Virginia Regulatory Town Hall

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Proposed Regulation
Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30 – 50, 30 – 80, and 30 - 120
Regulation title	Amount, Duration and Scope of Medical and Remedial Services; Methods and Standards for Establishing Payment Rates – Other Providers, and Waivered Services
Action title	Coverage and Reimbursement of Early Intervention (EI) Services under Part C of IDEA
Date this document prepared	

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.*

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

These regulations define a new approach to payment for Early Intervention services under Medicaid that supports the IT&C model. The proposed Early Intervention services would be provided in the child's natural environment, engage the family in the intervention, and engage the expertise of a multidisciplinary team to support the direct service provider. The new approach supports Medicaid payment for a broad base of qualified providers with demonstrated knowledge and skills in Early Intervention principles and practices. This regulatory action requires Part C practitioners to be certified by DBHDS as a condition of participation with DMAS as designated Early Intervention service providers in the Medicaid program.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

"DBHDS" means the Department of Behavioral Health and Developmental Services.
"DMAS" means the Department of Medical Assistance Services.
"EI" means early intervention as defined in the proposed regulation.
"I&TC" means the Infant and Toddler Connection, the name of Virginia's Part C Early Intervention program for children who are eligible for services under Chapter 53 (§ 2.2-5300 et seq.) of Title 2.2 of the *Code of Virginia*.
"IDEA" means the Individuals with Disabilities Education Act.
"Part C" means Part C of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1431 et seq.).

Legal basis

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., the 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, 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.

Specifically, the 2009 Appropriations Act, Item 306 TTT, states that:

> **TTT. The Department of Medical Assistance Services, in consultation with the Department of Mental Health, Mental Retardation and Substance Abuse Services, shall amend the State Plan for Medical Assistance Services in order to comply with the payor of last resort requirements of Part C of the Individuals with Disabilities Education Act (IDEA) of 2004. The Department of Medical Assistance Services shall promulgate regulations to become effective within 280 days or less from the enactment date of this act. The Department shall implement these necessary regulatory changes to be consistent with federal requirements for the Part C program.**

The General Assembly explained the nature of this mandate as follows:

> This amendment adds language directing the Department of Medical Assistance Services to work with the Department of Behavioral Health and Developmental Services to amend the Medicaid State Plan to ensure that those providing Early Intervention services through the Part C program bill Medicaid first, if appropriate, before billing the Part C program. This ensures that the state is in compliance with federal requirements contained in Part C of the Individuals with Disabilities Education Act (IDEA) of 2004.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

The planned regulatory action creates a new model for Medicaid coverage of Early Intervention services for children less than three years of age who are eligible for services under Chapter 53 (§ 2.2-5300 et seq.) of Title 2.2 of the Code of Virginia in accordance with Part C of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1431 et seq.). This new methodology fulfills the General Assembly mandate as follows: First, it establishes a framework for ensuring that providers of Early Intervention services for Medicaid children through the Part C program bill Medicaid first before using federal or state-only Part C program funds to comply with the federal Part C payor of last resort requirement set out in 34 CFR 303.527. In order to ensure compliance with federal Part C requirements DMAS, through these regulations, is establishing a newly recognized provider type and specialty to provide services specifically oriented to the requirements of individuals eligible for Part C services. This specialized provider group will support the service delivery system the State adopted to provide Early Intervention services -- the Virginia Infant and Toddler Connection of Virginia (I&TC). The I&TC is administered through local lead agencies. All local efforts are overseen by the Department of Behavior Health and Developmental Services (DBHDS), which receives Virginia's Part C allotment and administers the overall program. DBHDS contracts with local lead agencies to facilitate implementation of EI services statewide. The majority of local lead agencies are under the auspices of Community Services Boards, along with several universities, public health districts, local governments, and local education agencies.

These new regulations establish a broader range of specialized Part C providers to meet the individual child's needs and assure that providers have the specific expertise to effectively address developmental problems in young children as provided for in Part C. Routing Medicaid-covered individuals through Medicaid Part C providers ensures that the Commonwealth will draw down the maximum available federal Medicaid match for those Part C services currently paid with state-only funds.

The planned regulatory action is one component of an administrative initiative to revise the system of financing for Part C Early Intervention services in Virginia and ensure compliance with the payor of last resort requirements of Part C of IDEA. DBHDS is proposing new regulations for certification of EI providers in tandem with this initiative.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)

The sections of the State Plan related Virginia Administrative Code that are affected by this action are Amount, Duration and Scope of Medical and Remedial Services; Methods and Standards for Establishing Payment Rates – Other Providers, and Waivered Services (12 VAC 30 – 50, 30 – 80, and 30 - 120).

As discussed above in the Purpose Section, most of the services needed by the children enrolled in I&TC are habilitative in nature. In other words, they are designed to help a child with an identified developmental concern to achieve a given function for the first time, such as walking or talking. Traditional rehabilitation therapists are not always the most appropriate providers of Early Intervention services. Some children are better served by other practitioners with specialized knowledge and experience regarding child development and Early Intervention methods, together with consultation from licensed rehabilitation therapists as needed.

