



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

<b>Agency name</b>	DEPT OF MEDICAL ASSISTANCE SERVICES
<b>Virginia Administrative Code (VAC) citation</b>	12 VAC 30 50-130; 12VAC 30-50-226; 12VAC 30-60-61; 12 VAC 30-60-143; and 12 VAC 30-130-2000
<b>Regulation title</b>	Amount, Duration and Scope of Medical and Remedial Services; and Standards Established and Methods Used to Assure High Quality of Care
<b>Action title</b>	2011 Mental Health Services Program Changes to Ensure Appropriate Utilization and Provider Qualifications
<b>Date this document prepared</b>	

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 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Preamble

*The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.*

- 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.*

The Administrative Process Act (Section 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation

shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from the effective date. This suggested emergency regulation meets the standard at *COV 2.2-4011* (ii) as discussed below.

The Governor is hereby requested to approve this agency's adoption of the replacement emergency regulations entitled: 2011 Mental Health Services Program Changes to Ensure Appropriate Utilization and Provider Qualifications (12 VAC 30-50-130, 12 VAC 30-50-226, 12 VAC 30-60-61 and 12 VAC 30-60-143) and also authorize the initiation of the permanent regulation promulgation process provided for in § 2.2-4007.

### Legal basis

*Other than the emergency authority described above, 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 and 325, 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.

Item 297 YY, of Chapter 890 of the 2011 *Acts of Assembly* implements the requirement to review Intensive In-Home services and Community Mental Health services in order to ensure appropriate utilization, cost efficiency, and implementation of provider qualifications. This Budget Item included emergency regulatory authority.

This action is intended to supersede, pursuant to the Code of Virginia 2.2 4011(C) the Emergency/NOIRA (Town Hall project number 3288/5548) regulatory change previously promulgated with an effective date of July 1, 2010.

### 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.*

The Department is promulgating these replacement emergency regulations to comply with Chapter 890 Item 297 YY of the 2011 *Acts of Assembly* that implements the requirement to change Intensive In-Home services and Community Mental Health services in order to ensure appropriate utilization, cost efficiency, and implementation of provider qualifications.

## 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.*

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The agency is proposing this regulatory action to comply with Chapter 890, Item 297 YY, of the 2011 *Acts of Assembly* that gives DMAS authority to make programmatic changes in the provision of Intensive In-Home services and Community Mental Health services in order to ensure appropriate utilization, cost efficiency and provider qualifications. In recent years, the utilization of certain community-based mental health services has increased substantially. These changes are part of a review of the services to ensure that they are appropriately utilized. Specifically, the 2011 Appropriations Act states:

“YY The Department of Medical Assistance Services shall make programmatic changes in the provision of Intensive In-Home services and Community Mental Health services in order to ensure appropriate utilization and cost efficiency. The department shall consider all available options including, but not limited to, prior authorization, utilization review and provider qualifications. The Department of Medical Assistance Services shall promulgate regulations to implement these changes within 280 days or less from the enactment date of this act.”

## Substance

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

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The regulations affected by this action are Amount, Duration and Scope of Services (12 VAC 30-50-130 and 12 VAC 30-50-226) and Standards Established and Methods Used to Assure High Quality of Care (12 VAC 30-60-61 and 12 VAC 30-60-143): The services involved include skilled nursing facility services, EPSDT, and family planning; services related to the EPSDT program; community mental health services for children and adults and mental health services utilization.

This action implements the results of a review of mental health services for children and adults, as well as changing the name of the Department of Mental Health, Mental Retardation, and Substance Abuse Services to the Department of Behavioral Health and Developmental Services. These sections also set forth rules and penalties related to the marketing of Medicaid mental health services.

Section 12 VAC 30-50-130 deletes the allowance for a week of service for Intensive In-Home services without prior authorization. This is intended to eliminate claims processing issues that delayed payments to providers. Additionally, a statement that prior authorization is required for Day Treatment for Children and Adolescents is added to reflect the current procedures.

Section 12 VAC 30-60-61 requires that specific assessment elements be included as part of the initial assessment for children’s mental health services. It requires that the initial assessment for intensive in-home services be conducted in the home and adopts caseload and supervision guidelines that were published by the Dept. of Behavioral Health and Developmental Services’ Licensing Division. The emergency action specifies staff ratios for Day Treatment for Children and Adolescents and requires coordination with providers of case management. Section 12VAC 30-50-226 establishes qualifications for Qualified Mental Health Professionals (QMHPs) and establishes the definitions of the paraprofessionals’ experience levels. In sections 12 VAC 30-50-130 and 12 VAC 30-50-226, language is added to the definition of clinical experience to include that internships, practicums, and field experience must be supervised.

12 VAC 30-130-2000 contains the agency’s requirements and limits for providers’ marketing plans and activities. These are required to limit the frequency and manner in which providers approach potential clients and seek to engage such clients in their services.

