



Proposed Regulation 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	2/20/09

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*.

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

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, emergency regulations have been in effect since November 1, 2008.

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.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

Occupational therapy assistant (OTA) or certified occupational therapy assistant (COTA)

Occupational therapist (OT)

National Board for Certification in Occupational Therapy (NBCOT)

Virginia Occupational Therapy Association (VOTA)

Legal basis

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., the 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 explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

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 briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)

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 substance 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.

Issues

Please identify the issues associated with the proposed regulatory action, 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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

1) The primary advantage of this proposal to the public is more accountability for occupational therapist assistants by becoming a licensed profession. As such, their scope of practice is more defined and more inclusive, so their ability to provide services to populations of patients is enhanced. The availability of additional licensed practitioners has the potential to improve accessibility and the quality of occupational therapy services. There are no disadvantages.

2) There are no disadvantages of these provisions to the agency or the Commonwealth; licensure is required by law and already in effect under emergency regulations. More specificity about the scope of practice and supervision of OTA's allows Board staff to direct persons with questions about those issues to the regulations.

3) There are no other pertinent matters.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include 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 statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities particularly affected by the proposed regulation.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is 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 do so by mail, email or fax to Elaine Yeatts at 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. Written comments must include the name and address of the commenter. Comments may also be submitted on the Regulatory Townhall at: www.townhall.virginia.gov. In order to be considered comments must be received by the last date of the public comment period.

A public hearing will be held and notice of the public hearing may appear on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov) and the Commonwealth Calendar. Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.	a) As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation; b) The agency will incur some one-time costs (less than \$1,000) for mailings to the Public Participation Guidelines mailing lists and conducting a public hearing. Every effort will be made to incorporate those into anticipated mailings and meetings already scheduled; on-going expenditures will be offset by regulating occupational therapy assistants, including fees for applications and renewals.
Projected cost of the new regulations or changes to existing regulations on localities.	There are no costs on localities.
Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.	The individuals affected by the 2008 law requiring licensure are those persons who use the title of OTA or COTA and who are practicing as assistants to occupational therapists. Traditionally, health care institutions (nursing homes, hospitals, OT practices) are affected to the extent licensed practitioners are able to attract higher salaries;

	however, there was already title protection for OTA's that required them to obtain the same credential now required for licensure, so there may be additional financial benefit to licensed OTA's and no effect for their employers.
Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	There are currently 204 entities licensed as OTA's. Since OTA's work under the supervision of OT's within health care facilities, none of those entities would be considered small businesses.
All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	Currently, under emergency regulations, applicants for licensure pay an initial fee of \$70; the biennial renewal fee is \$70; the fee for late renewal is \$30 and the fee for reinstatement of a lapsed license is \$90. Renewal of license also requires 20 continuing competency hours biennially. At least ten of those hours must be Type 1, offered by a sponsor or organization recognized by the profession; the remaining hours may be Type 2, which are self-directed educational experiences. The Type 1 hours may include home study courses that are available on-line or in-service courses available at health care institutions for little or no cost. There were no changes in the fees or CE requirements in the proposed regulations.
Beneficial impact the regulation is designed to produce.	Compliance with requirements of law.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

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.

Regulatory flexibility analysis

Please 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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

There were no alternative methods considered; adoption of regulations was required by statute.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

There were no comments received during the public comment period following publication of the NOIRA. The VOTA has been in attendance at every meeting at which regulatory action was discussed and has been involved with the development of language throughout the process.

Family impact

Please assess the 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.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

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</i>

			<i>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 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	Adds subsection D to specify the responsibilities of an OTA to include: 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. <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>

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 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</i></p>
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			<p><i>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 tenth treatment session or 24 <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> <p><i>Current regulations are generally written for supervision of all types of unlicensed occupational therapy personnel. The need for frequent review and evaluation of treatment and patient progress is mitigated by the competency and accountability of an OTA. The amended requirement for OT review is standard practice, consistent with Medicare specifications.</i></p> <p>Subsection C is amended to specify that no more than three occupational therapy assistants can be counted among the six occupational therapy personnel who can be supervised at any one time. <i>This provision allows a facility to employ any number of OTA's who work part-time, but the OT would not supervise more than three OTA at any one time.</i></p> <p>Subsection D provides that the OTA must document in the patient record any aspects of the initial evaluation, treatment plan, discharge summary or other notes on patient care performed by the assistant, and the supervising occupational therapist shall review and countersign within 10 days of such information being recorded.</p> <p><i>The requirement for countersigning ensures oversight of services provided by the OTA within a reasonable period of time, allowing for intervention or redirection by the OT if planned interventions and treatment are not resulting in adequate patient progress.</i></p>
n/a	111	n/a	Section 111 specifies the requirements for supervision of unlicensed occupational therapy

		<p>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; and2. Certain routine patient-related tasks that, in the opinion of and under the supervision of an occupational therapist, have no potential to adversely impact the patient or the patient's treatment plan. <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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