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## Final Regulation Agency Background Document

<b>Agency name</b>	DEPT OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation(s)</b>	12 VAC 30-120-1000; 12 VAC 30-120-1012; VAC 30-120-1062; 12 VAC 30-120-1072; 12 VAC 30-120-1082
<b>Regulation title(s)</b>	Intellectual Disability Waiver: Definitions; Individuals Enrolled in the ID Waiver who are Receiving Congregate Residential Support Services and Require Exceptional Levels of Supports; Exceptional Rate Congregate Residential Supports Provider Requirements; Exceptional CRS rate reimbursement for certain congregated residential support services; Exceptional rate utilization review
<b>Action title</b>	Exceptional Rate for ID Waiver Individuals
<b>Date this document prepared</b>	3/9/2016

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.*

This action enables providers of congregated residential support services, currently covered in the Intellectual Disability Waiver (ID Waiver), to render, in a more fiscally sound manner, services to individuals who have complex medical and behavioral care needs. Such individuals, who may have long been institutionalized in the Commonwealth's training centers, are transitioning into

community settings over the next several years. These affected individuals have exceptional medical and behavioral support needs that cannot be adequately paid for under the current maximum reimbursement rate for congregate residential services. This action increases the reimbursement for congregate residential support services for the qualifying individuals.

**Acronyms and Definitions**

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.*

- CRS = Community Residential Services
- DBHDS = Department of Behavioral Health and Developmental Services
- DMAS = Department of Medical Assistance Services
- DOJ = Department of Justice
- ID = Intellectual Disability

**Statement of final agency action**

*Please provide a statement of the final action taken by the agency including:1) the date the action was taken;2) the name of the agency taking the action; and 3) the title of the regulation.*

I hereby approve the foregoing Regulatory Review Summary with the attached amended Virginia Administrative Code Sections 12 VAC 30-120-1000, 1012, 1062, 1072, and 1082, and adopt the action stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012, of the Administrative Process Act.

3/9/2016

/Signature/

Date

Cynthia B. Jones, Director

Dept. of Medical Assistance Services

**Legal basis**

*Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.*

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.

Chapter 2 of the *2014 Acts of the Assembly*, Item 301 III stated "Effective July 1, 2013, the Department of Medical Assistance Services shall have the authority, to establish a 25 percent higher reimbursement rate for congregate residential services for individuals with complex medical or behavioral needs currently residing in an institution and unable to transition to integrated settings in the community due to the need for services that cannot be provided within the maximum allowable rate, or individuals whose needs present imminent risk of institutionalization and enhanced waiver services are needed beyond those available within the maximum allowable rate. The department shall have authority to promulgate regulations to implement this change within 280 days or less from the enactment of this act." With the Governor's approval, DMAS adopted its emergency regulation effective November 1, 2014.

### Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

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The purpose of this action is to enable providers of congregate residential support services, currently covered in the Intellectual Disability Waiver (ID Waiver), to render, in a more fiscally sound manner, services to individuals who have complex medical and behavioral care needs. Such individuals, who may have long been institutionalized in the Commonwealth's training centers, will transition into community settings over the next several years in response to the settlement agreement between the Commonwealth and the Department of Justice. These affected individuals have exceptional medical and behavioral support needs that cannot be paid for under the current maximum reimbursement rate for congregate residential services. For providers to render services for such individuals, it is requiring substantially more staff time and skills than for individuals who do not have exceptional care needs thus the need for the exceptional reimbursement rate.

### Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both.*

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The regulations affected by this action are the Waiver Programs: Intellectual Disability Waiver (12 VAC 30-120-1000; -120-1012; 120-1062; 120-1072; 120-1082)

### CURRENT POLICY

The current ID waiver regulations became effective July 4, 2013, and constituted major revisions that were jointly agreed to by DMAS and the Department of Behavioral Health and Developmental Services (DBHDS). The revised waiver and regulations represented several years of work between the two agencies. This waiver is funded through Title XIX of the *Social Security Act* and administered daily by DBHDS.

