Virginia Regulatory Town Hall

townhall.virginia.gov

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

| | |
|---|---|
| **Agency name** | DEPT. OF MEDICAL ASSISTANCE SERVICES |
| **Virginia Administrative Code (VAC) citation** | 12 VAC 30-50-130; 12VAC30-60-25; 12VAC30-70-201, 70-321, 70-415 and 70-417; 12VAC30-80-21; 12VAC30-130-850 through 130-890 |
| **Regulation title** | Amount, Duration, and Scope of Medical and Remedial Care and Services Provided for Categorically and Medically Needy Recipients; Standards Established and Methods Used to Assure High Quality of Care; Methods and Standards for Establishing Payment Rates-Inpatient Hospital Services and -Other Types of Providers; Residential Psychiatric Treatment for Children and Adolescents |
| **Action title** | Institutions for Mental Disease Reimbursement Changes |
| **Date this document prepared** | |

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.*

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 § 2.2-4006(A)(4). The 2012 *Acts of the Assembly*, Chapter 3, Item 307 CCC directed the agency to develop a prospective payment methodology to reimburse institutions of mental disease (residential treatment centers and freestanding psychiatric hospitals) for services furnished by the facility and by others. The 2013 *Acts of the Assembly*, Chapter 806, Item 307 CCC directed the agency to require that institutions of mental diseases provide referral services to their inpatients when the inpatients need ancillary services.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Institutions for Mental Disease Reimbursement Changes (12 VAC 30-50-130; 12VAC30-60-25; 12VAC30-70-201, 70-321, 70-415, and 70-417; 12VAC30-80-21; 12VAC30-130-850 through 130-890) and also authorize the initiation of the promulgation process provided for in § 2.2-4007.01 *et seq*.

## 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. [Please cite the authority you are using to promulgate an emergency regulation.]*

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.

In addition, § 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.

The 2013 *Acts of the Assembly*, Chapter 806, Item 307 CCC stated:

"CCC. 1. In response to the unfavorable outcome to an appeal by the Department of Medical Assistance Services in federal court regarding reimbursement for services furnished to Medicaid members in a residential treatment center or freestanding psychiatric hospital, the department shall have the authority to implement this paragraph.

....

"3. The department shall develop a prospective payment methodology to be implemented as soon as practicable after the unfavorable federal court decision to reimburse residential treatment centers and freestanding psychiatric hospitals for services furnished by the facility and services furnished by other providers in and by the facility. The department shall revise reimbursement for services furnished Medicaid members in residential treatment centers and freestanding psychiatric hospitals to include professional, pharmacy and other services to be reimbursed separately as long as the services are in the plan of care developed by the residential treatment center or the freestanding psychiatric hospital and arranged by the residential treatment center or the freestanding psychiatric hospital. The department shall require residential treatment centers to include all services in the plan of care needed to meet the member's physical and psychological well-being while in the facility but may also include services in the community or as part of an emergency.

"4. The department shall have the authority to promulgate emergency regulations to implement this amendment within 280 days from the enactment of this act."

## Purpose

The US Department of Health and Human Services Office of Inspector General (OIG) audited DMAS claims for services rendered in Inpatient Psychiatric Facilities (IPFs) for members under age 21 and issued its report on March 17, 2004. The report concluded that DMAS must refund to CMS $3.9 million for disallowed claims (mostly physician and pharmacy claims) for services furnished to children who resided in IPFs between July 1, 1997, through June 30, 2001, because these services were not part of the allowable inpatient psychiatric benefit. These services were not included in the reimbursement rates for the IPFs but were billed and paid separately to other providers of services.

Based on the OIG report, CMS issued a disallowance on February 29, 2008. DMAS appealed the CMS disallowance but each appeal was denied resulting in a final decision being issued by the U.S. Court of Appeals on May 8, 2012.

In response to that decision, and in accordance with CMS' guidance on the inpatient psychiatric benefit, DMAS is changing several regulations to permit separate billing for services (referred to by CMS and in the regulations as "services provided under arrangement") when rendered to members under age 21 in IPFs when the IPF: i) arranges for and oversees the provision of all services, including services furnished through contracted providers; ii) maintains all records of medical care furnished to these individuals; and iii) ensures that all services are furnished under the direction of a physician.

DMAS will continue to enforce the requirement that written plans of care for individuals in IPFs be comprehensive, covering medical, psychological, social, behavioral and developmental needs (including emergency services). In addition, DMAS will require IPFs to: i) contract with non-employee providers of services under arrangement ; ii) make referrals to employee and contract-

ed providers of services provided under arrangement; iii) obtain and maintain medical records from all providers of services provided under arrangement that are not covered by the facility's per diem.

DMAS has prepared detailed regulations to implement these changes. DMAS will also issue additional guidance in a Medicaid Memorandum issued to affected providers) on exactly how and when the IPFs must update plans of care, establish contracts, make referrals, and obtain medical records. If these requirements are not met, the regulations establish detailed criteria for audits that would result in retractions of reimbursement.

## 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.*

---

DMAS needs to make these changes to comply with the results of the referenced lawsuit. This regulatory action is not essential to protect the health, safety, and welfare of citizens.

