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

Agency name	Department of Behavioral Health and Developmental Services
Virginia Administrative Code (VAC) citation	12 VAC35-225
Regulation title	Requirements for Virginia Early Intervention System
Action title	Establish an early intervention service system in Virginia
Date this document prepared	11/16/13

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), 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 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

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.

- 1) Please explain why this is an emergency situation as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

Chapter 806 of the 2013 Virginia Acts of Assembly (Budget Bill Item # 315 H.4) requires the Department of Behavioral Health and Developmental Services to promulgate regulations. The legislation states that the Department shall promulgate such regulations within 280 days or less from the enactment date of the act. The enactment date was May 3, 2013. Therefore, this is an "emergency situation" according to the APA (Code of Virginia § 2.2-4011).

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

Legal basis

The Department has the legal authority to promulgate these regulations under Virginia Code § 2.2-5304 and in the Item 315 H.4 of Chapter 806 of the 2013 Virginia Acts of Assembly

Section 2.2-4011 of the Code of Virginia 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.

In addition, these regulations implement Part C of the Individuals with Disabilities Education Act at 20 U.S.C. § 1435(a) and at 34 C.F.R. Part 303 in Virginia.

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.

Infants and toddlers from birth through age two who are not developing as expected or who have a medical condition that can delay normal development may require early intervention supports and services. The Virginia statewide system of early intervention services, The Infant & Toddler Connection of Virginia, has been operating since the mid-80s to identify children who could benefit from early intervention services; establish their eligibility under Part C of the Individuals with Disabilities Education Act (IDEA); coordinate care; and assure the availability of needed services. Last year 15,523 infants and toddlers were served in this system. More than 190 provider agencies participated in Virginia's early intervention system and 888 individuals were certified as early intervention practitioners.

This regulatory action is to codify 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.

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.

Congress enacted early intervention legislation in 1986 as an amendment to the Education of Handicapped Children's Act (1975) to ensure that all children with disabilities from birth through the age of two would receive appropriate early intervention services. This amendment formed Part H of the Act, which was re-authorized in 1991 and renamed the Individuals with Disabilities Education Act (IDEA). When the IDEA was re-authorized in 1998, Part H became Part C of the Act. Virginia has participated in the federal early intervention (under IDEA) program since its inception. The Department of Behavioral Health and Developmental Services (DBHDS) has been designated by the Governor as the Lead Agency for Part C in Virginia. In 1992, the Virginia General Assembly passed state legislation that codified an infrastructure for the early intervention system that supports shared responsibility for the development

and implementation of the system among various agencies at both the state and local levels. This legislation was designed to help Virginia meet federal regulations and guidelines by facilitating a move from a model of programmatic, single-agency responsibility for service provision to an interagency, shared responsibility for developing the early intervention system and for providing early intervention services to infants and toddlers with disabilities and their families. The Code of Virginia, §§2.2-2264 and 2.2-5300 through 2.2-5308, provides the framework for the Infant & Toddler Connection of Virginia Part C system and charges participating state agencies with the following:

- Establishing a statewide system of early intervention services in accordance with state and federal statutes and regulations;
- Identifying and maximizing coordination of all available public and private resources for early intervention services;
- Developing and implementing formal state interagency agreements that define the financial responsibility and service obligations of each participating agency for early intervention services, establishes procedures for resolving disputes, and addresses any additional matters necessary to ensure collaboration;
- Consulting with the lead agency in the promulgation of regulations to implement the early intervention services system, including developing definitions of eligibility and services;
- Carrying out decisions resulting from the dispute resolution process;
- Providing assistance to localities in the implementation of a comprehensive early intervention services system in accordance with state and federal statutes and regulations; and
- Requesting and reviewing data and reports on the implementation of early intervention services from counterpart local agencies.

DBHDS contracts with forty (40) local lead agencies to facilitate implementation of local early intervention services statewide. Local interagency coordinating councils (LICCs) have been established statewide to advise and assist the local lead agencies.

Under IDEA regulations, each state may develop its own definition of eligibility. In Virginia, families have the option to transition their two-year-old children (i.e., age 24 months) from Part C early intervention services to Part B special education services. Services provided under Part B are funded by federal Part B dollars and state and local funds.

Many of Virginia's current policies and practices require regulatory authority to enforce in order to assure adequate protection of the health, safety, or welfare of infant and toddlers with disabilities and their families.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

A list of the sections of the regulations is attached. These regulations:

- Provide details regarding the state infrastructure for early intervention services, not already provide by the Code of Virginia;
- Clarify Virginia's referral system;
- Outlines the intake, eligibility determination, and assessment processes;
- Details the expectations regarding service planning and delivery, including transition or discharge from the early intervention system of care;
- Explains the service funding and payment expectations;
- Establishes the procedural safeguards that individuals can expect;
- Addresses the alternative to resolve disputes; and
- Establishes a certification process for certain early intervention practitioners and a comprehensive system of personnel development.

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.

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.

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

Please also indicate, pursuant to your Public Participation Guidelines, 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.

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) the probable effect of the regulation on affected small businesses, and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or to **Catherine Hancock, Part C Administrator**, by phone, (804) 371-6592, fax (804) 371-7959, or email catherine.hancock@dbhds.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.

The agency is using the participatory approach to develop the proposed regulation. The public will be provided the opportunity to comment on the regulatory proposal at the quarterly meetings of the Virginia Interagency Coordinating Council (VICC). In accordance with federal requirements, the VICC has the role of advising and assisting the state lead agency about Part C. The agency will discuss this regulatory proposal and seek input from the VICC members at its regularly scheduled quarterly meetings. Also, interested members of the public will be afforded the opportunity to comment on the regulatory proposal during the public comment portion of the meeting. Notice of the VICC meetings will be posted on the Commonwealth Calendar. Any person who is interested in attending VICC meetings may contact Karen Durst at the Department to obtain additional information (telephone 804-786-9844, email karen.durst@dbhds.virginia.gov).

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.

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.

Additional information related to the substance of the regulations:

12VAC35-225 Requirements for the Virginia Early Intervention System

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