

Notice of Intended Regulatory Action (NOIRA) Agency Background Document

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| Agency name | Department of Medical Assistance Services |
| Virginia Administrative Code (VAC) citation(s) | 12 VAC 30-120-1700 et seq. |
| Regulation Title(s) | Waiver Services: Home and Community-Based Services for Technology Assisted Individuals |
| Action title | Technology Assisted Waiver Update |
| Date this document prepared | 6/4/2015 |

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*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

The Department of Medical Assistance Services (DMAS) intends to update the Technology Assisted Waiver (TW) regulations in order to accommodate changes in the industry and provide additional options to agencies for staffing of private duty nursing services. In response to provider requests, DMAS is considering permitting the substitution of additional training for private duty nurses in place of clinical experience. DMAS is also considering permitting families to use their authorized private duty nursing hours over the span of a week rather than limiting them to 16 hours of private duty nursing services in a 24-hour period.

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.

Section 1915(c) of the *Social Security Act* permits states to cover an array of home and community-based services that an individual needs to avoid institutionalization. These community services are eligible for federal matching funds. The Technology Assisted Waiver is one of DMAS' programs operating under this federal authority.

Purpose

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, please explain any potential issues that may need to be addressed as the regulation is developed.

The Technology Waiver (TW) serves individuals who require some form of mechanical device, such as ventilators, to sustain life. The waiver regulations require updating to ensure that they reflect best health care practices. These changes will provide greater access to the waiver and continue to ensure the health and safety of all individuals receiving TW services.

Substance

Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

The Medicaid waiver regulations that are affected by this action are: 12VAC30-120-1710, 12VAC30-120-1720, 12VAC30-120-1730 and 12VAC30-120-1740.

CURRENT POLICY (1)

The TW currently requires all nurses, who are reimbursed for rendering private duty nursing services to TW individuals, to have at least six months of related clinical experience prior to providing skilled private duty or skilled respite services for Medicaid reimbursement in this waiver program.

ISSUES

Nationally, as well as in Virginia, there is a nursing shortage. TW providers, such as home health agencies and nursing agencies, have a difficult time finding nurses with 6 months of specialized clinical experience in the complex care required by Tech Waiver individuals (ventilators, tracheostomies, nasogastric tubes, etc.). As more individuals with complex medical needs choose to remain in their communities, the shortage of experienced complex care nurses who can meet these individuals' service needs is exacerbated.

In part, this nursing shortage has occurred as a result of advances in the care of individuals who are dependent on ventilators. Today, individuals can receive care in the community versus residing in an

institution. This in turn has reduced the number of nursing facilities and specialized care ventilator units in nursing facilities where nurses can receive training and experience.

Additionally, acute care hospitals have shifted many of the responsibilities for direct respiratory care and tracheostomy/ventilator maintenance from staff nurses to respiratory therapists thus also decreasing opportunities for nurses to receive experience.

CURRENT POLICY (2)

DMAS currently requires families provide 8 hours of care in every 24-hour day to TW individuals. In the past, there have been concerns about the waiver individuals' health and safety as well as these individuals' care costs exceeding, in the aggregate, institutional costs. Should this happen, the federal funding agency, the Centers for Medicare and Medicaid Services (CMS), will withdraw federal funding for this community waiver resulting in these individuals being moved into institutions.

ISSUES

Families have stated that, while remaining within their weekly authorized number of private duty nursing hours, it should not matter to DMAS when the nursing hours are used: whether the hours are consolidated over just a few days in the week (assuming that home health/nursing agencies can provide enough nursing staff) or spread out over the entire week. These families have pointed out that it is difficult to find employment when they cannot commit to regular, consistent work schedules for their employers.

In addition, CMS is requiring Medicaid programs to have person-centered approaches for service delivery. DMAS believes that keeping this waiver's expenditures below the institutional care costs can be maintained while permitting these families greater flexibility in when authorized private duty nursing services are used.

CURRENT POLICY (3)

DMAS currently allows individuals to "make up" missed authorized private duty nursing (PDN) hours within the same week (Sunday through Saturday) of the missed shift. The total number of PDN hours and made up hours cannot exceed 16 hours per day.

ISSUES

With the change in the policy allowing families greater flexibility in scheduling their authorized hours per week, a policy to make up missed hours is no longer required. If previously scheduled hours are missed, the family still has those hours available within their weekly total authorized hours to schedule on another day during that same week. This rescheduling of the "missed hours" falls within their ability to "flex" their schedule and would not be considered make-up.

RECOMMENDATIONS

(1) DMAS recommends permitting providers to employ nurses (both RNs and LPNs) who have either 6 months of related clinical experience or who have completed a relevant provider training program. The regulations would provide the elements of the training.

- a. Trainer (RN/RT) must have at least 6 months hands on experience in the area of care they will be providing, such as ventilator, tracheostomy, peg tube, nasogastric tube, etc.).
- b. Training must include classroom as well as direct hands-on demonstration of skills by the trainee.
- c. Training must include the following subject areas related to the care being provided:
 - i. Anatomy and Physiology
 - ii. Frequently Used Medications
 - iii. Emergency Management
 - iv. Operation of Equipment
- d. Provider must ensure competency of staff.

Changes that will be proposed include modifying the staff experience requirement by allowing providers to substitute a quality training program for nurses in place of the current six months of clinical experience. This change is expected to increase the pool of potential nurses (RNs/LPNs) eligible to provide TW services.

(2) DMAS recommends changing the policy requiring families to provide 8 hours of care in a 24-hour day to permitting families the flexibility to use approved hours per week as agreed upon with DMAS. This type of flexibility allows TW individuals’ schedules to include longer days to accommodate physician appointments, community activities, caregiver work schedules, etc. A sample schedule for a TW individual that allows caregiver coverage for work but also extended hours for community involvement may be, for example:

| Week | Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday | Week Total |
|--------|--------|--------|---------|-----------|----------|--------|----------|------------|
| Agency | 8 | 16 | 20 | 16 | 20 | 16 | 16 | 112 |
| Family | 16 | 8 | 4 | 8 | 4 | 8 | 8 | 56 |

(3) DMAS recommends deleting the current wording related to make up or re-scheduling of missed hours as it is no longer germane.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no other alternatives that would increase the number of qualified providers. Families have specifically requested this additional flexibility to use their authorized private duty nursing hours in a week.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including 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 hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency's contact if you're interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is 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, recordkeeping 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.

The agency has met with stakeholders to discuss the proposed regulatory actions and alternatives. This participatory approach has resulted in the recommendations for revisions to the regulations.

Anyone wishing to submit written comments may do so by mail, email or fax to Steve Ankiel, 600 East Broad St. Richmond, Virginia 23219, Office 804-371-8894, Fax 804-371-4986; email steve.ankiel@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 hearing will not be held.