



Virginia Department of Planning and Budget **Economic Impact Analysis**

12 VAC 35-230 Operation of the Individual and Family Support Program
Department of Behavioral Health and Developmental Services
Town Hall Action/Stage: 5999 / 10065
January 18, 2024

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 19. The analysis presented below represents DPB’s best estimate of the potential economic impacts as of the date of this analysis.¹

Summary of the Proposed Amendments to Regulation

This regulatory action would make permanent an emergency regulation that has been in effect since January 19, 2023 and² that changed the distribution of Individual and Family Support Program (IFSP) funds from a first-come, first-served basis to one based on program categories and established criteria. This change results from Item 313.NN. of the 2022 Appropriation Act (Chapter 2, 2022 Special Session 1 Acts of Assembly).³

Background

IFSP assists individuals and their families who are on the waiting list for Virginia’s Medicaid Home and Community-Based Services Developmental Disability Waivers with accessing short term, person- and family- centered resources, supports, and services. The purpose of the program is to support individuals with developmental disabilities living in the community, in either their own home or the home of a family member (which includes the home of the

¹ Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

² <https://townhall.virginia.gov/l/ViewStage.cfm?stageid=9690>

³ <https://budget.lis.virginia.gov/item/2022/2/HB30/Chapter/1/313/>

principal caregiver), until they start receiving services and supports from the Medicaid waivers. Unlike Medicaid waivers, which include federal funding, IFSP is fully funded from state general fund resources. The total annual amount of state funding has been \$2.9 million since state fiscal year (FY) 2020, although funds available each year varied due to carry-overs of funding from previous fiscal years. In addition, prior to the emergency regulation up to \$1,000 was available per person per year.

The impetus behind this action extends back to 1999, when the U.S. Supreme Court ruled in *Olmstead v. L.C.*⁴ that the Americans with Disabilities Act requires public services and supports to be furnished in the most integrated settings appropriate to each person's needs in order to prevent their exclusion from the rights of citizenship. In 2009, the U.S. Department of Justice (DOJ) Civil Rights Division launched an aggressive effort to enforce *Olmstead v. L.C.* The division was involved in more than 40 matters in 25 states including Virginia.⁵ In 2012, the Commonwealth of Virginia and DOJ signed a settlement agreement as a result of DOJ's investigation of services provided to individuals with intellectual disabilities in Virginia's training centers, as well as services in the community for individuals with intellectual and other developmental disabilities.⁶

In a 2021 report,⁷ the court appointed independent reviewer stated that while the Commonwealth continues to make progress, it is not fully meeting the requirements related to individual and family supports. This report prompted the General Assembly to pass Item 313.NN. of the 2022 Appropriation Act, which mandated the Department of Behavioral Health and Developmental Services (DBHDS) promulgate emergency regulations to change the current distribution of annual IFSP funds from a 'first-come-first-served' basis to one based on program categories and established criteria. Specifically, DBHDS was mandated to create an annual public input process that includes a survey of needs and satisfaction in order to establish plans for disbursing IFSP funding in consultation with the IFSP State Council (an advisory group that pre-dates the emergency regulation).

⁴ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁵ <https://rga.lis.virginia.gov/Published/2015/RD385/PDF>

⁶ See *United States of America v. Commonwealth of Virginia*, Civil Action No. 3:12cv059-JAG, <https://dbhds.virginia.gov/doj-settlement-agreement/>

⁷ <https://dbhds.virginia.gov/assets/doc/settlement/indreview/ir-report-18th-review-period-as-filed-061421revised.pdf>, page 55

DBHDS is currently using three main tools to meet the directives of the General Assembly: the State Plan, which sets goals and expectations; the program guidelines, which set the funding allocation and the items and services that will be covered based on priority levels; and the scoring instructions to Community Service Boards (CSB) on how to determine the priority levels as individuals on the waitlist are assessed by community services boards for assignment into a particular waitlist priority category.

The goals in the current state IFSP plan⁸ are as follows:

Goal 1: Ensure that at least 3,000 individuals with developmental disabilities and their families have access to funding that prioritizes those with the greatest needs and most at risk of institutionalization every year.

Goal 2: Establish an active individual and family council structure that is made up of one statewide council and a regional council in each of the 5 DBHDS regions for the purpose of assessing needs and distributing information to individuals on the waiting list.

Goal 3: Develop a comprehensive communication plan that provides information to individuals and families as well as stakeholders who support them at least semi-annually.

Goal 4: Ensure the IFSP Program will connect individuals to appropriate supports and services while waiting on the waiting list through My Life My Community, Family to Family, Peer Supports and/or the Regional Council Structure.

In order to achieve these goals, current funding guidelines⁹ establish the following distribution of funding based on the waiver waitlist priority categorizations of 1, 2, and 3, as follows:

Priority 1: 50% of funds (\$1,250,000). A maximum of \$1000 per approved recipient. Application period will be open until funding is exhausted. Funding approval will be given to individuals in Priority 1 who are most at-risk of institutionalization indicated by a Critical Needs Summary score, as well as the date and time of the application is received.