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
12 VAC 30-50-130;		Intensive In-Home is authorized after one week of service provision	Intensive In-Home is authorized prior to service provision to alleviate claims processing problems
12 VAC 30-50-130			The name of the Department of Mental Health, Mental Retardation, Substance Abuse Services was changed to the Department of Behavioral Health and Developmental Services.
12 VAC 30-50-226; 12 VAC 30-50-130		Qualified Mental Health Professional (QMHP) qualifications were the same for children’s and adult mental health services.	QMHP qualifications are specific to children’s services and adult oriented services. The children’s services are acute, crisis oriented services and require different abilities. Definitions were revised to accompany these changes.
12 VAC 30-50-226; 12 VAC 30-50-130		QMHPs were allowed to qualify with specific years of experience to provide counseling services.	QMHPs will be required to have a minimum of a specified bachelor’s degree to qualify as a QMHP for children’s services. Degrees and experience are required based on children’s and adult oriented services. Qualifications will be relevant to the service provided. DMAS will allow certain QMHPs to continue to provide Medicaid reimbursed services.
12 VAC 30-50-226; 12 VAC-30-130		Qualified paraprofessionals had the same requirements for children’s and adult-oriented services.	Paraprofessionals will be required to have experience and education that is related to the population that they are working with.
12 VAC 30-50-226; 12 VAC-30-130		The definition of clinical experience does not specify that internships, practicums, and field experience must be supervised.	Language is added to the definition of clinical experience to require that internships, practicums, and field experience must be supervised. This is to ensure that staff is prepared to provide effective mental health services.

12 VAC 30-50-226; 12 VAC 30-60-61		The current definition for a Licensed Mental Health Professional (LMHP) does not contain all of the allowed professionals.	The definition for a LMHP was changed to include the licensing board standards and for purposes of Medicaid reimbursement, LMHP Supervisee or Resident was included.
12 VAC 30-60-61		Specific assessment data elements were not required for Intensive In-Home, Day Treatment for Children, and Levels A & B community residential services. The place of the assessment for Int. In-Home was not specifically stated and that it must be face to face. QMHPs were allowed to conduct the assessment with a review by a licensed MH professional for Int. In-Home and Day Treatment for Children.	Specific assessment data elements will be required to ensure uniform and complete assessments. The place of the assessment for Int. In-Home is required to be in the home as it is important to evaluate family dynamics. LMHPs or license eligible mental health professionals will be required to conduct the assessments for Intensive In-Home and Day Treatment for Children due to the acute nature of the service.
12 VAC 30-60-61		No caseload or supervision requirements for Intensive In-Home or Day Treatment for Children were in place	DMAS will adopt the DBHDS licensing requirements related to supervision and caseload size to promote quality
12 VAC 30-60-61		Marketing guidelines were not in place for children’s mental health services	Adherence to marketing guidelines will be required to prevent inappropriate marketing activities
12 VAC 30-60-61		No notification to case managers or the primary care provider was required	Communication with the case manager and the primary care provider will be required to ensure coordination.
12 VAC 30-60-61		No specific requirement regarding a lapse in service	For Intensive In-Home services and Day Treatment for Children, if there is a lapse in service of more than 2 weeks, the reason for the lapse and the rationale for continuing must be included in the record. The ISP must be updated, reviewed and signed.
12 VAC 30-60-61		Paraprofessionals could assist in the provision of Day Treatment for Children	Due to the acute and complex nature of the service, paraprofessionals will no longer be accepted providers for children’s day treatment services.
12VAC 30-60-143		Marketing guidelines were not in place for adult-oriented mental health services	Adherence to marketing guidelines will be required to prevent inappropriate marketing activities
12VAC 30-60-143		No notification to case managers for adult oriented services was required	Communication with the case manager will be required to ensure coordination.
12VAC 30-60-143		A QMHP was allowed to perform the assessment for Mental Health Support Services	A LMHP or LMHP Supervisee or Resident must complete the assessment. This will promote a thorough assessment and appropriate service delivery. Periodic reviews of the service plan must be conducted and if the QMHP does the review, it must be discussed with an LMHP

			or an LMHP Supervisee or Resident.
12VAC 30-60-143		A LMHP was required to do a 6 month review. It was not specified that the review must be face to face.	A LMHP or LMHP Supervisee or Resident will be allowed to do the review. The client must be seen face to face to promote a quality assessment.
	12 VAC 30-130-2000		This contains the agency's requirements and limits for providers' marketing plans and activities which are required to limit the frequency and manner in which providers approach potential clients and seek to engage such clients in their services.

**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.*

This action is based upon Chapter 890, Item 297 YY, of the 2011 *Acts of Assembly* giving DMAS authority to make programmatic changes in the provision of Intensive In-Home services and Community Mental Health services in order ensure appropriate utilization and cost efficiency. DMAS chose to implement these changes to add consistent requirements for services to promote the quality of those 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 meeting is to be held to receive comments on this notice.*

The agency/board 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 regulation. The agency/board 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 for the public comment file may do so by mail, email or fax to **Catherine Hancock, Office of Behavioral Health, 600 East Broad Street, Richmond, Virginia, 23219, and** e-mail [Catherine.Hancock@dmas.virginia.gov](mailto:Catherine.Hancock@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.

**Participatory approach**

*Please indicate the extent to which an ad hoc advisory group will be used 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.*

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DMAS is using the participatory approach to develop this regulatory scheme. Public and private stakeholders were included in the development of the changes.

**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.*

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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.