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Fast-Track Regulation Agency Background Document

Agency name	Department of Behavioral Health & Developmental Services
Virginia Administrative Code (VAC) citation(s)	<u>12 VAC 225-10 et. seq.</u>
Regulation title(s)	Requirements for Virginia's Early Intervention System
Action title	Establish Early Intervention System Requirements
Date this document prepared	Revised 10/22/2015

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*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

In 2013, DBHDS initiated a regulatory change to add to the existing permanent Early Intervention Services Provider Certification regulations.

The changes proposed in this current fast track differ from those proposed in 2013, in that federal Part C of the Individuals with Disabilities Education Act (IDEA) regulations were revised in September 2011 and the United States Department of Education, Office of Special Education Programs (OSEP) required that the Commonwealth promulgate state regulations to reflect the totality of the federal regulations in order to continue to be eligible for federal grant funds. The existing permanent Early Intervention Services regulations only addressed Provider Certification. The main changes in the September 2011 federal regulations were in increasing parental protections and requiring notification (with parental permission) to the state education agency when the toddler transitions from Early Intervention Part C of IDEA services.

Virginia implemented these changes through policy guidance in the Virginia Early Intervention Practice Manual that was published in June 2012 See chart beginning on p.9.

As a result of the federal changes, Virginia adopted emergency regulations incorporating those amendments (including an updated certification process or whatever) in December 2014. However, in the months since adoption of those emergency regulations additional nonsubstantive amendments have been made at the request of OSEP and are reflected in these proposed changes in this fast track. These changes were intended to allow Virginia to promulgate regulations within the time frame required by OSEP. [NOTE: The department also decided to change from the longer permanent regulatory process to the fast track process.] See chart beginning on p.11.

These regulations are being promulgated to conform Virginia’s regulations to the federal IDEA Part C regulations that were published in the Federal Register on September 28, 2011. Virginia has already set forth the new requirements through the Early Intervention Practice Manual and then emergency regulations on December 29, 2014. This regulatory package will replace the current emergency regulations through the fast-track process. The federal regulatory changes (from September 28, 2011) were predominately in the areas of increasing family protections and requirements of the local Early Intervention program for transitioning infants and toddlers to other programs and services when Early Intervention programs are completed. The proposed fast-track regulations:

- Provide details regarding the state infrastructure for early intervention services;
- Clarify Virginia's referral system to Early Intervention Services;
- Outline the intake, eligibility determination, and assessment processes;
- Provide details for the expectations regarding service planning and delivery, including transition or discharge from the early intervention system of care;
- Explain the service funding and payment expectations;
- Establish the procedural safeguards that individuals can expect;
- Address the alternative to resolve disputes; and
- Continue the certification process for certain early intervention practitioners and a comprehensive system of personnel development.

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.

"IFSP" means "Individualized Family Service Plan."

Part C of IDEA means the Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.) (“IDEA”): Part C – Early Intervention program for infants and toddlers provides a broad array of services to children with special needs, birth through two years of age, and their families.

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.

1. February 5, 2015
2. Department of Behavioral Health and Developmental Services
3. Requirements for Virginia’s Early Intervention System

Change to fast-track regulations.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

The Department has the legal authority to promulgate these regulations under Virginia Code § 2.2-5304, as the state lead agency appointed to implement the early intervention system in Virginia, and in Item 315 H.4 of Chapter 806 of the 2013 Virginia Acts of Assembly.

In addition, these regulations implement Part C of IDEA, at 20 U.S.C. § 1431 et seq. and at 34 C.F.R. Part 303, in Virginia.

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.

These regulations are being promulgated to conform Virginia's regulations to the federal IDEA Part C regulations that were published in the Federal Register on September 28, 2011. The proposed fast-track regulations describe Early Intervention practices that are already in place. This regulatory package will replace the current emergency regulations. The federal regulatory changes were predominately in the areas of increasing family protections and the requirements of the local Early Intervention program for transitioning infants and toddlers to other programs and services when Early Intervention programs are completed.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

The United States Department of Education Office of Special Education Programs (OSEP) must approve a state's policies, procedures, and regulations for implementing the IDEA Part C grant. Approval of the regulations, policies and procedures is required to receive grant funding from OSEP. The fast-track process is being utilized so that Virginia can meet the federal deadline for approval which is June 30, 2016. Without permanent regulations, Virginia's \$10.7 million federal Early Intervention (Part C of IDEA) grant would be at risk. The fast-track process is the most feasible approach to meet the federal deadline for promulgation. Since the practices and procedures defined in the regulations have been required by the Early Intervention Practice Manual, the regulations are not considered controversial and the requirements have been in place for more than three years. There have been limited changes to the emergency regulations. These changes are not considered substantive and therefore are expected to be noncontroversial. The changes to the emergency regulations are detailed in the "Detail of Changes" section.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.

The only substantive changes from the emergency regulations in place to these fast track regulations occur in 225.490 and 225.500.

- In section 225.490 the requirement that DBHDS notifies practitioners when their Early Intervention certification expires is deleted as DBHDS does not have the capacity in its data system to send these notices.
- In section 225.500 the requirement that DBHDS notify practitioners that their status is inactive one year after their certification lapses is deleted as DBHDS does not have the capacity in its data system to send these notices.

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 primary advantages to implementing the regulations are that Virginia will be in compliance with federal regulations and will remain eligible for Early Intervention Part C of IDEA grant funding for infants and toddlers with disabilities. The advantage to the public is that infants and toddlers will continue to receive services and supports to promote their functional abilities and prevent complications. The provision of Early Intervention Services has been demonstrated to reduce treatment and educational costs later in life.

There are no disadvantages to the public.

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 that are more restrictive than the federal requirements.

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.

There are no localities that will bear a disproportionate impact.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

There are no viable alternatives to this proposed regulatory action. In its role as state lead agency for Virginia’s early intervention services system, Virginia’s Part C Program has issued policies and procedures to define and ensure consistency with federal regulations as they relate to Virginia’s early intervention system. Since the program’s inception, the Department has also issued guidance documents, policy letters, related interpretive materials, and provided technical assistance to local lead agencies. The Department considered various alternative criteria and processes, including the revision of current policies and procedures, to comply with the requirements of Part C of IDEA 2004. However, the Office of the Attorney General has advised the Department that regulations are required to strengthen the Department’s ability to supervise and monitor Virginia’s service system. Regulations have the force of law to compel actions that are necessary to meet federal requirements.

Additionally, OSEP requires that Virginia promulgate regulations that implement the federal regulations promulgated on September 28, 2011.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures	There is no expected fiscal impact to implement and enforce these regulations. The requirements are already in place with the Practice Manual and emergency regulations. Educational costs to inform stakeholders will be absorbed in current budgets.
Projected cost of the new regulations or changes to existing regulations on localities.	There is no expected fiscal impact to implement and enforce these regulations. The requirements are already in place with the emergency regulations.
Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.	Infants and toddlers in the Early Intervention system, their parents. Local Early Intervention Programs and providers of services..

<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p> <p>a) is independently owned and operated and;</p> <p>b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>In SFY 14 there were 16,272 infants and toddlers served in the Early Intervention program. There are 40 local Early Intervention Programs, and approximately 70 small businesses that provide early intervention services.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</p> <p>a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and</p> <p>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>There is no expected increase in costs due to these regulations as the requirements have been in place prior to the promulgation of these fast-track regulations.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>The primary advantage of these regulations is that they will help to ensure that services are provided in accordance with federal laws. It will also ensure continued federal funding due to compliance with federal rules. The regulations will assist in protecting the health, safety, and welfare of infants and toddlers in the Early Intervention System. Promulgating these regulations will enable Virginia to continue to be eligible for over \$10.7 million in federal Early Intervention (Part C of IDEA) grant funds.</p>

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.

Continued funding of Virginia’s IDEA Part C (Early Intervention) grant from the US Dept. of Education is dependent on conforming Virginia’s regulations to federal regulations.

This regulatory action is establish in regulations those portions of Virginia's current policies, procedures and practices that require the force of law to successfully enforce and to ensure that the state remains in compliance with federal mandates.

Public participation notice

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Three comments were received. Two comments stated the need for additional funding which is not within the scope of these fast-track regulations. The third commenter's suggestions were incorporated to the extent possible.

Periodic review and small business impact review report of findings

If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Commenter	Comment	Agency response

This fast-track is not the result of a periodic review.

Family impact

Please assess the impact of this 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.

