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Fast-Track Regulation Agency Background Document

Agency name	Department of Behavioral Health and Developmental Services
Virginia Administrative Code (VAC) citation(s)	12 VAC35-115
Regulation title(s)	Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department of Behavioral Health and Developmental Services ("Human Rights Regulations")
Action title	Behavioral Treatment Plans
Date this document prepared	September 18, 2017 (updated 11/06/17)

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The Human Rights Regulations received extensive revisions to improve the ability of the Office of Human Rights to perform its Code mandated responsibilities and maximize resources in a manner that promotes the vision of recovery, self-determination, empowerment, and community integration for individuals receiving services. These revisions became effective on February 9, 2017.

During the rollout of the regulations, an inadvertent error was discovered in 12 VAC35-115-105(B) (Behavioral Treatment Plans) that could create a barrier to individuals receiving services. This subsection allows providers to use individualized restrictions such as restraint or time out in a behavioral treatment

plan to address challenging behaviors that present an immediate danger to the individual or others, but only after a licensed professional has conducted a detailed and systematic assessment of the behavior and the situations in which the behavior occurs.

The Human Rights Regulations defines “licensed professional” as ‘a licensed physician, licensed clinical psychologist, licensed professional counselor, licensed clinical social worker, licensed or certified substance abuse treatment practitioner, or licensed psychiatric nurse practitioner.’

This action will:

- Amend a definition:

"Independent review committee" means a committee appointed or accessed by a provider to review and approve the clinical efficacy of the provider's behavioral treatment plans and associated data collection procedures. An independent review committee shall be composed of professionals with training and experience in applied behavioral analysis and interventions who are not involved in the development of the plan or directly providing services to the individual.

- Amend language in subsections B and C of 12VAC35-115-105 to state:

B. Providers may use individualized restrictions such as restraint or time out in a behavioral treatment plan to address challenging behaviors that present an immediate danger to the individual or others, but only after a licensed professional or licensed behavior analyst has conducted a detailed and systematic assessment of the behavior and the situations in which the behavior occurs. Providers shall document in the individual's services record that the lack of success or probable success of less restrictive procedures attempted or considered, and the risks associated with not treating the behavior, are greater than any risks associated with the use of the proposed restrictions.

C. Providers shall develop any behavioral treatment plan according to their policies and procedures, which shall ensure that:

1. Behavioral treatment plans are initiated, developed, carried out, and monitored by professionals who are qualified by expertise, training, education, or credentials to do so;
2. Behavioral treatment plans include nonrestrictive procedures and environmental modifications that address the targeted behavior; and
3. Behavioral treatment plans involving the use of restraint or timeout are submitted to an independent review committee, prior to implementation, for review and approval of the technical adequacy of the plan and data collection procedures.

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.

DBHDS – Department of Behavioral Health and Developmental Services
 LBA – Licensed Behavior Analyst
 State Board – State Board of Behavioral Health and Developmental Services

Statement of final agency action

Please 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 correction to the Human Rights Regulations was approved at the October 4, 2017, meeting of the State Board as a fast track action.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

Sections 37.2-203 and 37.2-304 of the Code of Virginia authorize the Board to adopt regulations that may be necessary to carry out the provisions of Title 37.2 and other laws of the Commonwealth administered by the Commissioner and the Department.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

Licensed behavior analysts (LBAs) are one of the main professions providing behavioral services in Virginia. Currently, there is a six-month waiting list for behavioral plan development. Without the amendment to the language, it will be more difficult for individuals to have access to behavioral services.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

These amendments are noncontroversial. LBAs have been a licensed profession in Virginia since the 2012 General Assembly established the profession (2012 Acts of Assembly, Chapter 3) and since then, LBAs have been active in the DBHDS system.

Substance

Please 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.

These amendments will enhance protection of rights for individuals in the system by allowing the most appropriately trained professionals (subject matter experts) to develop and implement behavioral treatment plans. This amendment will increase the number of those professionals available to develop the plans.

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 there are no disadvantages to the public or the Commonwealth, please indicate.

There is no identified disadvantage to the public or the Commonwealth in making this change.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is 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.

This is not more restrictive than applicable federal standards.

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.

No locality is particularly affected by this action.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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.

This will facilitate more successful living options for individuals with providers in the community by providing access to additional subject matter experts to prepare behavioral treatment plans for individuals with complex behavioral needs.

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.

<p>Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures</p>	<p>There is no additional cost to implement and enforce the amendment.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There is no additional cost on localities as a result of these changes.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Individuals receiving or needing services and their families; providers licensed by DBHDS; LBAs; all professionals listed in the definition of “licensed professional” who conduct behavioral treatment plans.</p>
<p>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: 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.</p>	<p>There are approximately 502 providers utilizing over 800 behavioral treatment plans. There is a six-month waiting list for behavior plan development. Individuals consistently report that this is a service that they have difficulty in accessing due to the limited number of appropriate licensed professionals.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) 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.</p>	<p>There is no additional administrative cost for individuals, businesses or other entities.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>By individuals having these plans there will be less interruption of services or crisis events. This is better for the individuals, their families, and the community.</p>

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 is no other alternative to the regulatory action.

Public participation notice

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.

Periodic review and small business impact review report of findings

If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

This action is not the result of a periodic or small business impact review.

Family impact

Please assess the impact of this 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.

This amendment will be a positive impact on families because the family members with disabilities in need of these behavioral plans can receive them more promptly.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.

For changes to existing regulation(s), please use the following chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
12VAC35-115-30. Definitions.		"Independent review committee" means a committee appointed or accessed by a provider to review and approve the clinical efficacy of the provider's behavioral treatment plans and associated data collection procedures. An independent review committee shall be composed of professionals with training and experience in applied behavioral analyses who are not involved in the development of the plan or directly providing services to the individual.	<ul style="list-style-type: none"> This action will add and replace language to this definition: '... An independent review committee shall be composed of professionals with training and experience in <u>applied behavioral analysis and interventions</u>...' <p>The term "applied behavioral analysis" was confusing as it can be interpreted to mean a specific professional designation.</p>
12 VAC35-115-105. B. Behavioral Treatment Plans		"B. Providers may use individualized restrictions such as restraint or time out in a behavioral treatment plan to address challenging behaviors that present an immediate danger to the individual or others, but only after a licensed professional has conducted a detailed and systematic assessment of the behavior and the situations in which the behavior occurs. Providers shall document in the individual's services record that the lack of success or probable success of less restrictive procedures attempted or considered, and the risks associated with not treating the behavior, are greater than any risks associated with the use of the proposed restrictions."	<p>Subsection B.</p> <ul style="list-style-type: none"> Add: 'but only after a licensed professional <u>or licensed behavior analyst</u> has conducted a detailed and systematic assessment of the behavior.....' <p>This amendment allows the most appropriately trained professionals (subject matter experts) to develop and implement behavioral treatment plans, and will increase the number of those professionals available to develop the plans.</p>
12 VAC35-115-105. C. Behavioral Treatment Plans		Behavioral treatment plans are submitted to an independent review committee , prior to implementation, for review and approval of the technical adequacy of the plan and data collection procedures.	<p>Subsection C.3.</p> <ul style="list-style-type: none"> Insert: '3. Behavioral treatment plans <u>involving the use of restraint or timeout</u> are submitted to an independent review committee, prior to implementation, for review and approval of the technical adequacy of the plan and data collection procedures.'

			<p>This addition clarifies that <u>only</u> behavioral treatment plans involving the use of restraint or timeout are submitted to an independent review committee; all other behavioral treatment plans are not submitted to the committee.</p>
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