

CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES

NOTICE OF EMERGENCY REGULATIONS AND FINDING OF EMERGENCY

Emergency Regulations for Alternative Services Delivery

FINDING OF EMERGENCY REGULATORY ACTION IS NECESSARY

The Department of Developmental Services (Department/DDS) finds that the amendments and adoption to California Code of Regulations, title 17, section(s) 54326 and 56810, respectively, are necessary on an emergency basis in order to maintain the essential health and wellbeing of Californians with developmental disabilities and to ensure they have the opportunity to receive critical services through an alternative delivery of services during the COVID-19 pandemic through the network of 21 regional centers and contracted providers. The Department finds that these emergency regulations are necessary for the immediate preservation of the public peace, health and safety, and general welfare to the citizens of California, within the meaning of Government Code section 11346.1.

NOTICE AND INTRODUCTION

NOTICE IS HEREBY GIVEN that the Department proposes to amend and adopt the regulations on an emergency basis as described below. Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to the submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency regulations to OAL, interested persons have five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In addition to the five-day comment period for the emergency filing indicated above, there will be the routine 45-day public comment period when these regulations are permanently amended via the regular rulemaking process which will be completed within 180 days of OAL's approval of this emergency package.

WRITTEN COMMENT PERIOD

The Department plans to file the emergency rulemaking package with OAL five working days from the date of this notice. If you would like to make comments on the Finding of Emergency or the proposed emergency regulations, the comments must be received by both the Department and OAL within five calendar days of the Department's filing of the emergency regulations with OAL. Please check the OAL web site at www.oal.ca.gov to

find out when the emergency regulation is filed with OAL. Responding to comments at this point in the process is strictly at the Department's discretion. Comments should be sent **simultaneously** to:

Department of Developmental Services
Attn: Legislation, Regulations & Public Affairs
RE: ALTERNATIVE SERVICES DELIVERY
1600 9th Street, Rm 330
Sacramento, CA 95814; or
Facsimile: (916) 654-1913; or
E-mail: RegulationsMailing@dds.ca.gov

and

Office of Administrative Law
Attn: Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Facsimile (916) 323-6826.
E-mail: OALReferenceAttorney@oal.ca.gov

FINDING OF EMERGENCY

SPECIFIC FACTS DEMONSTRATING THE NEED FOR IMMEDIATE ACTION

On March 4, 2020, Governor Gavin Newsom declared a State of Emergency as part of the state's response to address the global COVID-19 outbreak. The COVID-19 public health crisis has had a particularly adverse impact on the approximately 360,000 Californians with developmental disabilities. In particular, access to needed nonresidential services has been limited due to adherence to public health guidelines, including maintaining physical distancing, limiting participation in group activities, and stay-at-home orders issued by state and local officials. In Executive Order N-25-20 dated March 12, 2020, the Governor stated that "it is critical that [individuals with developmental disabilities] continue to receive their services while also protecting their own health and the general public health."

These proposed regulations are necessary to enable individuals with developmental disabilities to receive their nonresidential services by alternative methods during the ongoing COVID-19 public health crisis.

EVIDENCE FOR EMERGENCY

Delays in providing nonresidential services during COVID-19 continue to harm individuals with developmental disabilities. These proposed emergency regulations need to become effective as soon as possible, with the intent that they are in effect no later than September 1, 2020. Retainer payments currently made to providers of nonresidential services terminate effective August 31, 2020. These regulations must

become effective September 1, 2020, so that such providers are available to provide services to individuals with developmental disabilities beginning on that date.

CONSEQUENCES OF FAILING TO ADDRESS THE SITUATION THROUGH EMERGENCY REGULATIONS

California receives federal funding for retainer payments that have been used to keep nonresidential service providers solvent and available to provide services to individuals with developmental disabilities once the COVID-19 crisis abates. However, the availability of federal funding for retainer payments is time limited. Therefore, it is necessary to develop alternative methods to deliver nonresidential services and accompanying changes to reimbursements for these services.

Failure to enact these emergency regulations will likely result in a decrease in nonresidential service providers and therefore prevent individuals with developmental disabilities from accessing needed services and supports, which would have a detrimental impact on their health and wellbeing. Enactment of the emergency regulations will permit individuals with developmental disabilities to continue receiving services necessary for their health and wellbeing during the COVID-19 public health crisis.

AUTHORITY AND REFERENCE

The Department is proposing to amend the regulations in section 54326, and adopt section 56810, title 17, California Code of Regulations under the authority provided in Chapter 157, Statutes of 2003; Section 4648.12(c)(1)(A) of the Welfare and Institutions Code and Section 11152, Government Code. The Department makes reference to specific statutory provisions in order to implement, interpret, or make specific the emergency changes in sections 4500.5, 4501, 4502.1, 4620, 4643.5, 4646, 4648, and 4685.5, of the Welfare and Institutions Code.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Existing Law

These proposed regulations will amend title 17, California Code of Regulations, section 54326, subdivision (a)(11), and add section 56810, subdivisions (a) through (e). They will not conflict with any existing statute or other regulation.

