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

Agency name	DEPT. OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation(s)	12 VAC 30-40-290 and 12 VAC 30-40-370
Regulation title(s)	More Liberal Income Disregards; More Liberal Methods of Treating Resources Under 1902(r)(2); Variations From the Basic Personal Needs Allowance
Action title	Disregard Sterilization Compensation Payments as Income and Resources
Date this document prepared	8/12/2015

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to eighteen months), 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 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

This regulatory action promulgates regulations to disregard payments, for the purpose of Medicaid eligibility determinations, made to compensate individuals who were involuntarily sterilized pursuant to the Virginia Eugenic Sterilization Act and who are living as of February 1, 2015.

This action is a result of language authorized by the 2015 General Assembly in the *2015 Acts of the Assembly*, Chapter 665, Item 307 T which directed the Department of Medical Assistance Services to seek authority from the Centers for Medicare and Medicaid Services to disregard these payments in determinations of Medicaid eligibility.

Emergency Authority

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. Please explain why this is an emergency situation as described above, and provide specific citations to the Code of Virginia or the Appropriation Act, if applicable.

Section 2.2-4011(B) 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 *2015 Acts of the Assembly*, Chapter 665, Item 307 T directed the agency to modify the Medicaid eligibility regulations to permit persons who were involuntarily sterilized to retain their compensation without it affecting their eligibility. The nature of the emergency is that individuals will soon be receiving this compensation, and the legislature determined that it should not be considered when determining Medicaid eligibility. The necessity for the action is the direction of the legislature to proceed with this change immediately.

The Governor is hereby requested to approve this agency’s adoption of the emergency regulations entitled Disregard Sterilization Compensation Payments as Income and Resources (12 VAC 30-40-290 and 12 VAC 30-40-370) and also authorize the initiation of the 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) the promulgating entity, i.e., agency, board, or person.

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, 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.

The 2015 Acts of the Assembly, Chapter 665, Item 307 T directed DMAS to modify its eligibility regulations to exempt sterilization compensation (to be awarded to individuals who had been involuntarily sterilized under previous state policy) from consideration during the Medicaid eligibility determination process.

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 purpose of this action is to allow individuals, who are compensated for their involuntary sterilization, to accept their monetary compensation without losing their eligibility for Medicaid.

Need

Please describe 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.

This regulatory action is required to comply with the legislative directives as set out in Chapter 665 of the 2015 Acts of the Assembly, Item 307 T.

Substance

Please describe any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons the agency has determined that the proposed regulatory action is essential to protect the healthy, safety, or welfare of Virginians.

The section of the State Plan for Medical Assistance that is affected by this action is the Eligibility Conditions and Requirements, More Liberal Income Disregards (12 VAC 30-40-290) and creates the new section Variations from the Personal Needs Allowance (12 VAC 30-40-370).

CURRENT POLICY

Unless otherwise exempted by state or federal requirements, all income an individual receives must be counted in the Medicaid eligibility determination. Similarly, all money an individual has at the beginning of a month either in his hand or in a financial institution account must be considered a resource in the Medicaid eligibility determination. Money an individual has cannot be counted as both income and a resource in the same month, so payments received by individuals would be counted as income the month received and, if retained, a resource in following months.

ISSUES

Current policy would require payments (awards, settlements) made to individuals involuntarily sterilized as a result of the Virginia Eugenical Sterilization Act to be counted as income in the month of receipt of the payment and, if retained, a resource in following months. Counting this payment as both income in the month of receipt and a resource thereafter could result in individuals losing Medicaid eligibility.

RECOMMENDATIONS

The 2015 Acts of the Assembly, Chapter 665 Item 307 T directed DMAS to seek federal authority to disregard compensation payments received by individuals who were involuntarily sterilized pursuant to the Virginia Eugenical Sterilization Act and who are living as of February 1, 2015. Receipt of federal authority to disregard these payments in the Medicaid eligibility determination will mean that these payments will have no impact on eligibility for new or current enrollees who receive this payment.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
12 VAC 30-40-290		Sets out more liberal policies for disregarding various sources of income for various eligibility groups.	This action adds the disregard of all amounts received by all aged, blind, or disabled individuals as payment for involuntary sterilization under the Virginia Eugenical Sterilization Act.
	12 VAC 30-40-370	Sets out allowed variations from the standard Personal Needs Allowance.	This action expands the allowance in the Personal Needs Allowance for payments to individuals who were involuntarily sterilized under the Virginia Eugenical Sterilization Act.

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 2015 legislative mandate did not permit any alternatives to the policy contained herein.

Public participation

Please indicate whether 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. Please also indicate 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 this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and 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: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and 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 Emily McClellan, Regulatory Manager, Policy Division, DMAS, 600 East Broad Street, Suite 1300, Richmond, VA 23219; (804) 371-4300; fax (804) 786-1865; Emily.McClellan@dmass.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

Please assess the 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; nor 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.