Currently, local IT&C systems have two choices for serving pre-school children enrolled in Medicaid: (1) provide all Early Intervention services to Medicaid enrollees with the regular licensed rehabilitation therapists, who may lack the specialized knowledge and experience for Early Intervention, or (2) provide some Early Intervention services without Medicaid reimbursement, but pay for them with limited federal Part C, state, or local funds. Early Intervention type services may currently be obtained by a variety of agencies participating with Medicaid; however, there is no uniform reimbursement for Part C services. This disparity has made it difficult to support a uniform fee schedule for Part C services across all payment sources. Resolving this disparity is a necessary step to bring Virginia into compliance with the payor of last resort requirement.

These regulations define a new approach to payment for Early Intervention services under Medicaid that supports the IT&C model. The proposed Early Intervention services would be provided in the child's natural environment, engage the family in the intervention, and engage the expertise of a multidisciplinary team to support the direct service provider. The new approach supports Medicaid payment for a broad base of qualified providers with demonstrated knowledge and skills in Early Intervention principles and practices. This regulatory action requires Part C practitioners to be certified by DBHDS as a condition of participation with DMAS as designated Early Intervention service providers in the Medicaid program.

Medicaid payment for defined Early Intervention services would provide a framework for ensuring that providers of Early Intervention services through the IT&C model bill Medicaid first, if appropriate, before using Part C program funds to comply with the payor of last resort requirement contained in Part C of IDEA. Certified individuals and agencies who currently participate with the Agency shall obtain Part C designation from DMAS and bill for services as Early Intervention providers rather than as a rehabilitation agency provider or another designation. New providers shall enroll to participate with DMAS with a Part C specialty designation in order to bill for EI services. DMAS and DBHDS shall be able to identify services paid for by Medicaid that are provided under the purview of the IT&C model. Early Intervention services shall be reimbursed on a fee-for-service basis for non-MCO providers. All private and governmental fee-for-service providers shall be paid according to the same methodology, with separate fees for certified Early Intervention providers who are licensed as physical therapists,

physical therapy assistants, occupational therapists, occupational therapy assistants, speech pathologists, or registered nurses to ensure access to Early Intervention services.

It is important to note that there is a distinct difference between EI services, which are medically appropriate only for children under the age of three years, and similar habilitative services available to children aged three years up to age 21. DMAS is making this distinction clear in 12 VAC 30-50-131 (Definitions), where DMAS has included the following language:

> EI services are available to qualified individuals through Early and Periodic Screening, Diagnosis and Treatment (EPSDT). EI services are distinguished from similar rehabilitative services available through EPSDT to individuals aged three and older in that EI services are specifically directed towards children from birth to age three. EI services are not medically indicated for individuals aged three and above.

Issues

Please identify the issues associated with the proposed regulatory action, including:
1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
2) the primary advantages and disadvantages to the agency or the Commonwealth; and
3) other pertinent matters of interest to the regulated community, government officials, and the public.

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The primary advantage to private citizens of implementing the new provisions is that payment for services from a broader range of trained early intervention providers will be available to disabled children covered by Medicaid.

The primary advantage to the Commonwealth is the ability to draw down additional federal Medicaid funds to support Part C early intervention services.

There are no disadvantages to the public or the Commonwealth associated with the proposed regulatory action.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no requirements that exceed applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

This change applies statewide; there are no localities particularly affected.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

DMAS 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. DMAS 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 Molly Carpenter, Department of Medical Assistance Services, 600 East Broad St., Richmond, Virginia 23219, telephone number 804-786-1493, fax number 804-225-3961, email Molly.Carpenter@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.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.	The proposed regulation is projected to cost the Medicaid program an additional $2.3 in general funds in FY 2010. These funds will be obtained by transfer from DBHDS to DMAS where they will draw down federal Medicaid matching funds, resulting in a net increase of approximately $2.3 to the Commonwealth. There are no projected costs to the state to implement and enforce the proposed regulation beyond those costs which have already been incurred to implement the emergency regulations.

Projected cost of the *new regulations or changes to existing regulations* on localities.	None.
Description of the individuals, businesses or other entities likely to be affected by the *new regulations or changes to existing regulations*.	The new regulations affect infants and toddlers with delayed development by supporting a service method better designed to better meet their needs. A variety of community agencies provide early intervention services and are affected by the change in payment methodology, including rehabilitation agencies, mental health and mental service agencies, community services boards, public health districts, public school districts, universities, and hospital systems. Under the new regulations early intervention services may also be provided by certified individuals who do not fall within traditional Medicaid provider categories.
Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means 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.	As of December 2009, 2830 infants and toddlers receive early intervention services paid by Medicaid. There are 100 enrolled Medicaid providers of early intervention services under the emergency regulations. Approximately half of these providers are small businesses, including individual practitioners.
All projected costs of the *new regulations or changes to existing regulations* for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	There are no additional costs to affected entities beyond the administrative costs of billing DMAS for services.
Beneficial impact the regulation is designed to produce.	This regulation is designed to give the Commonwealth the ability to draw down additional federal Medicaid funds to support Part C early intervention services.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