Policy Statement

The Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq. specifies the State of California's responsibility to support service delivery to persons with developmental disabilities, and the right of those individuals to receive services identified in his or her individual program plan.

The State of Emergency for COVID-19 prevents consumers from accessing most nonresidential services. Service providers and consumers must comply with state and local public health guidance to prevent the risk of exposure to COVID-19. Consumers

have a right to receive nonresidential services and are at risk for negative outcomes when there is a lapse in service delivery.

The Governor's declaration of a State of Emergency due to COVID-19 has authorized retention payments for service providers, which has sustained the community capacity for service provision thus far. This will conclude August 31, 2020 and without authority for alternative delivery of services, many nonresidential service providers would not be able to provide services in the traditional manner and be consistent with public health guidelines. As a result, providers may be forced to reduce or close their businesses and the community capacity will be diminished. The loss of service providers would be an immediate and long-term impediment for the developmental services system.

The proposed regulations authorize alternative service delivery for nonresidential services and specify requirements for service provider reimbursement. The regulations allow service providers to be creative and resourceful in providing services to consumers, with an emphasis on safety and minimizing the impact of COVID-19 to the consumer.

Benefits of the Proposed Emergency Regulations

This proposed emergency regulation intends to support delivery of nonresidential services to individuals with developmental disabilities during the COVID-19 public health crisis and provides a mechanism for providers of such services to receive payment and remain fiscally solvent to sustain the state's developmental services provider network and preserve the future delivery of services. Allowing alternative delivery of nonresidential services will promote public health and safety by reducing the frequency and duration of in-person interactions and help reduce the spread of COVID-19.

COMPATABILITY WITH EXISTING REGULATIONS

The proposed emergency amendments are compatible with current regulations. The proposed emergency amendments compliment the entirety of the California Code of Regulations, title 17.

COMPATABILITY WITH FEDERAL LAW

The proposed emergency amendments do not conflict with federal law.

SUMMARY OF PROPOSED AMENDMENTS

The proposed amendments to section 54326 and adoption of section 56810, title 17, California Code of Regulations are summarized as follows:

Section 54326, subdivision (a), paragraph (11)(A), states that providers who serve individuals with developmental disabilities cannot bill when consumers are absent from their programs and not receiving a nonresidential service. There is an exception where nonresidential services cannot be provided to consumers due to a State of Emergency

declared by the Governor. If services cannot be provided due to a State of Emergency, providers of nonresidential services may still receive payment during the duration of the Emergency. Payments made to providers during the State of Emergency when services cannot be provided are referred to as absence or retainer payments.

The proposed amendment to section 54326, subdivision (a), paragraph (11)(A), would discontinue the absence or retainer payments made due to the COVID-19 public health crisis. Instead 54326, subdivision (a), paragraph (11)(B), would allow vendors to provide and bill for alternative delivery of nonresidential services to consumers impacted by COVID-19 under proposed section 56810. The amendments to section 54326, subdivision (a), paragraph (11)(A) are necessary to authorize payments for alternative service delivery for nonresidential services to consumers and permit consumers to receive services during the COVID-19 public health emergency.

The Lanterman Act specifies that individuals with developmental disabilities are entitled to receive services that allow them to approximate the pattern of everyday living available to people without disabilities of the same age. Because of COVID-19, consumers are unable to receive all available nonresidential services. Adoption of section 56810, subdivisions (a) through (e) is necessary to permit the alternative delivery of nonresidential services to consumers adversely impacted by COVID-19.

Subdivision (a): Describes the purposes of the regulation and provides the framework for interpreting and applying subdivisions (a) through (e).

Subdivision (b), paragraph (1): Authorizes vendors to utilize delivery of nonresidential services to meet a consumer's needs.

Subdivision (b), paragraph (2): Requires vendors to be creative, resourceful and make modifications as necessary so that nonresidential services are provided to consumers during COVID. Requires vendors to utilize alternative delivery nonresidential services when traditional delivery of such services is not possible or must be modified due to COVID-19. Requires providers to be responsive to each consumer's current needs and mindful of the importance of safety when delivering nonresidential services during COVID-19.

Subdivision (c): Identifies the types of alternative delivery of nonresidential services that may be provided during COVID-19.

Subdivision (c), paragraph (1): Specifies that nonresidential service providers may provide supports related to minimizing the exposure or impact of COVID-19 on consumers.

Subdivision (c), paragraph (2): Specifies that nonresidential service providers may complete an individualized assessment of skills, preferences, and service needs for the consumer.