Priorities 2 and 3 (combined): 50% of funds (\$1,250,000). A maximum of \$500 per

⁸ <https://dbhds.virginia.gov/assets/MyLifeMyCommunity/IFSP-Councils/IFSP%20State%20Plan.pdf>

⁹ <https://dbhds.virginia.gov/assets/MyLifeMyCommunity/IFSP-Funding/IFSP-Funding%20Program%20Guidelines%20and%20FAQs.pdf>

approved recipient. Application period will be open for a month and then closed. No applications will be reviewed or funds distributed before the application period is closed. Funding approval will be given randomly to applicants within Priorities 2 and 3 based on the number of applications received and funds requested not to exceed predetermined funding amounts. IFSP will award funds to a randomized sample until all applicants in Priority 2 and 3 have had opportunity to access funding before repeating funding for previous awardees.

This guideline also establishes a detailed list of items and services that eligible for funding under three categories: safe living, community integration, and improved health outcomes. The priority levels in turn are assigned by the Community Service Boards based on a separate guideline.¹⁰

The process of establishing goals, priority levels, and scoring are all subject to change over time based on the Council's recommendation and information gathered during the public input period. More specifically, DBHDS will draft annual funding priorities and program criteria for each of the required program categories. These priorities and criteria will then be published in draft form for public comment and then in final form, prior to opening the funding opportunity, as part of the annual IFSP review process. Additionally, DBHDS, based on information gathered through public input and in consultation with the IFSP State Council, must annually establish eligibility criteria, the award process, the appeals process, and any other protocols necessary for ensuring the effective use of state funds.

The legislative mandate has already been implemented through an emergency regulation that became effective on January 19, 2023 and is currently set to expire on July 18, 2024. This proposed action would make the emergency regulation permanent.

Estimated Benefits and Costs

Prior to the emergency regulation, the total annual funding made available for IFSP in the budget was distributed based on a 'first-come-first-served' approach. The legislative mandate directed DBHDS to adopt a distribution methodology based on assessment of needs, and to

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<https://dbhds.virginia.gov/library/developmental%20services/critical%20needs%20summary%20guidance%208%2022%2016.pdf>

review and revise the needs assessment annually. Consequently, the proposed permanent action mainly sets out that IFSP funding awards will be based on annual funding priorities and program criteria developed by the DBHDS, in consultation with the IFSP State Council.

According to DBHDS, it would be impractical to establish specific criteria in the regulation because the regulatory timelines and review process specified by the Administrative Process Act are too inflexible to accommodate changes to criteria that would be subject to annual review and revisions within the annual state funding cycle. Thus, rather than setting specific criteria in regulation, the proposal sets out a process to determine criteria according to which an individual's needs would be assessed for funding purposes. Since the specific criteria would be fluid based on annual reviews and feedback, the distribution of funds among eligible persons and the types of services would be subject to change over time depending on future reviews and criteria.

As part of the needs approach, DBHDS has established in program guidelines that Priority 1 awards would be limited to no more than \$1,000 per applicant and comprise 50 percent of the funding, and Priority 2 and 3 awards would be limited to no more than \$500 and combined they would comprise the remaining 50 percent of the funding. Priority 2 and 3 applications are pooled together for consideration of awards. In the past, any applicant could be awarded up to \$1,000 if their application was submitted before other applications. DBHDS states that the goal of the IFSP is to minimize the risk of being institutionalized by considering both the individual circumstances of the applicant and their family, which is not consistent with a first-come, first-served approach. Thus, the request for use of funds must fall under a type of support (based on a published list of allowable expenditures) within three categories: safe living, community integration, and improved health outcomes. By utilizing the priority levels as the criteria for funding awards, state resources would be more appropriately distributed.

It is worth noting that the IFSP resources are limited by the amount of funds allocated by the General Assembly. Hence, nothing in this regulatory action would affect the total amount of funding. Instead, the main effect that would result from the proposed regulation is the distribution of funding among individuals and the types of services and supports they receive, as driven by the specific criteria adopted and updated by DBHDS on an ongoing basis.

The table below compares the funding distribution resulting from the different methodologies: fiscal year FY 2020 (which was based on first-come, first-served approach) and FY 2023 (which is based on a needs assessment).^{11 12}

Funding, Applications and Awards	FY2020	FY2023
Total Funding	\$2,500,226	\$2,499,618
Applications Received	3,646	4,914
Applications Funded	2,531	3,770
Average Award Amount	\$988	\$663
Distribution of Requests by Type	FY \$s and %	FY \$s and %
Safe Living (Respite/Home repairs/Safety and Security Systems)	\$646,170 (26%)	\$923,133 (37%)
Improved Health Outcomes (Medical Care/Therapies/Communication Devices)	\$764,791 (31%)	\$797,585 (32%)
Community Integration (Day Support/Transportation/Summer Camps)	\$647,996 (26%)	\$778,900 (31%)
Emergency Supports (Rent or Mortgage/Utility Assistance)	\$441,269 (18%)	\$0 (0%)
Distribution of Funding by Priority Type	FY \$s and %	FY \$s and %
Priority 1 (up to a \$1,000 award)	NA	\$1,249,985 (50%)
Priority 2 (up to a \$500 award)	NA	\$703,179 (28%)
Priority 3 (up to a \$500 award)	NA	\$546,457 (22%)

Note that the decrease in the average award amount is driven in part by the increase in the number of applications received. Based on this comparison, the most significant result of the

¹¹ Comparable data could not be constructed for FY2021 and FY2022 due to the data breach of the funding portal.

