Virginia Regulatory Town Hall

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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	12 VAC 30 – 50, VAC 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 form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), 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 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Preamble

The APA (Code of Virginia § 2.2-4011) states that an "emergency situation" is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

1) Please explain why this is an "emergency situation" as described above.
2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The Administrative Process Act (Section 2.2-4011) states that an agency may adopt regulations in an "emergency situation": (A) upon consultation with the Attorney General after the agency has submitted a request stating in writing the nature of the emergency, and at the sole discretion

of the Governor; (B) a situation in which Virginia statutory law, the Virginia 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; or (C) in a situation in which an agency has an existing emergency regulation, additional emergency regulations may be issued as needed to address the subject matter of the initial emergency regulation provided the amending action does not extend the effective date of the original action. This suggested emergency regulation meets the standard at *COV* 2.2-4011 (B) 280 day standard as discussed below.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Amount, Duration and Scope of Medical and Remedial Services; Methods and Standards for Establishing Payment Rates – Other Providers, and Waivered Services: Coverage and Reimbursement of Early Intervention Services under Part C of IDEA (12 VAC 30 – 50, 30 – 80, and 30 - 120) and also to 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) promulgating entity, i.e., 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 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 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 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 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 emergency 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.

Need

Please detail 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.

In 1986 Congress passed Part C of the Individuals with Disabilities Act (IDEA), which deals with Early Intervention, to address the developmental needs of children from birth to age three. The goals of Early Intervention are to enhance the development of infants and toddlers with disabilities, to reduce long-term educational costs by minimizing the need for special education, to minimize the risk of institutionalization, and maximize independent living, and finally to enhance the capacity of families to meet their child's needs. Services are designed to identify and meet a child's needs in five developmental areas, including: physical development, cognitive development, communication, social or emotional development, and adaptive development. Part C services include, but are not limited to, Audiology, Assistive Technology, Counseling/Psychological services, Family training, counseling and home visits, Medical Evaluation (for diagnostic purposes), Nursing, Nutrition, Occupational Therapy, Physical Therapy, Service Coordination, Social Work, Special Instruction, Speech/Language, Transportation, and Vision-related services.

Developmental problems in pre-school aged children are currently addressed by Medicaid through physical therapy, occupational therapy, and speech-language pathology services provided by acute and rehabilitation hospitals, home health agencies, and rehabilitation agencies under a physician-directed rehabilitative model. Many of the services that are most effective at meeting the specific needs of Part C children can be provided by EI specialists and professionals. Many of these specialists and professionals, however, are not licensed or certified to provide traditional rehabilitative services. Although Part C services fit within the federal definition of Rehabilitative Services found in 42 CFR 440.130(d), specific Early Intervention providers have not previously been recognized by DMAS under the Virgina State Plan. Consequently, DMAS could not routinely pay a Part C provider servicing Medicaid-enrolled pre-schoolers unless the provider was licensed to provide rehabilitation. This situation has created a gap in Medicaid payment for Part C services, because many of the providers best equipped to address the needs of Part C children are not enrolled because of the licensure issue. Even if they are enrolled, there is currently no DMAS designation for providing EI services as a specialty. Therefore, DMAS has no mechanism for specifically reimbursing Part C services. As a result the State has paid for EI services entirely from the limited federal Part C grant allotment or with state and local funds.

Recognizing that the period between birth and three years of age is a time of rapid cognitive, linguistic, social, emotional, and motor development, and that infants and toddlers learn best through everyday experiences and interactions with familiar people in familiar contexts, the primary role of the provider of Early Intervention services is to work with family members and caregivers to enable them to implement effective strategies throughout their everyday activities to enhance their child’s development. The proposed regulatory action is needed to support Early Intervention services designed to address developmental problems in these young children, as

provided for in Chapter 53 of Title 2.2 (§ 2.2-5300 et seq.) of the Code of Virginia, which addresses Part C of the Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.). These services are provided to children from birth to age three who have (i) a 25 percent developmental delay in one or more areas of development, (ii) atypical development, or (iii) a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay. Research suggests that these problems are most effectively addressed by a multidisciplinary approach working in partnership with the child's family. Virginia's approach to providing Part C Early Intervention services focuses on identifying and using natural learning opportunities; recognizing families as the primary agents of change in their children's development; using a primary service provider model, as appropriate for the individual child and family, to support the family as they implement strategies specified in an individualized family service plan; and using resources efficiently.

The regulatory action is one component of a comprehensive plan to bring Virginia's I&TC program into compliance with federal Part C regulations, specifically the payor of last resort requirements, and make efficient use of federal and state funds. DMAS and DBHDS plan to enter into an interagency agreement to use $2.34 million of the state fund appropriation (item 316.K.1 of the 2009 Appropriations Act) designated for the Part C Early Intervention System as the required state match for Medicaid federal funds to support this proposed expansion of Medicaid funded services. DMAS anticipates implementing this regulatory action without increased cost to the state or localities.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

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 emergency 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.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
	12 VAC 30-50-131: EPSDT and Early Intervention services	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 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 120-360 Definitions			“Early Intervention” is defined for the Medicaid 1915B waiver consistent with the proposed 12 VAC 30-50-131.
12 VAC 120-380 Medallion II MCO responsibilities			Early Intervention is addressed as covered service in EPSDT section in conformity with the MCO contracts.
	12 VAC 120-396		This change stipulates 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.

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.

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.

Public participation

Please indicate 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 on this notice.

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. The agency/board 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 (**Molly.Carpenter@dmas.virginia.gov**) or fax to Molly Carpenter, Department of Medical Assistance Services, 600 East Broad St., Richmond, Virginia 23219, at telephone number is 804-786-1493, fax number is 804-225-3961. 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.

DMAS has been having weekly meetings with affected members of the public and will continue to do so.

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

DMAS used the participatory approach to develop this emergency regulation, and will continue to do so. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization represented (if any).

Family impact

Assess the potential 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.