This waiver program covers: (i) assistive technology; (ii) companion services (both consumer-directed and agency-directed); (iii) crisis stabilization; (iv) day support; (v) environmental modifications; (vi) personal assistance services (both consumer-directed and agency-directed); (vii) personal emergency response systems (PERS); (viii) prevocational services; (ix) residential support services; (x) respite services (both consumer-directed and agency-directed); (xi) services facilitation (only for consumer-directed services); (xii) skilled nursing services; (xiii) supported employment, (xiv) therapeutic consultation, and (xv) transition services.

This waiver ID program currently serves 10,465 individuals with intellectual disabilities and has a list of 8,249 individuals waiting to be served. It has 1,573 providers enrolled with DMAS to render all of this waiver's covered services.

Based on DBHDS data, DMAS and DBHDS estimate that approximately 250 individuals will need and qualify for the additional support services that are to be covered by this exceptional reimbursement rate. The total additional expenditures estimated for this reimbursement expansion is \$7.4 M per fiscal year (with approximately \$3.7 M of this amount being General Funds).

## ISSUES

In 2008, the Department of Justice (DOJ) began an investigation in the Commonwealth, pursuant to the Civil Rights of Institutionalized Persons Act, and in 2010 expanded it to examine the Commonwealth's compliance with the Americans with Disabilities Act and the U.S. Supreme Court *Olmstead* ruling (<http://www.law.cornell.edu/supct/html/98-536.ZS.html>). This expansion covered Virginia's entire system of services for citizens with intellectual and developmental disabilities, including all five state training centers and community services serving these individuals. The *Olmstead* decision requires that individuals with disabilities be served in the most integrated settings possible. The DOJ investigation concluded that Virginia needed to improve service provision to better integrate community services, and that Virginia's training centers' discharge process required improvement.

The agreement reached between DOJ and the Commonwealth directly ties to this regulatory action. According to DBHDS, the individuals who have exceptional medical care and behavioral health issues and are being discharged from training centers require additional supports in order to successfully transition into their communities and remain there safely. Residential support services providers, who will be accepting many of these exceptional care individuals, are facing significant challenges in rendering services for such individuals within the existing reimbursement rate structure. They are consistently providing services and staff time in excess of the waiver's service maximum reimbursement limits.

RECOMMENDATIONS

This action recommends an increase of 25% in the reimbursement rate to residential support services providers who serve individuals who have complex medical and behavioral needs to better compensate them for caring for these exceptional care individuals.

**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 there are no disadvantages to the public or the Commonwealth, please indicate.*

The greatest advantage is expected to be to the affected individuals who have complex medical and behavioral care needs and who reside in training centers in enabling them to transition to community living. This additional reimbursement will also be an advantage to the congregate residential providers who agree to accept individuals with complex care needs.

The disadvantage to the Commonwealth of not enabling these individuals to transition into community living would be the failure to implement the settlement agreement with DOJ.

**Requirements more restrictive than federal**

*Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

There are no requirements more restrictive than federal requirements for this service.

**Localities particularly affected**

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

No individual locality is uniquely affected by this action as this change will apply statewide.

**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.*

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.

**Changes made since the proposed stage**

*Please list all changes that made to the text of the proposed regulation and the rationale for the changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. \*Please put an asterisk next to any substantive changes.*

<b>Section number</b>	<b>Requirement at proposed stage</b>	<b>What has changed</b>	<b>Rationale for change</b>
12VAC30-120-1000	The definition of behavioral specialist did not refer to the Virginia Code definition.	"Behavioral specialist" means a person who possesses any of the following credentials: (i) endorsement by the Partnership for People with Disabilities at Virginia Commonwealth University as a positive behavioral supports facilitator; (ii) board certification as a behavior analyst (BCBA) or board certification as an associate behavior analyst (BCABA) <u>as required by Code of Virginia, §54.1-2957.16;</u> or (iii) licensure by the Commonwealth as either a psychologist, a licensed professional counselor (LPC), a licensed clinical social worker (LCSW), or a psychiatric clinical nurse specialist.	This change was made in response to public comment.
12VAC30-120-1000	N/A	Wording change: Under Behavioral health authority “as required by the Code of Virginia §54.1-2957.16” has been added.	To clarify the definition of Behavioral specialist.
12VAC30-120-1012	N/A	Wording change: In paragraph B “he resided” has been changed to “residing”.	For clarity.
12VAC30-120-1062	N/A	Wording change: Under paragraph F (b) “and shall document the observations in the provider’s	For clarity.

		record” has been added.	
	N/A	Wording change: Under paragraph F (4b) “individuals” has been added. “Typical to this population” has been deleted.	For clarity.
	N/A	Wording change: Under paragraph F (6b) “contains” has been deleted. “Needed” has been added. “Them” has been added.	For clarity.
	N/A	Wording change: Under paragraph F (6c) “involvement” has been deleted.	For clarity.

