.

### 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.*

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In select Medicaid home and community based services (HCBS) waivers and through the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program (for personal care only), enrolled individuals with a need for personal assistance, respite or companion services may receive these services using the consumer-directed (CD) model of service delivery, the agency-directed (AD) model of service delivery, or a combination of both. The CD model differs from the AD model by offering the individual the option to be the employer (hiring, training, scheduling, and firing) of attendants who are the individual’s employees. Unlike the AD model, there is no home health agency involved in the selection and management of personal care attendants; the individual enrolled in the waiver is the employer. If the individual is unable to perform employer functions, or is younger than 18 years of age, and still elects to receive CD care, then a family member or caregiver must serve as the employer of record (EOR).

Individuals in the Intellectual Disability (ID) Waiver, Individual and Family Developmental Disabilities Support (IFDDS) Waiver, or Elderly or Disabled with Consumer Direction (EDCD) Waiver have the option of CD services if criteria are met. The EPSDT program children also have the option of CD personal care services.

Individuals choosing CD services must receive support from a CD services facilitator in conjunction with CD services. The CD services facilitator is responsible for assessing the individual's particular needs for a requested CD service, assisting in the development of the plan of care, assuring service authorizations are submitted for care needs, providing training to the individual and family/caregiver on their responsibilities as an employer, and providing ongoing support of the CD services. The services facilitator provides necessary supportive services that are designed to assist the individual in his employment duties.

**Need**

*Please describe 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.*

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Unlike agency-directed staff, CD services facilitators are not licensed by any governing body, nor do they have any regulatorily-established degree requirements. Most other types of Virginia Medicaid-enrolled providers (such as physicians, dentists, home health agencies, hospitals and nursing homes, for example) have degrees, licensing or certification requirements. This regulatory package is intended to ensure that all services facilitator staff, including those who are employed by or contracted with a Medicaid-enrolled Services Facilitator receive training to ensure that they are familiar with the program's requirements and meet the qualifications to handle the unique needs of home and community-based waiver enrollees who choose to direct their own long term care services in their communities.

DMAS is documenting an increasing number of cases of services facilitators not performing their required duties, such as:

- § Some services facilitators have not submitted timely service authorization requests to the DMAS service authorization contractor resulting in delays, and even total lapses, in service provision. Such delays and lapses in receipt of services puts these individuals at risk of abuse, neglect, or exploitation.
- § Some services facilitators are having difficulty accurately completing plans of care, resulting in the service authorization contractor’s request for additional justification, thereby delaying the individual’s receipt of services. Such delays jeopardize their health care needs. Medicaid individuals have reported being unable to reach their service facilitators by phone, thereby jeopardizing these individuals' health, safety and welfare.
- § There are increasing numbers of calls indicating that some services facilitators who lack the basic Medicaid and program knowledge are not adequately informing Medicaid individuals about services that they may need.

Individuals who are approved for home and community-based care are, by definition, at risk of institutional care in the absence of the provided community based services. It is the care received from their attendants that enables them to remain safely in their homes and communities. Interruptions in and absence of needed care services due to services facilitators not appropriately performing their duties puts these affected individuals at risk of being institutionalized. The recommendations contained in these emergency regulations address these issues.

**Substance**

*Please describe 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 the agency has determined that the proposed regulatory action is essential to protect the healthy, safety, or welfare of Virginians.*

The regulations that are affected by this action are: the Amount, Duration, and Scope of Services Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) (12 VAC 30-50-130) and Waiver Services for: (i) the Individual and Families with Developmental Disabilities (DD) waiver (12 VAC 30-120-700 and -120-770); the Elderly or Disabled with Consumer Direction (EDCD) waiver (12 VAC 30-120-900 and -120-935); and, (iii) the Intellectual Disabilities (ID) waiver (12 VAC 30-120-1020 and -120-1060).

**CURRENT POLICY**

Individuals enrolled in certain home and community-based waivers or who receive personal care through EPSDT may choose between receiving services through a Medicaid enrolled provider agency or by using the consumer-directed model. Individuals who prefer to receive their personal care services through an agency are the beneficiaries of a number of administrative type functions, the most important of which is the preparation of an individualized service plan (ISP) and the monitoring of those services to ensure quality and appropriateness. This ISP sets out all the services (types, frequency, amount, duration) that the individual requires and that his physician has ordered.

The consumer-directed (CD) model differs from agency-directed (AD) services by allowing the Medicaid-enrolled individual to develop his or her own service plan and self-monitor the quality of those services. To receive CD services, the individual or another designated individual must act as the employer of record (EOR). The EOR hires, trains, and supervises the attendant(s). A minor child (younger than age 18) is required to have an EOR. Services facilitation is a service that assists the individual (and the individual's family or caregiver, as appropriate) in arranging for, directing, and managing services provided through the consumer-directed model.

