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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	Department of Behavioral Health and Developmental Services
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	12 VAC35-225
<b>VAC Chapter title(s)</b>	Requirements for Virginia's Early Intervention System
<b>Action title</b>	Response to <a href="#">Periodic Review</a>
<b>Date this document prepared</b>	<del>10/24/2019</del> <del>01/19/2021</del> 03/23/2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.*

This action is the result of a [periodic review](#). The proposed amendments are not substantive and clarify the current Medicaid appeals process (Section 420) and the current requirements for obtaining parental consent to bill Medicaid managed care organizations (Sections 240, 250 and 280) for Early Intervention Part C services and supports. Language in Section 420 is deleted and replaced with a description of the Early Intervention Dispute Resolution process and the Medicaid appeals process.

### Acronyms and Definitions

*Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.*

DBHDS means Department of Behavioral Health and Developmental Services.

MCO means Medicaid managed care organization.

## Statement of Final Agency Action

*Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.*

The State Board of the Department of Behavioral Health and Developmental Services approved the promulgation of these amendments to Chapter 225 at its [meeting on July 15, 2020](#).

## Mandate and Impetus

*Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”*

*As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.*

This action is part of the regular review cycle. Since the regulations were initially promulgated, it was determined that further clarity was needed to specify that the Medicaid appeals process is different from the Early Intervention Part C dispute resolution process. Additionally, since the Department of Medical Assistance Services recently included Early Intervention Part C services in managed care; the updated process for Medicaid provider enrollment and obtaining parental consent for billing Medicaid and the managed care entities was added.

These are not expected to be controversial changes as the new language clarifies procedures currently in place. Beyond the new language these regulations, in large part, implement federal code and regulations so there is limited ability to make amendments to the Virginia regulations. Federal code is found at Part C of the Individuals with Disabilities Education Act at 20 U.S.C. § 1435(a) and federal regulations are found at 34 CFR 303.1 et. seq.

## Legal Basis

*Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.*

The Department promulgated the regulations (12 VAC35-225) under Emergency Regulatory Authority. The Department has the legal authority to promulgate these regulations under Virginia Code § 2.2-5304 and in [Item 322 H.1-2](#), of Chapter 56 of the 2020 Special Session 1 Acts of Assembly (originally, [Item 315 H.4](#), of Chapter 806 of the 2013 Virginia Acts of Assembly). **(DMAS related language, Item 313 QQ. 1-4.**

In addition, these regulations implement Part C of the Individuals with Disabilities Education Act at 20 U.S.C. § 1435(a) and at 34 C.F.R. Part 303 in Virginia.

## Purpose

*Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.*

This action is part of the regular review cycle. Since the regulations were initially promulgated, it was determined that further clarity was needed to specify that the Medicaid appeals process is different from the Early Intervention Part C dispute resolution process. Additionally, since the Department of Medical Assistance Services included Early Intervention Part C services within managed care, procedures for provider enrollment with Medicaid and obtaining parental consent for billing Medicaid and the managed care entities was added.

The intent of the regulatory revisions is to clarify processes and inform stakeholders of information necessary to provide services to infants, toddlers, and their families.

## Substance

*Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.*

Section 240 – Use of Public Benefits or Public Insurance- adds language to state that consent from the parent must be obtained for the Medicaid managed care entity in order to bill for services.

Section 260 – Written Notification- adds language that the parent has the right to withdraw consent to disclose the infant or toddler's personally identifiable information to Medicaid and the Medicaid managed care entity

Section 280 – Provider Billing for Early Intervention Services- clarifies that providers must enroll with the Medicaid managed care entity.

Section 420 – Appeal to the Department of Medical Assistance Services- adds language that differentiates between the Medicaid appeals process and the Early Intervention Part C dispute resolution process.

## Issues

*Identify the issues associated with the regulatory change, 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 there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.*

The primary advantages of the changes to the public are that families, program providers, and other stakeholders will be clear about procedures for appeals with descriptions of both the Early Intervention Dispute Resolution process and the Medicaid appeals process. Since the Department of Medical Assistance Services recently included Early Intervention Part C services in managed, these changes help to ensure that the Commonwealth makes appropriate decisions regarding Part C funding while also receiving allowable appeals within the managed care framework.

**Requirements More Restrictive than Federal**

*Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.*

These revisions are not more restrictive than federal regulations.

**Agencies, Localities, and Other Entities Particularly Affected**

*Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

**Other State Agencies Particularly Affected**

These regulatory revisions will assist the Department of Medical Assistance Services in clarifying correct procedures for obtaining consent and becoming a Medicaid provider.

**Localities Particularly Affected**

There are no localities particularly affected.

**Other Entities Particularly Affected**

Local Early Intervention lead agencies and Early Intervention Part C providers will be impacted by these regulations.

**Economic Impact**

*Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.*

**Impact on State Agencies**

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> <li>a) fund source / fund detail;</li> <li>b) delineation of one-time versus on-going expenditures; and</li> <li>c) whether any costs or revenue loss can be absorbed within existing resources</li> </ul>	<p>There are no new costs associated with these revisions.</p>
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<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	There are no new costs associated with these revisions.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	These revisions will clarify the process for obtaining consent and will differentiate between the Medicaid appeals process and the Early Intervention Part C Dispute Resolution process.

