

DECISION BRIEF FOR:
The Honorable James S. Gilmore, III
Governor

SUBJECT: EMERGENCY REGULATION for Treatment Foster
Care Case Management

ACTION NEEDED
BY ---DEC 29th
RETURN TO DMAS

SUMMARY

1. REQUEST: The Governor is hereby requested to approve this agency's adoption of the emergency regulation entitled Treatment Foster Care Case Management to amend the State Plan to comply with Chapter 935 of the 1999 *Virginia Acts of Assembly* Item 335X.1. directing DMAS to cover treatment foster care services for children subject to the Comprehensive Services Act.
2. RECOMMENDATION: Recommend approval of the Department's request to take an emergency adoption action regarding Treatment Foster Care Case Management. The Department intends to initiate the public notice and comment requirements contained in the Code of Virginia §9-6.14:7.1.

/s/ Dennis G. Smith Nov. 8, 1999
Dennis G. Smith, Director Date

3. CONCURRENCES:

Secretary of Health and Human Resources:

Concur _____

Concur w/Modifications _____

Disapprove _____

Department of Planning and Budget:

Concur _____

Concur w/Modifications _____

Disapprove _____

Claude A. Allen

Date

Signature

Date

Title

4. ACTION: Governor

Approve _____

Approve w/ Modifications _____

Deny _____

James S. Gilmore, III

Date

5. FILED: Registrar of Regulations

Jane D. Chaffin

Date

DISCUSSION

6. **BACKGROUND:** The sections of the State Plan affected by this action are Case Management Services (Attachment 3.1-A, Supplement 2 (12VAC30-50-480)), Standards Established and Methods Used to Assure High Quality of Care (Attachment 3.1-C (12VAC 30-60-170)), Methods and Standards for Establishing Payment Rates-Other Types of Care (Attachment 4.19-B (12 VAC 30-80-11)). The state regulations affected by this action are Treatment Foster Care Services (12 VAC 30-129-100 through 12 VAC 30-129-170).

Chapter 935 of the *1999 Virginia Acts of Assembly* and Chapter 464 of the *1998 Virginia Acts of Assembly* directed the Department to submit an amendment to the State Plan for Medical Assistance to provide Medicaid coverage for treatment foster care. The amendment was initially to have been effective January 1, 1999. The 1999 Appropriations Act extended the effective date to January 1, 2000. The amendment for treatment foster care was to have taken effect within 280 days of enactment of the Act, giving DMAS the authority to promulgate emergency regulations.

This new service was designed to provide federal Medicaid matching funds for a service funded at the present time only through state and local funding. Prior to this legislative mandate, the Joint Legislative Audit and Review Commission (JLARC) completed in 1997 a review of the Comprehensive Services Act. JLARC recommended that Medicaid coverage be extended to include treatment foster care. More access to this level of care can be instrumental in avoiding the use of more restrictive and expensive institutional services. The 1998 and 1999 Appropriations Act provisions were based upon these JLARC recommendations.

During 1998, DMAS staff worked with a large work group of stakeholders, including representatives from the Office of Comprehensive Services to design a program intended to meet all federal requirements. The proposed State Plan amendment was informally submitted to the Health Care Financing Administration (HCFA) for review in November, 1998. In December, 1998, federal staff informed DMAS that the coverage of treatment foster care would not be approved as a State Plan amendment because the service included components not qualifying for Medicaid federal matching funds.

During 1999, DMAS continued to explore with HCFA alternative available avenues to federal funding for treatment foster care services for CSA children. Based on technical assistance by staff of HCFA, the covered service was redesigned and redefined as case management of treatment foster care. This revision permits Medicaid reimbursement for case management services that are a major portion of costs for CSA children in treatment foster care. This approach removes other components of treatment foster care that did not qualify for Medicaid federal matching funds, such as the stipend for foster parents.

Comprehensive Services Act

In 1992, the Virginia General Assembly enacted the Comprehensive Services Act for At-Risk Youth and Families (Chapter 46, Title 2.1 of the *Code of Virginia*). The intent of the legislation was to create a collaborative system of services and funding that is child-centered, family-focused and community-based when addressing the strengths and needs of troubled and at-risk youths and their families. The purpose is to preserve families and provide appropriate services in the least restrictive environment while protecting the welfare of children and maintaining public safety. Part of the

initiatives to improve services to children was the development of a continuum of care for children including in-home services, specialized foster homes, and residential treatment services. The specialized foster homes include treatment foster homes for children with behavioral or mental health problems.

DMAS expects that coverage of case management for children who are receiving treatment foster care services will provide additional support and services to families in trouble. This is expected to promote family unity and healing of dysfunctional relationships.