¹² Source: DBHDS

change in methodology appears to be in the distribution of funds by type of service. For example, emergency supports (which includes help with rent, mortgage, and utility assistance) has been eliminated and funds from this category have been redirected mostly to safe living (i.e., an 11 percent increase) and community integration (i.e., a 5 percent increase). According to DBHDS, the elimination of the emergency supports category occurred because IFSP funding is intended to meet one-time needs, not ongoing support needs such as rent, mortgage, and utility costs. In contrast, the funding amount allotted to improved health outcomes has seen only a modest increase (i.e., 1 percent).

Additionally, it appears that categorization of priorities would make some funding available at all priority levels. That is 50 percent, 28 percent, and 22 percent have been allotted to Priority categories 1, 2, and 3 respectively under the new distribution methodology. Awards in categories 2 and 3 would be given randomly, such that the percentage allotted would vary each year.

In theory, allocation of scarce resources based on needs rather than on a first-come, first-served basis should improve the efficiency of the distribution of funds and lead to better health, safety, and welfare outcomes in the aggregate. However, the expected improvement in outcomes results from the legislative mandate, not the regulatory change, because the regulation itself does not set the specific criteria. Instead, the regulation establishes a process wherein funding parameters (i.e., goals, priority levels, and scoring) will be revised on an ongoing basis outside the regulatory process. Moreover, this regulatory change does not result from a discretionary Board action but rather the Board's implementation of the legislative mandate.

Another effect of the legislative mandate, rather than the regulatory change, is an expected increase in administrative costs to continuously collect and evaluate data and revise the funding parameters on an annual basis. For example, the development of a new application process could potentially result in one-time costs for DBHDS staff to develop the new system. However, DBHDS reports ongoing efforts have contributed to greater technological functionality of the waiver system and IFSP system in recent years. The IFSP portal and the WaMs¹³ system have been connected in order to facilitate automation across the entire system that, overall, has

¹³ Virginia Waiver Management System (WaMS) is the data management system that manages the DD waivers; houses a record of the Individualized Service Plan (ISP); is the entry point to request Service Authorization for DD waiver services; and, acts as a conduit for communication between providers, support coordinators, and DBHDS.

contributed to a reduction in the manual work performed by staff during the application process. As such, additional staff time required to develop and establish criteria is offset by the reduction in needed staff time associated with the improved automation. Additionally, DBHDS is not aware of any increase in the number of appeals. Also, the functionality of the IFSP system is expected to improve as a result of this change. For instance, under the first-come, first-served system, individuals would rush to submit their application as soon as the system opened, which led to two major crashes of the IFSP Web portal. As there is no longer an individual benefit to applying first, DBHDS expects to see reduction in transient pressures on their computer system. Similarly, DBHDS expects that the IFSP State Council as well as CSBs will be able to handle the increased role in their consultation responsibilities by using existing resources. Finally, eligible individuals and their families would have to learn the new procedures involved with the application for funding if they have not already done so.

In summary, while the change in the IFSP funding distribution method would affect the distribution of funds among the eligible individuals and introduce some administrative compliance costs, those effects are the direct result of the legislative mandate and not the regulation itself. Instead, the main impact of the proposed regulation is to facilitate compliance with the legislative mandate by establishing a process to determine specific distribution criteria, evaluating those criteria, and revising them annually as directed.

Businesses and Other Entities Affected

The proposed changes mainly apply to individuals on the waiting list for Medicaid waivers. In FY 2020 and FY 2023, there were 3,646 and 4,914 applications received, respectively.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.¹⁴ An adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. As noted above, the proposed regulatory action is mainly responsible for establishing

¹⁴ Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define “adverse impact,” state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

a process to meet the legislative mandate and by itself does not adversely affect any entity. Thus, an adverse impact by the regulation is not indicated.

Small Businesses¹⁵ Affected:¹⁶

The proposed amendments do not adversely affect small businesses.

Localities¹⁷ Affected¹⁸

The proposed action by itself does not introduce costs nor particularly affect any locality more than others.

Projected Impact on Employment

The proposed amendments do not appear to affect total employment.

Effects on the Use and Value of Private Property

No effects on the use and value of private property or real estate development costs are expected.

¹⁵ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

¹⁶ If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

¹⁷ “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

¹⁸ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.