### ISSUES

Currently, there is no process to verify that potential and/or enrolled services facilitators are qualified to perform or possess the knowledge, skills, and abilities related to the duties they must fulfill as outlined in current regulations. Consumer-directed services facilitators are not licensed by any governing body, nor do they have any degree or training requirements established in regulation. Other types of Virginia Medicaid-enrolled providers are required by the Commonwealth to have degrees, meet licensing requirements, or demonstrate certifications as precursors to being Medicaid-enrolled providers.

### RECOMMENDATIONS

The regulations are needed to provide the basis for the Department to ensure qualified services facilitators are enrolled as service providers and receive reimbursement under the Medicaid waiver programs and through EPSDT. These regulations are also needed to ensure that enrolled services facilitator providers employ staff who also meet these qualifications. The regulations will ensure that services facilitators have the training and expertise to effectively address the needs of those individuals who are enrolled in home and community-based waivers who direct their own care. Services facilitators are essential to the health, safety and welfare of this vulnerable population. As part of the process, the Department used the participatory approach and has obtained input from stakeholders into the design of these regulations.

The regulations are intended to positively impact those choosing to direct their own care under the home and community-based waiver and through EPSDT by ensuring the services facilitators are qualified and can be responsive to the needs of the population.

These changes are intended to be applied across all Medicaid HCBS waivers (IFDDS, EDCD, and ID) and EPSDT in which there is consumer direction of services, and the concurrent services facilitation, is permitted. The changes are as follows:

- If a services facilitator is not a Registered Nurse, then the services facilitator is required to contact the individual's primary care physician and request consultation;
- The services facilitator is required to have sufficient knowledge, skills and abilities (KSAs) to perform his duties (the KSAs are set out in the regulations at 12 VAC 30-120-935);
- The services facilitator is required to have either a college degree or be a Registered Nurse and have designated amounts of experience supporting individuals with disabilities or older adults;

- The services facilitator is being required to pass with a score of at least 80% the DMAS-approved training course;
- The services facilitator is required to have a satisfactory work record. The services facilitator cannot have a prior conviction in his record of having committed barrier crimes as set out in the Virginia Code, cannot have a founded complaint in the DSS Child Protective Services Central Registry, and cannot be excluded from participating in Medicaid;
- If the services facilitator fails to conduct his duties, as shown in patient records, then DMAS will recover expenditures;
- The services facilitator is being required to have access to a computer with secure internet access;
- Functions and tasks that must be performed by the services facilitator are set out; and,
- Required documentation in patients' records is set out.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, and likely impact of proposed requirements
12 VAC 30-50-130		EPSDT provides for all services that are medically necessary for individuals younger than 21 years of age.	Proposes that services facilitators be required for individuals who are receiving consumer-directed personal care services and incorporates all of the educational and training requirements of 12 VAC 30-120-935.
12VAC30-120-700		Definitions for IFDDS waiver	Revises definition of consumer directed model of service and services facilitation for consistency across all HCBS waivers. Updates other terms (MR, DMHMRSAS, etc.) as technical changes.
12VAC30-120-770		Criteria for consumer directed model of service delivery	Establishes the same criteria for Consumer-Directed Services Facilitators across all waivers that SFs must meet to be qualified to receive Medicaid reimbursement.
12VAC30-120-900		Definitions for EDCD waiver	Revises definition of consumer directed model of service and services facilitation for consistency across all HCBS waivers. Updates other terms (MR, DMHMRSAS, etc.) as technical changes.
12VAC30-120-935		Participation standards for specific covered services	Establishes the same criteria for Consumer-Directed Services Facilitators across all waivers that SFs must meet to be qualified to receive Medicaid reimbursement.
12VAC30-120-1020		Covered services; limits on covered services for ID waiver	Revises the criteria to serve as a qualified Consumer Directed Services Facilitator
12VAC30-120-1060		Participation standards for provision of services; providers' requirements for ID waiver	Establishes the same criteria for Consumer-Directed Services Facilitators across all waivers that SFs must meet to be qualified to receive Medicaid reim-

			bursement.

### 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.*

The alternative of not addressing these training and job performance issues is not satisfactory because of the dangers it poses to individuals who wish to direct their care services in the affected waivers. These regulations are intended to have a positive impact on those individuals who choose to direct their own care as permitted by several Medicaid home and community based waivers and EPSDT. These regulations ensure that the services facilitators are qualified to perform these services and can be responsive to the needs of vulnerable populations.

### Public participation

*Please indicate whether 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. Please also indicate whether a Regulatory Advisory Panel or a Negotiated Rulemaking Panel has been used in the development of the emergency regulation and whether it will also be used in the development of the permanent regulation.*

The agency is seeking comments on the regulation that will permanently replace this emergency regulation, including but not limited to 1) ideas to be considered in the development of the permanent replacement regulation, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) the potential impacts of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to **Nichole Martin, RN, Manager, Div of Long Term Care, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219, (804) 371-5016; (804) 786-1680; [Nichole.Martin@dmas.virginia.gov](mailto:Nichole.Martin@dmas.virginia.gov)**. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.

### Family Impact

*Please assess the 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.*

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These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; nor 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.