**Public comment**

*Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.*

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
Virginia Association for Behavior Analysis	Number ii should read “licensure by the Commonwealth as either a behavior analyst (LBA) or assistant behavior analyst (LABA)” In order to practice behavior analysis in Virginia, one must be licensed according to §54.1-2957.16. Also, the a in BCaBA is lowercase and stands for “assistant.”	The definition will be amended to include reference to §54.1-2957.16. No change will be made to “BCABA” based on the comments provided by the Virginia Institute of Autism.  "Behavioral specialist" means a person who possesses any of the following credentials: (i) endorsement by the Partnership for People with Disabilities at Virginia Commonwealth University as a positive behavioral supports facilitator; (ii) board certification as a behavior analyst (BCBA) or board certification as an associate behavior analyst (BCABA); or (iii) licensure by the Commonwealth as either a psychologist, a licensed professional counselor (LPC), a licensed clinical social worker (LCSW), or a psychiatric clinical nurse specialist.
Virginia Institute of Autism	"Behavioral specialist" means a person who possesses any of the following credentials: (i) endorsement by the Partnership for People with Disabilities at Virginia Commonwealth University as a positive behavioral supports facilitator; (ii) board certification as a behavior analyst (BCBA) or board certification as an associate behavior analyst (BCABA); or (iii) licensure by the Commonwealth as either a psychologist, a licensed	Please see the comment above.

	<p>professional counselor (LPC), a licensed clinical social worker (LCSW), or a psychiatric clinical nurse specialist.</p> <p>Also included the same comments as submitted above.</p> <p>When referring to a licensed person, the A is capitalized, but still refers to "assistant."</p>	
Dower and Associates, Inc.	Same comments as submitted by Virginia Institute of Autism.	Please see the comment above.
Virginia Network of Private Providers, Inc.	<p>There was a delay in the implementation of the increased rates, which was expected to create a large number of provider applications upon implementation (due to pent-up demand). However, the number of applications has been more modest than expected, which indicates:</p> <ul style="list-style-type: none"> <li>• The conditions on providers in 12VAC30-120-1012 are excessive and costly, making the program less attractive</li> <li>• Providers are subject to increased risk of being found non-compliant with requirements</li> <li>• Providers have been successfully supporting individuals in the community but can't demonstrate compliance with 12VAC30-120-1012(B)(2) under the funding system.</li> </ul> <p>The exceptional rate will extend only to the individual's conversion to the revised rate structure. However, the commenter makes these points, as they hope similar rules are not made about individuals on SIS Levels 6 or 7 and the providers who support them.</p>	<p>Item 307 BBBB.1 in the 2013 Acts of Assembly targets two groups for an exceptional rate: 1) individuals with complex medical or behavioral needs currently residing in an institution and unable to transition into community; and 2) individuals whose needs present imminent risk of institutionalization and enhanced waiver services are needed beyond those available within the maximum allowable rate. The criteria for an exceptional rate are designed to target the population described above.</p> <p>Regarding services after the revised rate structure, that issue is beyond the scope of these regulations.</p>
Individual	Same comments as submitted by Virginia Association for Behavior	See response above.

	Analysis.	
Individual	Same comments as submitted by Virginia Association for Behavior Analysis.	See response above.

**All changes made in this regulatory action**

*Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
1000		Includes definitions applicable to the ID waiver program.	Change at proposed stage: New definitions added for terms needed for the exceptional reimbursement rate change.
	1012		Change at proposed stage: Sets out specific medical care and behavioral criteria that individuals in the waiver will have to meet in order for qualify for exceptional support services.
	1062		Change at proposed stage: Sets out provider requirements for exceptional rate of reimbursement.
	1072		Change at proposed stage: Sets out exceptional rate of reimbursement.
	1082		Change at proposed stage: Sets out utilization review requirements for DMAS and DBHDS.