



Virginia  
Regulatory  
Town Hall

## Final Regulation Agency Background Document

<b>Agency Name:</b>	12 VAC 30
<b>VAC Chapter Number:</b>	Chapter 50
<b>Regulation Title:</b>	Amount, Duration, and Scope of Services: Rehabilitative Services
<b>Action Title:</b>	Expansion of School Based Services
<b>Date:</b>	October 31, 2000

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

### Summary

*Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.*

These adopted final regulations conform the State Plan to the requirements of Chapter 967 of the 1999 Acts of Assembly with regard to the expansion of school health services. These adopted final regs provide, for Special Education children, for the expansion of skilled nursing services, the recognition of more different types of licenses for occupational therapists to perform therapy services and be reimbursed by DMAS, and the addition of the coverage of psychiatric and psychological in the schools. These final adopted regulations also recognize the schools authority to conduct routine screenings of children who are not in Special Education.

### Changes Made Since the Proposed Stage

*Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.*

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The subsection of 12 VAC 30-50-229 at 1.A.2 was re-written, per agreement with the Department of Planning and Budget, to clarify the language and intent of the provision.

### Statement of Final Agency Action

*Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.*

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The agency's Director adopted these final regulations on October 31, 2000.

### Basis

*Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.*

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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 the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Director approved, on May 9, 2000, the initiation of a public comment period for the proposed regulations. The Code, in §9-6.14:7.1 et seq., requires agencies to adopt and amend regulations subject to public notice and comment when the action being taken does not meet one of the statutory exemptions.

Subsequent to an emergency adoption action, the agency initiated the public notice and comment process as contained in Article 2 of the APA. The emergency regulation became effective on January 12, 2000. The Code, at §9-6.14:4.1(C) required the agency to file the Notice of Intended Regulatory Action within 60 days of the effective date of the emergency regulation if it intended to promulgate a permanent replacement regulation. The Notice of Intended Regulatory Action for this regulation was filed with the Virginia Register on January

12, 2000, and published at 16 VR 11:1373 (February 14, 2000). No comments were received during the NOIRA comment period.

### Purpose

*Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.*

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The purpose of this proposal is to promulgate permanent regulations, to supersede the current emergency regulations and to provide for the expansion of health care services which can be rendered by employees of school divisions to Special Education Children and be reimbursed by Medicaid. This action is expected to benefit the health and welfare of Special Education children because it will permit them to obtain daily needed medical care while remaining in their educational settings.

### Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.*

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The section of the State Plan affected by this action is the Amount, Duration, and Scope of Services, Other Diagnostic, Screening, Preventive, and Rehabilitative Services, i.e., other than those provided elsewhere in this plan: Rehabilitative Services: School Based Services (VAC 12 VAC 30-50-229.1).

In 1991, the Department of Medical Assistance Services began covering physical, occupational and speech-language therapies for the special education population in Virginia school divisions. This DMAS coverage expansion began as a result of a study by the Governor's Child Health Task Force as described in its report entitled "Investing in Virginia's Future" (December 1991). Under federal law, Virginia school divisions are required to offer special education services to children with handicapping conditions. DMAS became involved in covering special education services due to budgetary initiatives within the Commonwealth to utilize available federal Medicaid funding for services which otherwise had been funded by state and local sources. The particular services were selected by DMAS for coverage because the existing DMAS requirements for covering them were similar to the definitions and provider qualifications already implemented by the school divisions.

The federal Individuals with Disabilities Education Act (IDEA), as amended (20 U.S.C. § 1400 et seq.) requires school divisions to provide all special education and related services to children

with one or more of thirteen specified disabilities. Under the federal IDEA, school divisions prepare an Individualized Education Program (IEP) plan for each child qualifying under IDEA, specifying all special education and related services needed by the child. The IEP is the child-specific definitive document enumerating the care and services required. The children are to receive a “free appropriate” education (federally defined as special education and related services which include transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education), at no cost to the parents. The 1997 federal amendments re-authorizing IDEA added specificity as to the role of Medicaid and other non-education entities in reimbursing for special education services. The greater specificity provided that agencies other than the local school authority had an obligation to precede the local school division in financing necessary special education services.

