



Virginia
Regulatory
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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 -900 through 12 VAC30-120-980
Regulation title	Elderly or Disabled with Consumer Direction Waiver
Action title	Elderly or Disabled with Consumer Direction Waiver 2009 Updates
Date this document prepared	

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*.

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.

This regulatory action updates the Elderly or Disabled with Consumer Direction Waiver (EDCD) to accommodate changes in the industry and to provide greater clarity in these regulations.

Legal basis

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.

DMAS' Elderly or Disabled with Consumer Direction Waiver operates under the authority of § 1915 (c) of the *Social Security Act* and 42 CFR § 430.25(b)(2) which permit the waiver of certain State Plan requirements. These cited federal statutory and regulatory provisions permit the establishment of Medicaid waivers to afford the states with greater flexibility to devise different approaches to the provision of long term care services. This particular waiver provides Medicaid recipients who are elderly or disabled with numerous supportive services to enable such individuals to remain in their homes and communities at lower costs, as opposed to being institutionalized in nursing facilities.

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.

Updating changes are needed to the Elderly or Disabled with Consumer Direction Waiver (EDCD) in order to accommodate changes in the industry and to improve clarity. These regulations have not been substantially revised since their re-promulgation in 2006. These changes will continue to assure the health and safety of all participants.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

The state regulations that are affected by this action are the Elderly or Disabled with Consumer Direction Waiver located at 12 VAC 30-120 -900 through 12 VAC 30-120-980.

No changes are recommended for the eligibility criteria used to determine if applicants for this waiver can be approved. Currently, these regulations require the use of the DMAS-122 form by local departments of social services to communicate to long term care providers, relevant information about recipients' eligibility and patient pay amounts. With the patient pay information on the DMAS-122 form, providers are thereby advised about the payment amounts they can expect from DMAS for the services that they render.

Currently, the existing adult day health care services regulations contain providers' standards, similar to licensing standards, applicable to the centers' physical plants, staffing requirements, and provision of meals. For agency-directed personal care services, DMAS requires that the nurse supervisor perform visits (for initial assessments and follow up visits) to recipients' homes within specified numbers of days depending on if the recipient is cognitively impaired or not cognitively impaired. Currently, the regulations require that DMAS approve personal care aide training classes for agencies. Currently, the regulations permit someone who is only 10 years old

to provide personal care aide services. Currently, the regulations set a standard of a minimum of 40-hours of training for personal care aides. Currently, the regulations require that the consumer-directed services facilitator perform criminal record checks.

Changes will be proposed as follows: (i) to allow for Licensed Practical Nurses (LPNs) to supervise personal care aides under agency-directed personal care and respite care services; (ii) to require personal care agencies to ensure that the personal care aide has the required skills and training to perform services as specified in the individual’s supporting documentation; (iii) to change the age from 10 years old to 18 years old for program aides in Adult Day Care; (iv) to revise the regulations to reflect the replacement of the DMAS-122 form with the Medicaid Long-Term Care Communication Form (DMAS-225); (v) to remove standards that apply to the physical plant of the adult day health care center. As DMAS is not the licensing agency for this type of facility.

Further changes will permit, based on the personal care agency’s assessment of the recipient, longer periods of time between supervising Registered Nurse and Licensed Practical Nurse supervisory visits; new standards are recommended for the new supervisory provider type of Licensed Practical Nurses; agencies must ensure that its aides have the training and skills required to perform the services required in recipients’ plans of care; alternative methods of aide service documentation are permitted; the Medicaid contracted Fiscal/Employer Agent will now be responsible for obtaining criminal record checks for aides in consumer-directed services;

Duplicative statements, (such as in 12VAC 30-120-930(I)(4) and 12VAC30-120-970)), are being removed to improve clarity and reduce confusion.

Additional suggestions received from recipients’ advocates and health care industry representatives during this Notice of Intended Regulatory Action comment period will also be considered and addressed in the next proposed stage.

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, please 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 agency has met with stakeholders and providers over the last six months to discuss the proposed regulatory actions and viable alternatives have been considered. These suggested revisions represent the consensus of the agency’s advisory group.

Discussions on permitting Licensed Practical Nurses to supervise personal care aides will follow other practices in community healthcare services.

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 hearing is to be held to receive comments on this notice.

In the development of these proposed changes DMAS sought input from the affected regulated industries. The process of discussion took place over several months and multiple meetings and concluded with these proposed changes. Attached is a list of participants.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal.

The agency 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 regulations. The agency 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, 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.

Anyone wishing to submit written comments may do so by mail, email or fax to William Butler, **600 East Broad St. Richmond, Virginia 23219, Office (804) 371-8886, Fax (804) 371-4986, email: william.butler@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.

Participatory approach

Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, technical advisory committees) will be involved 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 has met with stakeholders and providers for the last six months to discuss this proposed regulatory action and all viable alternatives have been considered. This participatory approach has resulted in the recommendations for revisions to the regulations.

Additional suggestions made during this NOIRA stage comment period will be addressed in the next proposed stage.

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.

Participants

Bonnie Gordon, Virginia Association of Personal Care Providers

Joe Petti, Provider

Karen Ellis, Provider

Lisa Davey, Provider

Marcia Tetterson, Virginia Association for Home Care and Hospice

Olivia Jones, Provider

Tammy Reaves, Provider