This proposed regulatory action should have a positive impact on the children with developmental delays and their families who are eligible to receive services under the federal Part C program. These regulations establish Virginia's early intervention services system for children and their families to assure services provided support families in attaining self-sufficiency, self-pride, and ultimately help their children with disabilities attain self-sufficiency and self-pride. The regulatory actions should not have any impact on family income, as they implement the current payment structure already established in the practice manual.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the pre-emergency regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.

In 2013, DBHDS initiated a regulatory change to add to the existing permanent Early Intervention Services Provider Certification regulations.

The changes proposed in this current fast track differ from those proposed in 2013, in that federal Part C of the Individuals with Disabilities Education Act (IDEA) regulations were revised in September 2011 and the United States Department of Education, Office of Special Education Programs (OSEP) required that the Commonwealth promulgate state regulations to reflect the totality of the federal regulations in order to continue to be eligible for federal grant funds. The existing permanent Early Intervention Services regulations only addressed Provider Certification. The main changes in the September 2011 federal regulations were in increasing parental protections and requiring notification (with parental permission) to the state education agency when the toddler transitions from Early Intervention Part C of IDEA services. Virginia implemented these changes through policy guidance in the Virginia Early Intervention Practice Manual that was published in June 2012. See chart beginning on p.9.

As a result of the federal changes, Virginia adopted emergency regulations incorporating those amendments (including an updated certification process or whatever) in December 2014. However, in the months since adoption of those emergency regulations additional nonsubstantive amendments have been made at the request of OSEP and are reflected in these proposed changes in this fast track. These changes were intended to allow Virginia to promulgate regulations within the time frame required by OSEP. [NOTE: The department also decided to change from the longer permanent regulatory process to the fast track process.] See chart beginning on p.11.

I. Differences between the previous regulations (pre-emergency) and the proposed regulation

The proposed fast track regulations provide requirements for Virginia's early intervention services and supports system for children and their families under the federal Part C program.

If a new regulation is being promulgated, use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
225-10	Authority	Code of Virginia § 2.2-5300 et. seq. And 34 CFR 303.201	This section identifies that DBHDS is the state lead agency and places this statutory requirement in administrative code. This is not a change.
225-20	Definitions	34 CFR 303.4; Code of Virginia § 2.2-5300	This section insures consistency in the use of terms through out the document. These procedures are currently in place via the Early Intervention Practice Manual.
225-30	Service System Structure	34 CFR 303 et. seq. and Code of Virginia § 2.2-5300 et. seq.	This section implements state code and federal regulations. These procedures are currently in place via the Early

			Intervention Practice Manual and State Code.
225-40	Public Awareness	34 CFR 303.116 and Virginia Early Intervention Practice Manual	This ensures that infants and toddlers are identified for services. These procedures are currently in place via the Early Intervention Practice Manual.
225-50	Referrals	34 CFR 303.116 and Virginia Early Intervention Practice Manual	This ensures that infants and toddlers are identified for services and appropriately referred. These procedures are currently in place via the Early Intervention Practice Manual.
225-60-110	Intake, Eligibility, and Assessment	34 CFR 303.300 et. seq. and Virginia Early Intervention Practice Manual	This section describes processes for determining eligible infants and toddlers and assessment procedures. These procedures are currently in place via the Early Intervention Practice Manual.
225-120-180 and 225--200	Service Planning, Delivery, and Discharge	34 CFR 303.300 et. seq. and Virginia Early Intervention Practice Manual	This section describes the how services are planned. These procedures are currently in place via the Early Intervention Practice Manual.
225-190	Transition	34 CFR 303.344 and Virginia Early Intervention Practice Manual	This was a new requirement in the federal regulations of September 2011. Plans for transitioning toddlers from Early Intervention services must be documented and potentially eligible toddlers are identified, with parental permission, to the VA Dept. of Education.
225-210-280	Funding and Payment Systems	34 CFR 303.500 and Virginia Early Intervention Practice Manual	This section describes which services are at no charge and how other funding sources are allowed. These are not new requirements and were in place prior to the new federal rule.
225-290-370	Procedural Safeguards	34 CFR 303.400 and Virginia Early Intervention Practice Manual	This section implemented new protections for families related to confidentiality and involvement in the care of the infant and toddler in the federal September 2011 regulations. Virginia implemented these in the Virginia Early Intervention Practice Manual and therefore, these practices have been in place more than two years.
225-380-420	Dispute Resolution	34 CFR 303.430 and Virginia Early Intervention Practice Manual	This section describes the options that families and stakeholders have related to disagreements with decisions