Federal funds are authorized under IDEA for the services but the majority of the funds have historically been from state and local revenues. The Medicare Catastrophic Coverage Act of 1988 amended Title XIX of the Social Security Act (the authority for the Medicaid program), providing that nothing under the Medicaid statute should be interpreted to prohibit Medicaid payments for services simply because they are prescribed in a child’s Individualized Education Program. The IEP may refer to services such as speech therapy or nursing services for the treatment of the child.

For the special education services covered by DMAS, reimbursement is only for the federal portion of the payment. DMAS does not receive a General Fund appropriation to reimburse for these school-based services. The school divisions provide documentation to DMAS that they expended funds for the services billed to DMAS. DMAS then reimburses the local school divisions for the federal share of the payment.

Since the initial DMAS coverage of school-based services in 1991, discussions have been ongoing between DMAS and the Department of Education (DOE) into further service expansions resulting in the changes that were effective July 1, 1997. In the fall of 1998, a joint legislative subcommittee discussed Medicaid coverage of school-based services resulting in Chapter 967 of the 1999 Virginia Acts of Assembly.

Chapter 967 of the 1999 Virginia Acts of Assembly addressed several areas (listed below) of Medicaid coverage of special education services and prompted the current emergency regulation. For example, the legislation addresses coverage of psychological/psychiatric services in schools and changes in provider qualifications for psychologists and speech therapists, substantially revised the DMAS/DOE interagency agreement, revised the payment rates for services, required development of methods to assist school divisions in identifying Medicaid eligible children, and required development of a document which combines elements of the DMAS Plan of Care with the DOE Individualized Education Program plan. Chapter 967 included language not only to address qualifications of psychologists but also speech therapists and directs DMAS to recognize qualifications for services beyond what is currently recognized for reimbursement in non-school settings.

DMAS is also extending, with these regulations, the length of coverage of skilled nursing services for children in special education. Currently in schools, DMAS covers a maximum 90

minutes a day of skilled nursing services. The decision to cover beyond 90 minutes a day of skilled nursing services is based on the 1997 amendments to IDEA, the Garret court decision, and a Virginia Office of Attorney General memorandum in August of 1999 citing language in Chapter 967 that DMAS coverage is to assist school divisions in the funding of medically necessary services "...by making use of every possible, cost-effective means...".

In addition to Virginia's legislative activity, the U.S. Supreme Court issued a decision (Cedar Rapids Community School District v. Garret. 526 U.S.66, 143 L. Ed.2d 154, 119 S.Ct. 992 (1999)) in March of 1999 further affecting DMAS' considerations in expanding coverage of special education services. The Garret case involved a special education child who was wheelchair bound and ventilator dependent who required all day nursing services. The school division (Cedar Rapids) maintained that Garret needed medical services that are not included under the federal Individuals with Disabilities Education Act. The Court rejected this position finding that supportive services (such as nursing care) are included under the IDEA and school districts were required to fund the care, even for children having extensive nursing needs.

While Medicaid was not mentioned in this decision, the Garret case has received considerable publicity and underscores the extensive health care services school divisions must provide to children with special education needs under IDEA. The 1997 federal amendments re-authorizing IDEA provided that states identify agencies, other than education agencies, with responsibility for paying for special education services. These agencies are to have financial responsibility for the special education services preceding the local education agency. Title XIX Medicaid programs are specifically mentioned as part of this process.

These regulatory changes are essential for the economical management of an important governmental function. Local school divisions will obtain federal Medicaid dollars for these special education services whereas, prior to the current emergency regulations, these services were funded from state and local budgets.