In planning for the regulatory action, DMAS considered alternative definitions for the scope of services to be covered by Medicaid and provider qualifications for Early Intervention services in consultation with state and local I&TC program staff and other stakeholders. Consideration was given to defining multiple categories of Early Intervention services based on the training and licensure of the individual provider. It was decided that reimbursing for a single Early Intervention service would be a better fit for the IT&C primary provider service model.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

There is no adverse impact on small businesses. No alternative regulatory methods were identified that would accomplish the objectives of applicable law.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

DMAS' Notice of Intended Regulatory Action was published in the 11-23-09 Virginia Register (VR 26:6) for its public comment period from 11-23-09 to 12-23-09. DMAS received comments from the Catherine Harrison of Virginia Association of Health Plans and Candice McAuliffe of Anthem Healthkeepers Plus expressing concern about (1) defining Part C Early Intervention as an EPSDT service and (2) that the language in 12 VAC 30-120-396 of the emergency regulations would hamper the ability of MCOs to negotiate rates with providers.

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 will not: 1) strengthen or erode the authority or 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; or 4) increase or decrease the disposable family income.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
	12 VAC 30-50-131: Early Intervention services (under EPSDT)	N/A	Early Intervention services would be provided in the child's natural environment, engage the family in the intervention, engage the expertise of a multidisciplinary team to support the direct service provider, and support Medicaid payment for a broad base of qualified providers with demonstrated knowledge of Early Intervention principles and practices. This section requires practitioners to be certified by DBHDS as a condition of participation with DMAS as an Early Intervention provider in the Medicaid program.
12 VAC 30-80-20 Services that are reimbursed on a cost basis		Currently, community services boards (CSBs) are reimbursed for Early Intervention services on a cost basis through enrollment with DMAS as a rehabilitation agency. The vast majority of rehabilitation services furnished by CSBs are for Early Intervention.	The proposed regulatory action deletes the reference to rehabilitation agencies operated by CSBs being reimbursed their costs for rehabilitation services. Currently participating CSBs shall obtain Part C designation as a specialty from DMAS. All Early Intervention providers, including CSBs, would be reimbursed according to the methodology described in the new subsection, 12 VAC 30-80-96. If CSB providers furnish non-Part C rehabilitation services, they would be paid the rate described in 12 VAC 30-80-200 for those services rather than their costs.

	12 VAC 30-80-96 Fee-for-service: Early Intervention (under EPSDT).		The proposed service would be reimbursed on a fee-for-service basis for non-MCO providers. All private and governmental fee-for-service providers would be paid according to the same methodology. There would be separate fees for (1) certified Early Intervention providers who are licensed as a physical therapist, physical therapy assistant, occupational therapist, occupational therapy assistant, speech pathologist, or registered nurse and (2) other certified Early Intervention providers to ensure that the knowledge and skills of these licensed practitioners are available.
12 VAC 30-80-200 Prospective reimbursement for rehabilitation agencies		Currently, CSBs are enrolled as rehab agencies, and are paid for EI services. Physical rehab. services provided by CSBs are excluded from the payment methodology by which other rehab agencies are reimbursed. The majority of rehab services furnished by CSBs are for EI.	This regulatory action deletes this exclusion because it will no longer be applicable. CSBs who wish to provide Part C EI services shall obtain the designation from DMAS as a specialty. CSB providers who furnish non-Part C rehab services will be paid the existing fee schedule rate for those services rather than their costs.
12 VAC 30-120-360 Definitions			"Early Intervention" is defined for the Medicaid 1915B waiver consistent with the proposed 12 VAC 30-50-131.
12 VAC 30-120-380 Medallion II MCO responsibilities			This paragraph clarifies that early intervention services funded by Medicaid are to be covered as described in 12 VAC 30-50-131, AND as defined in the MCO Contract. Presently the contract states that these services are carved-out of the MCO contract. EI coverage will be

			required in the MCO contracts within the next several months. We anticipate that EI coverage will be required in the MCO contracts. The MCO contract controls when the services are covered under the MCO and/or when services are carved-out. The regulations at 12VAC30-50-131 control the amount, duration, and scope of coverage.

Changes since the Emergency Regulation

	12 VAC 120-396		As a result of discussions with Medicaid Managed Care providers, in the emergency regulation DMAS created a new subsection (12 VAC 30-120—396) that stipulated that payment for EI services provided to an enrollee of a MCO by a nonparticipating provider shall be the lesser of the provider's charges or the Medicaid fee schedule. During the NOIRA comment period, however, DMAS received input from the MCO providers who stated that this language was not required, so the Agency removed it from the proposed regulation.