Subdivision (c), paragraph (3): Specifies that nonresidential service providers may complete an individualized service plan to provide needed services for a consumer.

Subdivision (c), paragraph (4): Specifies that services provided via telephone, video or other electronic communication will constitute an alternative delivery of nonresidential services.

Subdivision (c), paragraph (5): Specifies that delivery of supplies or other items to a consumer needed to provide services or supports will constitute an alternative delivery of nonresidential services.

Subdivision (c), paragraph (6): Specifies that using self-guided training and educational materials supplied by the vendor will constitute an alternative delivery of nonresidential services.

Subdivision (c), paragraph (7): Specifies that skills training to individuals within the consumer's household who are specifically designated to support the consumer will constitute an alternative delivery of nonresidential services.

Subdivision (c), paragraphs (8), (9) and (10): Specify that services ordinarily provided to a consumer in-person in various settings modified to comply with the most restrictive state or local guidelines in effect at the time the service is to be delivered will constitute an alternative delivery of nonresidential services.

Subdivision (c), paragraph (11): Specifies that supports provided to transition to the Self-Determination Program authorized by Welfare and Institutions Code section 4685.5 will constitute an alternative delivery of nonresidential services.

Subdivision (c), paragraph (12): Specifies that training provided to vendor staff that is necessary for consumers to receive nonresidential services will constitute an alternative delivery of nonresidential services and identifies eight possible types of trainings that would qualify.

Subdivision (d), paragraph (1): Identifies five certifications a vendor must make prior to seeking reimbursement for providing alternative delivery of nonresidential services. The vendor must certify in writing that it: (1) seeks reimbursement for one or more service identified in subdivision (c); (2) will engage the consumer about options available under the vendor's alternative delivery of nonresidential services; (3) can be contacted at a specified phone number and email address during the time services are being provided;

(4) will maintain documentation of alternative services provided; and (5) will have staff to provide services.

Subdivision (d), paragraph (2): Establishes an ongoing reporting requirement for vendors to submit written reports to the regional center identifying the amount of alternative nonresidential services provided. An initial report covering the period of September 1, 2020 to October 31, 2020 is due by November 30, 2020. Subsequent monthly reports data for the prior month are due on the last day of the month thereafter. The reports from the vendors must contain the following information: (1) the number of consumers with service authorizations; (2) the number of consumers served by the vendor who received alternative delivery of nonresidential services; (3) the number of consumers with service authorizations who did not receive alternative delivery of nonresidential services; (4) the number of consumers who used each type of service listed in subdivision (c); (5) a description of the alternative delivery of services provided to consumers that is not listed in subdivision (c), if any, and the number of consumers who used them; and (6) the number of days in each month each consumer received an alternative service.

Subdivision (e) sets forth how vendors may submit reimbursement claims for providing alternative delivery of nonresidential services. Subdivision (e): requires vendors to submit claims for alternative delivery of nonresidential services utilizing a monthly unit rate, calculated using the average monthly amount reimbursed based on the prior 12 months ending February 2020. For those 12 months, only those months where the amount of reimbursement to the vendor is greater than zero shall be included in determining the average

Subdivision (e), paragraph (1): Specifies that the monthly unit rate for vendors reimbursed by individual consumer service authorizations shall be calculated using the average monthly amount reimbursed to the vendor for each consumer.

Subdivision (e), paragraph (2): Specifies that the monthly unit rate for vendors not reimbursed by individual consumer service authorizations shall be calculated using the monthly average amount reimbursed to the vendor.

THECHNICAL, THEORETICAL, AND EMPIRICAL STUDY OR REPORT

None.

DETERMINATIONS

Substantial Difference from Existing Comparable Federal Regulations or Statute: None.

Incompatibility with Existing Laws and Regulations: None.

Mandate imposed on Local Agencies or School Districts that Requires State Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.

Cost to Any Local Agency or School District that Requires Reimbursement Pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None

Cost or Savings to Any State Agency: None. These regulations will result in expenditures already included in the Department's Budget.

Non-discretionary Cost or Savings Imposed upon Local Agencies: DDS anticipates there will be no fiscal impact to Local Agencies. None. The proposed regulations would only affect vendors providing services to individuals with developmental services, not government agencies. The local government would not have an additional role on the enforcement of the regulation.

Costs or Savings in Federal Funding to the State: Implementation of these regulations allows for continued receipt of federal funding.

AVAILABILITY OF FINDING OF EMERGENCY, TEXT OF PROPOSED EMERGENCY REGULATIONS, AND RULEMAKING FILE

A copy of the exact language of the proposed emergency regulations and this Notice and Finding of Emergency may be viewed and downloaded from DDS's web site at www.dds.ca.gov.