			made by Early Intervention Programs. These procedures have been in place via the Virginia Early Intervention Practice Manual
225-430-510	Early Intervention Practitioner Certification Requirements	12 VAC35-220-30; 34CFR 303.31 and Virginia Early Intervention Practice Manual	These requirements were previously promulgated and are incorporated in this package to avoid confusion by having regulations in different sections of the administrative code.
225-520	Comprehensive System of Personnel Development	34 CFR 303.18	This section describes the responsibility of the state lead agency to provide a system for professional development of providers. This had been in place in Virginia long term and is not a new federal requirement.
225-530-540	Lead Agency Oversight Responsibility	34 CFR 303.120 et. seq.	This section describes the lead agency responsibilities related to oversight and monitoring of the provision of services. This is not a new requirement. DBHDS has assumed this responsibility prior to the promulgation of the September 2011 federal regulations.

II. Following are the proposed changes to the existing emergency regulation(s) adopted in December 2014:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
225.50		Upon referral, the single point of entry shall begin an early intervention record for the child and assign a service coordinator who will assist the family with intake, eligibility determination and assessment for service planning and, if eligible, development of an IFSP.	Upon referral, the single point of entry shall begin an early intervention record for the child and assign a service coordinator who will assist the family with intake, eligibility determination, and, <u>if eligible</u> , assessment for service planning and development of an IFSP. This is a clarification and is not substantive.
225.120		Other services as may be identified by the Department	Other services, as identified by <u>the IFSP team</u> . This language was requested by OSEP and clarifies current practice.
225-130-B.4		If the parent chooses to wait, the service coordinator shall document the parent's	If the parent chooses to wait, the service coordinator shall document the parent's decision in a contact note. <u>The parent's</u>

		decision in a contact note, and the delay in the start of services shall be considered a family scheduling preference.	<p><u>consent to the IFSP service shall begin once the parent's specific provider is available, and services shall be provided in a timely manner following parent consent.</u></p> <p>This language is to clarify that parents do not need to wait for services to begin and is required by OSEP.</p>
225-420-A.3		The frequency and length of services in the IFSP	<p>The frequency, length and <u>intensity</u> of services in the IFSP.</p> <p>This change clarifies when an appeal can be made.</p>
225-430-B.2		Behavior Analysts certified through the Behavior Analyst Certification Board as a Board Certified Behavior Analyst (BCBA) [In accordance with Chapter 3 of the 2012 Virginia General Assembly.]	<p><u>Behavior Analysts licensed by the Virginia Board of Medicine;</u></p> <p>This clarifies that BCBA's must have a license. Certification is required for licensure in Virginia.</p>
225-430-B-3.h – i.			<p><u>Educators licensed by the Virginia Board of Education with Endorsement in adapted curriculum k-12;</u></p> <p><u>i. Educators licensed by the Virginia Board of Education with endorsement in general curriculum k-12;</u></p> <p>This adds language to conform Early Intervention regulations with the VA Dept. of Education</p>
225-430-C.1		Assistant Behavior Analysts certified through the Behavior Analyst Certification Board as a Board Certified Assistant Behavior Analyst (BCaBA). [In accordance with Chapter 3 of the 2012 Virginia General Assembly.]	<p><u>Assistant Behavior Analysts licensed by the Virginia Board of Medicine.</u></p> <p>This clarifies that BCaBA's must have a license. Certification is required for licensure in Virginia.</p>
225-490		The Department shall notify practitioners in writing of the date their early intervention certification expired and that the early intervention practitioner has been placed on inactive status in the practitioner database maintained by the department.	<p>This language is removed as the Department does not have the capacity to notify practitioners of a lapse in certification. Practitioners are notified of the expiration date with certification.</p>
225-500-A-2		The practitioner, after a year, fails to comply with the recertification requirements set forth in these regulations	<p>This language is removed as the Department does not have the capacity to identify practitioners of a lapse in certification. Practitioners are notified of the expiration date with certification.</p>