## Issues

*Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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 there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.*

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The advantage for the affected children and their families is that these children will receive necessary health care services, with the parents' knowledge and approval, during the school day without requiring the parents to lose time from their jobs. The advantage to the schools by using their own employees is that the children will lose less instruction time (by eliminating the necessity for travel to a doctor's office). Medicaid coverage of therapy and screening services also serves as a source of income for the schools which replaces previously used local and state

dollars. The agency projects no negative issues involved in implementing this proposed change since localities' participation as Medicaid providers is voluntary.

### Public Comment

*Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.*

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DMAS' proposed regulations were published in the July 31, 2000, Virginia Register for their public comment period from July 31 through September 29, 2000. DMAS sent this proposed regulation to all 130 local (city and county) school districts, the Department of Education (DOE), and the Virginia Poverty Law Center and requested comments. DOE also forwarded DMAS' proposed regulations to the Special Education directors and school nurse coordinators. Comments were received from Wythe County, Fairfax County, and Rappahannock County public schools. A summary of the comments received and the agency's responses follow.

#### Wythe County Public Schools:

The commenter stated that this billing capability (of the schools directly to Medicaid) would be a tremendous step forward in providing and helping pay for the health care needs of the special education population. Presently, this locality does not participate as a Medicaid enrolled provider.

#### Response:

DMAS appreciates this locality's support and hopes it will reconsider its non-participation and enroll with Medicaid as a provider in the future.

#### Fairfax County Public Schools:

This locality fully endorsed the establishment of permanent regulations allowing for the expansion of health care services, reimbursable by Medicaid, to be provided by employees of school divisions for students with disabilities. This commenter specifically supported the extension of the coverage of skilled nursing services. This commenter also supported the changes in provider qualifications for school psychologists and speech-language pathologists. This commenter pointed out that these changes would assist school divisions to serve a wider range of special education students with complex health needs.

#### Response:

DMAS appreciates this county's support of its regulations and its participation in this important method of paying for health care services for special education students.

#### Rappahannock County Public Schools:

This commenter agreed that, in principal, the regulations seemed to address an important issue. However, the commenter pointed out that documentation, paperwork, and additional services all have additional costs. "If this program is completely and fully funded 100% by the state for direct services and related paperwork, only then can additional regulation be supported. If schools are required to provide additional services without full funding, then current services will be diminished. Unfortunately, the Commonwealth has historically mandated programs and have [sic] only paid a portion of the program, leaving the remainder up to the locality. Small, rural school systems strapped for funding are often placed in a position to take funding away from some other worthy educational effort to meet new mandates. If 100 percent (not equalized) funding will support services and paperwork for the Proposed Regulation for Expanded School Health Services indefinitely; only then would support follow".

Response:

The Department's reimbursement of the federal share reflects the funding decisions of the General Assembly and the Governor since 1992 (Chapter 893, 1992 Acts of Assembly, Item 313). DMAS cannot restructure this fundamental financing mechanism through its administrative rule making process. The commenter raises an issue that is beyond the scope of this regulation.

**Detail of Changes**

*Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.*

STATEMENT DETAILING CHANGES

VAC Citation	Federal Citation	Substance of the Suggested Change
12 VAC 30-50-229.1A.2.		Subsection has been modified, per agreement with DPB, for purpose of clarifying the language and the requirement.

CERTIFIED:

\_\_OCTOBER 11, 2000\_\_  
DATE

\_\_VICTORIA P. SIMMONS\_\_\_\_\_  
VICTORIA P. SIMMONS,  
REGULATORY COORDINATOR

### Family Impact Statement

*Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.*

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This regulatory action will not have any negative affects on the institution of the family or family stability. It will not increase or decrease disposable family income or erode the marital commitment. It will not discourage economic self-sufficiency, self-pride, or the assumption of family responsibilities. These proposed regulatory changes will have a positive impact on families of Special Education children. Since parents will be involved in developing their children's Individualized Education Plan, their consent for all of these covered services will be mandatory. These special needs children will be able to obtain some of the daily needed medical care from school nursing staffs which will permit these children to attend school while relieving their families of these demands.