7. AUTHORITY TO ACT: The *Code of Virginia* (1950) as amended, §32.1-325, grants to the Board of Medical Assistance Services (BMAS) the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, §32.1-324, grants to the Director of the Department of Medical Assistance Services (DMAS) the authority to administer and amend the Plan for Medical Assistance in lieu of Board action pursuant to the Board's requirements. The *Code* also provides, in the Administrative Process Act (APA) §9-6.14:4.1(C)(5), for an agency's adoption of emergency regulations subject to the Governor's prior approval.

Subsequent to the emergency adoption action and filing with the Registrar of Regulations, this agency intends to initiate the public notice and comment process contained in Article 2 of the APA. Therefore, approval to file the required Notice of Intended Regulatory Action is also necessary and hereby being requested by this action.

Chapter 935 of the 1999 *Virginia Acts of Assembly* contains the following language to replace similar authority granted in the 1998 Appropriations Act.

"As a condition of this appropriation, the Department [of Medical Assistance Services] shall promulgate regulations to implement Medicaid reimbursement for treatment foster care designed to serve children and youth referred by local Comprehensive Services Act teams. If the Health Care Financing Administration approves treatment foster care for Medicaid reimbursement, emergency regulations as specified in §9-6.14:4.1.C.5, Code of Virginia, shall be effective January 1, 2000, or earlier. However, emergency regulations may become effective at a later date if the federal Health Care Financing Administration determines, upon submission of a proposal by the Department, that federal regulations preclude earlier implementation."

Furthermore,

"...if the United States Department of Health and Human Services or the Health Care Financing Administration determines that the process for accomplishing the intent of a part, section, subsection, paragraph, clause, or phrase of this item is out of compliance or in conflict with federal law and regulation and recommends another method of accomplishing the same intent, the Director of the Department of Medical Assistance Services, after consultation with the Attorney General, is authorized to pursue the alternative method."

Without an emergency regulation, this amendment to the State Plan and the related regulations cannot become effective until the publication and concurrent comment and review period requirements of the APA's Article 2 are met. Therefore, an emergency regulation is needed to meet the January 1, 2000, effective date established by the General Assembly.

8. NEED FOR EMERGENCY ACTION: The Code §9-6.14:4.1(C)(5) provides for regulations which an agency finds are necessitated by an emergency situation. To enable the Director, in lieu of the Board of Medical Assistance Services, to comply with Chapter 935 of the 199 *Virginia Acts of Assembly*, he is to take this adoption action, with the Governor's prior approval. This issue qualifies as an emergency regulation as provided for in §9-6.14:4.1(C)(5)(ii), because Virginia Appropriation Act requires this regulation to be effective on January 1, 2000. As such, this regulation may be adopted without public comment with the prior approval of the Governor.

Since this emergency regulation will be effective for no more than 12 months and the Director wishes to continue regulating the subject entities, the Department is initiating the Administrative Process Act Article 2 procedures.

9. FISCAL/BUDGETARY IMPACT: Treatment foster care will be offered by child placing agencies that operate such programs and that are licensed or certified by the Department of Social Services to comply with the Medicaid provider qualifications. JLARC estimated that there are 1,305 children who can benefit from treatment foster care services at an average cost of \$15,978 per year per child. Only a portion of the services included in the JLARC estimate has been approved by the federal government for Medicaid coverage. It is estimated that the average cost for the covered services is \$12,143 per child. Based on these costs, it is estimated that moving these services to Medicaid will result in \$7.6 M in state savings. The local share of the savings is 37.3% and the state share is 62.7%. Federal matching funds will be available for 51.67 % of the program expenditures during federal Fiscal Year 2000. The funds approved in the 1998 Appropriations Act have taken these savings into account. The appropriations were placed in CSA's budget and will be transferred to DMAS as needed to make expenditures to the providers. There are no localities that are uniquely affected by these regulations as they apply statewide.
10. RECOMMENDATION: Recommend approval of this request to adopt this emergency regulation to become effective on January 1, 2000. From its effective date, this regulation is to remain in force for one full year or until superseded by final permanent regulations promulgated through the APA. Without an effective emergency regulation, the Department would lack the authority to pay for case management for CSA children who are receiving treatment foster care services.
11. APPROVAL SOUGHT FOR 12 VAC 30-50-480, 12 VAC 30-60-170, 12 VAC 30-80-111, 12 VAC 30-129-100 et seq.

Approval of the Governor is sought for an emergency modification of the Medicaid State Plan in accordance with the Code of Virginia §9-6.14:4.1(C)(5) to adopt the following regulation: