

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

SUBJECT: EMERGENCY REGULATION for Expansion of School-Based Services for Spec. Ed. Children

ACTION NEEDED
BY ----JAN 10th
RETURN TO DMAS

SUMMARY

1. REQUEST: The Governor is hereby requested to approve this agency's adoption of the emergency regulation entitled Expansion of School-Based Services for Special Education Children as a result of the *1999 Virginia Acts of Assembly* (Chapter 967) which expanded service coverage for Medicaid children in Special Education.
2. RECOMMENDATION: Recommend approval of the Department's request to take an emergency adoption action regarding Medicaid Expansion of School-Based Services for Special Education Children. 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. 3, 1999
Dennis G. Smith, Director Date

3. CONCURRENCES:
Secretary of Health and Human Resources: Department of Planning and Budget:
Concur _____ Concur _____
Concur w/Modifications _____ Concur w/Modifications _____
Disapprove _____ 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 the Narrative for the Amount, Duration, and Scope of Services (Supplement 1 to Attachment 3.1 A&B) (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). Virginia school divisions are required to offer special education services under federal law 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) (P.L. 101-476) 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 law, 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 includes 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.

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.

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.

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. The 1996 General Assembly requested DMAS to study its coverage of school-based health services. One of the recommendations of this referenced study was for DMAS to expand coverage to include skilled nursing services and the Individualized Education Program meetings for the special education population. Furthermore, the 1997 General Assembly directed DMAS to cover these services by July 1, 1997. DMAS received final approval from its federal funding agency, the Health Care Financing

Administration (HCFA), for coverage of these services in State Plan Amendment 97-19, effective July 1, 1997.

In the fall of 1998, a joint legislative subcommittee discussed Medicaid coverage of school-based services. The discussions included presentations from DMAS and DOE staff, as well as representatives from local school divisions and consultants. Two bills were introduced in the 1999 General Assembly session, SB1199 (patron Senator Houck) and an identical-HB2360 (patron Delegate Bloxom), which further addressed DMAS' coverage of special education services. SB 1199 was approved by the General Assembly and signed by the Governor to become Chapter 967.

The *1999 Virginia Acts of Assembly* Chapter 967 addressed several areas (listed below) of Medicaid coverage of special education services and prompted this emergency regulation. For example, coverage of psychological/psychiatric services in schools, changes in provider qualifications for psychologists and speech therapists, substantial revisions to the DMAS/DOE interagency agreement, revisions to payment rates for services, development of methods to assist school divisions to identify Medicaid eligible children, and development of a document which combines elements of the DMAS Plan of Care with the DOE Individualized Education Program plan.

In addition to Virginia's legislative activity, the U.S. Supreme Court issued a decision (*Cedar Rapids Community School District v. F. Garret, et al*) in March 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 Act* 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.

DMAS was directed by the 1999 General Assembly, in Chapter 967 of the *Code*, to cover psychology and psychiatry services for children in special education. Chapter 967 includes language not only to address qualifications of psychologists but also speech therapists. With both these professions, Chapter 967 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 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 a Virginia Office of Attorney General memorandum in August 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...", the 1997 amendments to *IDEA*, and the Garret court decision.

PREVIOUSLY PROPOSED REGULATIONS

In 1995, DMAS proposed regulations for school-based services. In cooperation with DOE, DMAS proposed to differentiate between adult and pediatric rehabilitation requirements. It had become problematical for the enrolled school divisions to obtain physician re-certifications (every 60 days) for children having permanent disabilities. DMAS recognized that its 60-day physician re-certification requirements were appropriate for adults (who were healing from accidents or serious illnesses) but not for permanently disabled children who required ongoing maintenance support. This proposed

regulation also provided for the coverage of psychological services, for these special education children, in the schools.

Based on public comments received, DMAS was directed to remove the coverage of psychological/psychiatric services from the package prior to the adoption action. DMAS was unable to comply with the 1998 General Assembly mandate to cover school-based psychiatry and psychology services due to unresolved issues of qualifications for psychologists. Like other DMAS covered school-based special education services, the services in this emergency regulation must be included in the child's Individualized Education Program plan for DMAS coverage to occur.

7. **AUTHORITY TO ACT:** The Code of Virginia (1950) as amended, §32.1-324, grants to the Director of the 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.

Without an emergency regulation, this amendment to the State Plan cannot become effective until the publication and concurrent comment and review period requirements of the APA's Article 2 are met.

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 the General Assembly's direction, he must adopt this emergency change to the State Plan. This issue qualifies as an emergency regulation as provided for in §9-6.14:4.1(C)(5)(ii), because the 1999 Virginia Appropriation Act requires this regulation to be effective within 280 days from the enactment of the law. 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.

Chapter 967 of the *Code*, which was passed by the 1999 General Assembly and prompted this emergency regulation, specified that DMAS promulgate all necessary regulations to implement these provisions within 280 days of the law's enactment (or no later than January 12, 2000).

9. **FISCAL/BUDGETARY IMPACT:** For the 1998-99 school year, DMAS "reimbursed" approximately \$1.76 million to school divisions for Medicaid covered special education services. One-half of this amount is federal funds reimbursed by DMAS and the other half is documented matching funds from school divisions allowing DMAS to draw-down the federal funds. The 1998-99 school year reimbursement represents about 11,200 claims paid for services.

Currently only about 44 school divisions actively bill Medicaid since enrollment by school divisions is voluntary. The expanded coverage in this regulatory package is also only for federal funds reimbursed by DMAS. The three items that account for the federal fund fiscal impact are: coverage for psychiatry and psychological services; the additional speech therapists providing services; and the longer duration of skilled nursing services covered.. The total annual federal funds estimated to be needed are \$884,000 but which will be prospectively adjusted (in the HCFA-37 requested funds report).

10. **RECOMMENDATION:** Recommend approval of this request to adopt this emergency regulation to become effective on January 12, 2000. From its effective date, this regulation is to remain in force for one full year or until superseded by final permanent regulations. Without an effective emergency regulation, the Department lacks the authority to reimburse school divisions for these additional services.

11. APPROVAL SOUGHT FOR 12 VAC 30-50-229.1).

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: