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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Medicine, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC85-20-10 et seq.
Regulation title	Regulations Governing the Licensure of Occupational Therapists
Action title	Regulation and licensure of occupational therapy assistants
Date this document prepared	8/18/08

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.

Chapters 64 and 89 (HB383 and SB134) of the 2008 Acts of the Assembly require the Board of Medicine to establish requirements for the licensure of occupational therapy assistants. The second enactment in the legislation requires that the Board promulgate regulations to implement the provisions of the act to be effective within 280 days of its enactment. Therefore, there is an “emergency situation” as defined in § 2.2-4011 of the Administrative Process Act.

The key provisions of the regulations are the national credential specified for licensure, the requirements for continuing competency and renewal, the provisions for supervision of occupational therapy assistants (OTA), and the perimeters for practice. In order to be licensed, an applicant must pass the certification examination for an occupational therapy assistant from the National Board for Certification in Occupational Therapy (NBCOT). Practice by an OTA must be supervised by an occupational therapist (OT) and includes services that do not require the clinical decision or specific knowledge, skills and judgment of a licensed OT nor the discretionary aspects of the initial assessment, evaluation or development of a treatment plan.

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.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Medicine the authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

...

6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...

In the Medical Practice Act (§ **54.1-2900 et seq.**), the Board of Medicine is mandated to set in regulation the requirements for licensure as an occupational therapy assistant.

§ 54.1-2956.1. Powers of Board concerning occupational therapy.

The Board shall take such actions as may be necessary to ensure the competence and integrity of any person who practices occupational therapy or claims to be an occupational therapist or occupational therapy assistant or who holds himself out to the public as an occupational therapist or occupational therapy assistant or who engages in the practice of occupational therapy, and to that end it may license practitioners as occupational therapists or occupational therapy assistants who have met the qualifications established in regulation by the Board.

§ 54.1-2956.5. Unlawful to practice occupational therapy without license; restriction of titles for occupational therapy assistants.

A. It shall be unlawful for any person not holding a current and valid license from the Board to practice occupational therapy or to claim to be an occupational therapist or to assume the title "Occupational Therapist," "Occupational Therapist, Licensed," "Licensed Occupational Therapist," or any similar term, or to use the designations "O.T." or "O.T.L." or any variation

thereof. However, a person who has graduated from a duly accredited educational program in occupational therapy may practice with the title "Occupational Therapist, License Applicant" or "O.T.L.-Applicant" until he has taken and received the results of any examination required by the Board or until six months from the date of graduation, whichever occurs sooner.

B. It shall be unlawful for any person to practice as an occupational therapy assistant as defined in § 54.1-2900 or to hold himself out to be or advertise that he is an occupational therapy assistant or use the designation "O.T.A." or any variation thereof unless such person holds a current and valid license from the Board to practice as an occupational therapy assistant.

However, a person who has graduated from a duly accredited occupational therapy assistant education program may practice with the title "Occupational Therapy Assistant-License Applicant" or "O.T.A.-Applicant" until he has taken and received the results of any examination required by the Board or until six months from the date of graduation, whichever occurs sooner.

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 intent of the regulatory action is compliance with the statute that requires the Board to establish licensure for OTA's and to promulgate regulations for that purpose. The goal of the regulation is to set the minimum criteria necessary for initial licensure and continued licensure and to establish an appropriate scope of practice for an OTA who practices in coordination with and under the supervision of an OT.

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.

The Board has reviewed the role delineations for occupational therapy and adopted regulations that specify the extent of responsibilities within the education and experience of the two levels of licensees. While the OTA can be an active participant in patient care from the initial assessment through discharge decisions and planning, the OT is ultimately responsible and accountable for patient care and outcomes under clinical supervision. The role of an OTA is to perform those tasks assigned, document in the patient record, consult with the OT on patient responses and functionality and provide for resources necessary upon discharge. The OTA renders services under the supervision of an OT that do not require the clinical decision or specific knowledge, skills and judgment of a licensed OT and do not include the discretionary aspects of the initial assessment, evaluation or development of a treatment plan for a patient. By clearly specifying the scope of practice for an OTA and the requirements of the OT for supervision, co-signing patient records and re-evaluating patients, there is some assurance that the health and safety of citizens receiving occupational therapy services are protected.

Substance

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

In addition to those listed below, sections of the regulation that are applicable to occupational therapy assistants as well as occupational therapists have been amended accordingly.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10	n/a	Sets out definitions for words and terms used in the regulation	Adds a subsection A to reference words and terms already defined in the Code and adds OTA to definitions, where appropriate.
26	n/a	Sets fees for licensure and renewal	Cost for the initial license is \$70; biennial renewal is \$70. Other fees are set proportionally. <i>Fees for OTA are generally set at one/half the amount for an OT, which is consistent with other professions licensed under Medicine in which there is a subordinate license (Radiologic technologist and radiologic technologist, limited)</i>
45	n/a	Provides for practice by a graduate awaiting results of the licensure examination	Subsection B is added to specify that OTA-applicants can practice for six months or until they have received the results of the examination, whichever comes first. <i>The regulatory provision is identical to the statutory.</i>
50	n/a	Sets out the requirements for an examination to qualify for licensure	Subsection B is added to specify that the NBCOT certification examination is required for initial licensure. <i>Currently, there is title protection in the Code which restricts the use of OTA or Occupational Therapist Assistant to someone who holds the credential established in regulation. Section 61 of this chapter provides that the NBCOT certification is required for use of the protected titles. Therefore, anyone who is currently practicing as an OTA has passed the NBCOT certification examination and will qualify for licensure.</i>
61	n/a	Sets the credential required for a person to use the title of OTA	This section is repealed since certification is being replaced by licensure.
90	n/a	Sets out the general responsibilities of an OT	Adds subsection B to specify that an OTA renders services under the supervision of an OT that do not require the clinical decision or specific knowledge, skills and judgment of a licensed OT and do not include the discretionary aspects of the initial assessment, evaluation or development of a treatment plan for a patient. <i>The general duties and responsibilities set out in</i>

			<i>this section are similar to those proposed by the VOTA and found in regulations of neighboring states.</i>
100	n/a	Sets out the individual responsibilities of an OT	<p>Adds subsection D to specify the responsibilities of an OTA to include:</p> <ol style="list-style-type: none"> 1. Participation in the evaluation or assessment of a patient by gathering data, administering tests and reporting observations and client capacities to the occupational therapist; 2. Participation in intervention planning, implementation and review; 3. Implementation of interventions as determined and assigned by the occupational therapist; 4. Documentation of patient responses to interventions and consultation with the occupational therapist about patient functionality; 5. Assistance in the formulation of the discharge summary and follow-up plans; and 6. Implementation of outcome measurements and provision of needed patient discharge resources under the direction of the occupational therapist. <p><i>The Board derived the description of OTA responsibilities from a compilation of listings in other states' regulation and recommended from the VOTA. The OTA may be a participant in patient care from the initial assessment through discharge decisions and planning. The role of an OTA is to perform those tasks assigned, document in the patient record, consult with the OT on patient responses and functionality and provide for resources necessary upon discharge.</i></p>
110	n/a	Sets out the supervisory responsibilities of the OT for unlicensed occupational therapy personnel	<p>Subsection A now specifies the delegation by an OT to a licensed occupational therapy assistant. #1 provides that the OT is ultimately responsible and accountable for patient care and outcomes under his clinical supervision. <i>The OTA is responsible for safe performance of the tasks and responsibilities to which he is assigned, but the OT is accountable for the overall well-being of the patient and for the clinical outcome of treatment.</i></p> <p>#2 is amended to delete the reference to "unlicensed occupational therapy personnel" which was inclusive of OTA's and continues to include OTA's who are now "licensed" personnel. It currently provides that an occupational therapist shall not delegate the</p>

		<p>discretionary aspects of the initial assessment, evaluation or development of a treatment plan for a patient nor shall he delegate any task requiring a clinical decision or the knowledge, skills, and judgment of a licensed occupational therapist.</p> <p>#3 is also amended to reference OTA's, who were previously considered "unlicensed occupational therapy personnel." Delegation shall only be made if, in the judgment of the occupational therapist, the task or procedures do not require the exercise of professional judgment, can be properly and safely performed by an appropriately trained OTA, and the delegation does not jeopardize the health or safety of the patient.</p> <p>#4 provides that delegated tasks or procedures shall be communicated <i>to an occupational therapy assistant</i> on a patient-specific basis with clear, specific instructions for performance of activities, potential complications, and expected results.</p> <p>Subsection B specifies that the frequency, methods, and content of supervision are dependent on the complexity of patient needs, number and diversity of patients, demonstrated competency and experience of the assistant, and the type and requirements of the practice setting.</p> <p><i>The Advisory Board reviewed regulations in other states in which the various levels of supervision were prescribed depending on the experience and years in practice of the OTA. While those are factors to be considered, there are other factors of equal importance. Therefore, the regulations do not equate a level of supervision to years of experience but require the supervision to be based on consideration of all pertinent factors and allow for flexibility dependent on patient needs and practitioner abilities.</i></p> <p>The occupational therapist providing clinical supervision shall meet with the occupational therapy personnel to review and evaluate treatment and progress of the individual patients at least once every fifth <u>tenth</u> treatment session or 21 <u>30</u> calendar days, whichever occurs first. <u>For the purposes of this subsection, group treatment sessions shall be counted the same as individual treatment sessions.</u></p>
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n/a	111	n/a	<p>Section 111 specifies the requirements for supervision of unlicensed occupational therapy personnel.</p> <p>Subsection A states that unlicensed occupational therapy personnel may be supervised by an occupational therapist or an occupational therapy assistant.</p> <p>Subsection B specifies the tasks that unlicensed occupational therapy personnel may be utilized to perform to include:</p> <ol style="list-style-type: none"> 1. Non-client-related tasks, including but not limited to, clerical and maintenance activities and the preparation of the work area and equipment; and 2. Certain routine patient-related tasks that, in the opinion of and under the supervision of an occupational therapist, have no potential to

			<p>adversely impact the patient or the patient's treatment plan.</p> <p><i>Since both OT's and OTA's may supervise unlicensed occupational therapy personnel (aides or other such designations), this section is added to specify the supervisory role and the tasks that may be so delegated.</i></p>
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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.

There are no alternatives to the promulgation of regulations, which are required by Chapters 64 and 89 (HB383 and SB134) of the 2008 Acts of the Assembly.

The Virginia Occupational Therapy Association (VOTA) has been working on a legislative proposal for several years because the scope of practice of and delegation of duties to certified occupational therapy assistants (COTA's) have been expanding in recent years across the country. Attempts to further define and expand the scope of COTA practice by regulations promulgated by the Board of Medicine were thwarted by the absence of regulatory authority over the profession. Therefore, the VOTA sought legislation to recognize the profession of occupational therapy assistants by licensure, which enables the Board to delineate those aspects of practice that may be performed by a licensed OTA or COTA, versus those tasks that may be assigned to an unlicensed, unregulated aide in occupational therapy practices.

In 2001, the Board of Health Professions reported on its study of the appropriate level of regulation for certified occupational therapy assistants (Senate Document 7). At that time, it was reported that 45 states license, certify or register OTA's, but most states reported low numbers of disciplinary actions for occupational therapy practice in general. The study concluded that there was not enough risk of harm to the consumer to warrant licensure.

In 2004, the VOTA successfully introduced legislation to establish title protection for OTA's who hold an initial certification as an occupational therapy assistant from a credentialing organization approved by regulations of the Board. Therefore, the Board had already established that an OTA or a COTA must be certified by the National Board for Certification in Occupational Therapy in order to use the title. The 2008 legislation extends the regulation of OTA's from title protection to licensure.

Since the passage of the legislation, the VOTA has worked closely with staff of the Board and the Advisory Board on Occupational Therapy to develop regulations that set out the scope of practice for OTA's, the supervisory responsibilities of OT's, and establishes the distinctions between the professions. All parties are very supportive of the resulting regulations.

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.

The agency/board is seeking comments on the intended regulatory action to replace the emergency regulations with permanent regulations, 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 may send them to Elaine Yeatts at the Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or Elaine.yeatts@dhp.virginia.gov or by fax to (804) 527-4434 or by posting on the Regulatory Townhall at www.townhall.virginia.gov. 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 on the Notice of Intended Regulatory Action.

At the conclusion of the NOIRA comment, the Board will adopt proposed regulations to replace the emergency regulation. A public hearing and 60 days of comment will be held at that time.

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.

There is no potential impact on the institution of the family.