## Substance

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

---

The sections of the State Plan for Medical Assistance that are affected by this action are: the Amount, Duration, and Scope of Medical and Remedial Services Provided to Categorically/Medically Needy Individuals-EPSDT Services (12 VAC 30-50-130); Standards Established and Methods Used to Assure High Quality of Care (Utilization control: freestanding psychiatric hospitals (12VAC30-60-25)); Methods and Standards for Establishing Payment Rates—Inpatient Hospital Services (12VAC30-70-201, 12 VAC 30-70-321, 12 VAC 30-70-415, and 12 VAC 30-70-417) and -Other Types of Providers (inpatient psychiatric services in residential treatment facilities (under EPSDT (12VAC30-80-21)). The state-only regulations that are affected by this action are Residential Psychiatric Treatment for Children and Adolescents (plans of care; review of plans of care (12VAC30-130-850 through 130-890).

Currently, DMAS pays separately for professional services, such as physician or pharmacy services, that are furnished in facilities (hospitals, nursing facilities, residential treatment centers, etc.) to inpatients or residents. Currently, each provider is only required to maintain records for the services they furnish directly. The facilities (hospitals, nursing facilities, residential treatment centers) are not currently required to make referrals for or maintain results of these services.

When a child is in an Inpatient Psychiatric Facility (either freestanding public/private psychiatric hospitals or residential treatment centers), under CMS' interpretation as a result of the referenced

court order, these separate payments to the providers of professional services and for drugs are not eligible for federal Medicaid matching funds unless the services are part of the inpatient psychiatric benefit. To be part of the inpatient psychiatric benefit and eligible for federal Medicaid matching funds, the IPF must oversee and arrange for these services, maintain the medical records of care furnished to these individuals and insure that services are furnished under the direction of a physician.

DMAS believes that certain services are already covered by these facilities' per diem payments. Therefore, the list of services provided under arrangement affected by this emergency regulation varies by each facility type (state freestanding psychiatric hospital, private freestanding psychiatric hospital, and residential treatment center).

The recommended regulatory changes are as follows:

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change, intent, and likely impact of proposed requirements |
|---|---|---|---|
| 12 VAC 30-50-130 | | EPSDT services provides for inpatient psychiatric services for individuals younger than 21 years of age and sets out the licensing/accreditation requirements that must be met by the defined Inpatient Psychiatric Facilities. | New text requires that the affected IPFs arrange for, maintain records of care furnished by and ensure that the services provided under arrangement are furnished under the direction of a physician. |
| 12 VAC 30-60-25 | | Utilization control requirements for freestanding psychiatric hospitals. Services provided under arrangement were not included in the utilization review/audit provisions. | New plan of care requirements are set out. The regulations establish the specific requirements for freestanding psychiatric hospitals, the time frames under which the requirements must be met, and how non-compliance will be addressed during audits. |
| 12 VAC 30-70-201 | | Regulations governing freestanding psychiatric hospitals operated by DBHDS did not include provisions for the reimbursement of services provided under arrangement. | All services provided under arrangement may be billed separately only if they are included in the plan of care; if they are arranged and overseen by the freestanding psychiatric hospital; and if the medical records for such services are maintained by the freestanding psychiatric hospital in the individual's medical record. |
| 12VAC 30-70-321 | | Freestanding psychiatric hospital billing requirements did not include provisions about services provided under arrangement. | The sections related to billing of services provided under arrangement were moved to a new section (12VAC30-70-415, below.) |
| | 12VAC30-70-415 | | All services provided under arrangement to freestanding psychiatric hospital patients may be billed separately only if they are included in the plan of care; if they are arranged and overseen by the freestanding psychiatric hospital; if the medical records for such services are maintained |

| | | | |
|---|---|---|---|
| | | | by the freestanding psychiatric hospital in the individual's medical record, and if the services are ordered by a physician. |
| | 12VAC30-70-417 | | Moved contents from Chapter 80 on Methods and Standards for Establishing Payment Rates for Other Types of Care to Chapter 70 that covers Methods and Standards for Establishing Payment Rates for Inpatient Hospital Care.<br><br>All services provided under arrangement to RTC residents may be billed separately only if they are included in the plan of care; if they are arranged and overseen by the RTC; if the medical records for such services are maintained by the RTC in the individual's medical record, and; if the services are ordered by a physician. |
| 12VAC 30-80-21 | | All professional services will be billed separately from the residential treatment center (RTC). | Billing for ancillary services furnished individuals residing in an IPF are subject to special rules in 12 VAC 30-70-415 and 12 VAC 30-70-417. |
| 12VAC 30-130-850 through 890 | | Plans of care did not need to include services provided under arrangement.<br><br>Services provided under arrangement were not included in the utilization review/audit provisions. | The plan of care will include a list of services provided under arrangement, the prescribed frequency of treatment and the circumstances under which the treatment shall be sought.<br><br>The regulations establish the specific requirements for RTCs, the time frames under which the requirements must be met, and how non-compliance will be addressed during audit. |

## 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.*

The agency considered making the inpatient psychiatric facility responsible for all services and increasing the per diem rate. DMAS concluded this approach placed too much financial risk on the inpatient psychiatric facilities.

## 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 panel has been used in the development of the emergency regulation and whether it will also be used in the development of the proposed 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 by mail, email, or fax to Sandra Brown, Manager, Office of Behavioral Health Services, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219; (804) 786-0102; (804) 786-1680; Sandra.Brown@dmas.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.

## 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.