**Impact on Localities**

Projected costs, savings, fees or revenues resulting from the regulatory change.	No fiscal impact unless it saves the provider time due to having specific information.
Benefits the regulatory change is designed to produce.	Provide clarity on obtaining consent and how to distinguish between the Medicaid appeals process and the Early Intervention Part C Dispute Resolution process

**Impact on Other Entities**

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	These clarifications will provide information to Early Intervention Part C families and providers of services.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	These changes will impact the 40 Early Intervention systems and their employees and contractors. While all families are informed about the Dispute Resolution process, very few choose this route. All parents in Early Intervention will have access to the information.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	No fiscal impact is expected for these clarifications.
Benefits the regulatory change is designed to produce.	Provide clarity on obtaining consent and how to distinguish between the Medicaid appeals process and the Early Intervention Part C Dispute Resolution process.

**Alternatives to Regulation**

*Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.*

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The current regulations could remain as is. If the regulations are left as is, it could lead to more questions from providers and families about the differences between Early Intervention Part C dispute resolution and the Medicaid appeals process.

### **Regulatory Flexibility Analysis**

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.*

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This regulatory action clarifies currently existing regulations related to the Early Intervention Part C program. It clarifies that consent must be obtained for the Medicaid managed care entity but does not add other requirements.

### **Public Participation**

*Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.*

*As required by § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.*

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If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Department of Behavioral Health and Developmental Services Office of Early Intervention Services is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Catherine Hancock, Part C Administrator, DBHDS, 1220 Bank Street, Richmond, VA 23219; phone 9804) 371-6592, fax (804) 371-7959, TDD:

(804) 371-8977, catherine.hancock@dbhds.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

**Detail of Changes**

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

**Table 1: Changes to Existing VAC Chapter(s)**

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
12VAC35-240		<p>B. Parental consent shall be obtained before the local lead agency or the early intervention service provider discloses, for billing purposes, a child's personally identifiable information to the Department of Medical Assistance Services.</p> <p>E. If the parent does not provide the consent to use or enroll in public benefits or public insurance or to disclose information to the the Department of Medical Assistance Services for billing purposes, the local lead agency must still make available the early intervention services on the IFSP to which the parent has provided consent.</p>	<p>B. Parental consent shall be obtained before the local lead agency or the early intervention service provider discloses, for billing purposes, a child's personally identifiable information to the <u>child's assigned Managed Care Organization or, if the child is not enrolled in managed care, to the Department of Medical Assistance Services.</u></p> <p>E. If the parent does not provide the consent to use or enroll in public benefits or public insurance or to disclose information to the <u>child's assigned Managed Care Organization or, if the child is not enrolled in managed care, to the Department of Medical Assistance Services</u> for billing purposes, the local lead agency must still make available the early intervention services on the IFSP to which the parent has provided consent.</p> <p>This clarifies the requirement to document the specific managed care entity</p>
12VAC35-260		1.d. The parent's right to withdraw consent for disclosure, for billing purposes, of a child's personally identifiable information to the Department of Medical	1.d. The parent's right to withdraw consent for disclosure, for billing purposes, of a child's personally identifiable information to the <u>child's assigned Managed Care Organization or, if the child is not enrolled in managed care, to the Department of</u>

		<p>Assistance Services at any time; and</p>	<p>Medical Assistance Services at any time; and</p> <p>This clarifies the requirement to document the specific managed care entity</p>
<p>12 VAC35-280</p>		<p>C.2. Enroll with the Department of Medical Assistance Services as an early intervention provider;</p> <p>D.2. Enroll with the Department of Medical Assistance Services as an early intervention provider</p>	<p>C.2. Enroll with the Department of Medical Assistance Services <u>and Medicaid contracted Managed Care Organizations</u> as an early intervention provider;</p> <p>D.2. Enroll with the Department of Medical Assistance Services <u>and Medicaid contracted Managed Care Organizations</u> as an early intervention provider</p> <p>This language clarifies the enrollment process.</p>
<p>12VAC35-420</p>			<p>Explanation: Medicaid appeals are separate from and shall not affect a parent's right to request any of the dispute resolution options under 12VAC35-225-390, 12VAC35-225-400 and 12VAC35-225-410.</p> <p>This clarifies the appeals process available to Medicaid members and the dispute resolution process available through Early Intervention Part C. The current language was confusing to some stakeholders.</p> <p>A. In addition to the dispute resolution options described in this chapter, Medicaid or FAMIS recipients <u>seeking to contest service decisions</u> shall have the right to file an appeal with the Department of Medical Assistance Services <del>when they disagree with certain actions. Actions that may be appealed include:</del></p> <ol style="list-style-type: none"> <li><del>1. Disagreement about the child's eligibility for services;</del></li> <li><del>2. The provision of early intervention services, including those listed on the IFSP; and</del></li> <li><del>3. The frequency, length, and intensity of services in the IFSP.</del></li> </ol> <p><del>B. To ensure this right to appeal, the service coordinator shall provide the family with written information on the appeals process, regardless of whether</del></p>



			<p>or not the family expresses agreement or disagreement, if the child is found ineligible; the local system is refusing to initiate a service the family is requesting or is refusing to provide a service at the frequency or length desired by the family; or a service is decreased or ended, unless the family requested the service be decreased or ended pursuant to federal and state Medicaid law. If the individual is enrolled in a Medicaid managed care organization or "MCO," the internal appeal process for the Medicaid MCO must be exhausted or deemed exhausted before appealing to the Department of Medical Assistance Services. Appeals to the Department of Medical Assistance Services are separate from the dispute resolution options available under this chapter and shall comply with applicable Department of Medical Assistance Services' regulations.</p> <p>B. A notice of action meeting federal and state requirements must be issued to the individual explaining the basis for the action and the right to appeal.</p> <p>C. Families shall follow all applicable Department of Medical Assistance Services requirements when filing an appeal.</p>
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