



Final Regulation Agency Background Document

Agency name	State Mental Health, Mental Retardation and Substance Abuse Services Board
Virginia Administrative Code (VAC) citation	12 VAC 35-105
Regulation title	Rules and Regulations for the Licensing of Providers of Mental Health, Mental Retardation, Substance Abuse, the Individual and Family Developmental Disabilities Waiver, and Residential Brain Injury Services
Action title	Amend the Regulations to include provisions for licensing providers of brain injury services
Date this document prepared	December 11, 2006

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

This action will amend the existing Rules and Regulations for the Licensing of Providers of Mental Health, Mental Retardation, Substance Abuse, the Individual and Family Developmental Disabilities Waiver, and Residential Brain Injury Services (12 VAC 35-105) to include provisions for licensing providers of brain injury services. The amendment adds a definition of "brain injury" and incorporates brain injury service providers into the definition of service "provider" that is subject to the licensing provisions. Several other definitions have been added or revised to encompass the providers of brain injury services. The description of providers that are issued licenses has also been expanded to include providers offering residential services to persons with brain injury under the Brain Injury Waiver, although presently there is no Brain Injury Waiver in Virginia. The amended regulation also includes requirements for provider staffing and supervision of brain injury services and adds requirements for the individualized services plan that address the specific needs individuals receiving brain injury 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.

On December 8, 2006 the State Mental Health, Mental Retardation and Substance Abuse Service Board adopted for final promulgation, the amendment to the Rules and Regulations for the Licensing of Providers of Mental Health, Mental Retardation, Substance Abuse Services, the Individual and Family Development Disabilities Waiver, and Residential Brain Injury Services to comply with Chapter 725 of the 2005 Virginia Acts of Assembly.

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 numbers, 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.

The State Mental Health, Mental Retardation and Substance Abuse Services Board (Board) has the statutory authority to adopt the proposed regulations under Va. Code § 37.2-203 and Chapter 725 of the 2005 Virginia Acts of Assembly. The authority is mandatory.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it 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.

This regulatory action will add provisions to the existing licensing regulations to enable the Department of Mental Health, Mental Retardation and Substance Abuse Services (Department) to license providers of residential services for individuals with brain injuries. Virginia does not currently have a Brain Injury Waiver.

In December 2005, the Board adopted emergency regulations to implement the provisions of the new legislation. Prior to that there was no designated licensing authority for residential services serving individuals with brain injuries and some applicants had been denied licensing as a result. This action will allow these services to continue to operate in Virginia. Before this specific licensing authority was implemented, some residential brain injury services were licensed as assisted living facilities by the Department of Social Services. This licensing authority has been or will be transferred to the Department.

The agency developed the regulations in collaboration with the Department of Rehabilitative Services and representatives of various stakeholder groups. The regulations are intended to establish a framework for licensing providers of brain injury services to ensure appropriate and consistent oversight, support, and resources to provide an acceptable standard of care for persons who receive services. Prior to this, there has been no single authority responsible for oversight of this residential service. Therefore, this

regulatory action is essential to protect the welfare of residents of Virginia with brain injuries and to ensure fair and consistent monitoring of providers of this service.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

Existing definitions have been modified and new definitions have been added to identify providers of brain injury services to be subject provisions for licensing. New definitions include "qualified brain injury professional (QBIP)" and "qualified paraprofessional in brain injury (QPPBI)" to identify the specific qualifications necessary for staff positions to provide services to persons with a diagnosis of brain injury. The provider staffing plan requirements are changed to require that brain injury services be supervised by a QBIP and direct care performed by a QPPBI. There are new requirements for assessment of services plans that are applicable to persons with a diagnosis of brain injury.

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.*

1. The development of brain injury services was limited in Virginia as no agency had previously been given licensing authority. This will increase the availability of these services in the Commonwealth. Since the emergency regulations were promulgated additional brain injury services have become licensed.
2. The advantage of this regulatory action to the Commonwealth is that it provides for licensing of brain injury residential services using the same regulations as those used for mental health, mental retardation, and substance abuse services, which simplifies and standardizes the regulatory process for services that are more intensive. These regulations are more demanding than Assisted Living Facility regulations that some of these facilities were previously licensed under.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

There have been no changes to the text of the regulation since the publication at the proposed stage.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Committer	Comment	Agency response
<p>Jane Peay, Central Virginia Community Services Board</p>	<p>The definition of “brain injury” does not include brain injury sustained as a result of birth trauma.</p> <p>The regulations should include provisions for need screening and in-depth assessment of the nature and severity of brain injury. Need detailed description of injury and course of recovery.</p>	<p>The definition in the regulations is exactly the same as the statutory definition (Chapter 725 of the 2005 Virginia Acts of Assembly). The statute provides a definition for acquired brain injury, which does not encompass brain injury from birth trauma.</p> <p>The regulations require that the brain injury service provider contract or employ a neuropsychologist or licensed clinical psychologist to provide neurobehavioral services. These individuals will assist with initial assessments, development of service plans, staff training, crises, and service design.</p> <p>No changes have been made in response to these comments.</p>
<p>Virginia Office for Protection and Advocacy</p>	<p>The agency should carefully consider the use of behavior management techniques and strategies. Restraints may be counter-indicated. Providers should be encouraged not to rely on seclusion and restraints.</p> <p>Increase qualifications required regarding staffing to include experience with brain injury.</p>	<p>Use of the least restrictive behavioral interventions are now required in the regulations. Residential services for individuals with brain injury will not use seclusion.</p> <p>The definition of “qualified brain injury professional (QBIP)” is written to require that the clinician working with individuals with brain injury be trained and have experience in brain injury. Direct care staff are required to complete an approved training curriculum on brain injury within six months of employment. This provision was crafted with some flexibility because it was thought that it would be difficult to find direct care employees with brain injury experience.</p>

		No changes have been made in response to these comments.
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All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
20		This section provides definitions of terms that are relevant to the current regulations. Terms that are specifically applicable to brain injury services and providers are not used in the current regulations and not defined in this section.	<p>Changes have been made to the definitions of “provider;” “community intermediate care facility/mental retardation;” “day support;” “instrumental activities of daily living (IADL);” “neglect;” “provider;” “residential service;” “residential treatment service;” and “service.” Each definition has been expanded to encompass brain injury services or providers, as appropriate. The definition of “provider” is expanded to include providers of services to persons who receive services under the Brain Injury Waiver or residential services for persons with brain injury. This will require brain injury service providers to be subject to licensing provisions under these regulations.</p> <p>Definitions are added for “activities of daily living;” “brain injury;” “neurobehavioral services;” “qualified brain injury professional (QBIP)” and “qualified paraprofessional in brain injury (QPPBI)” These terms are used in new provisions for brain injury services. The definitions are intended to clarify and facilitate the implementation of the new regulatory requirements.</p>
30		The current provision identifies the types of providers that are subject to licensing requirements under the regulations. These include providers of services to persons with mental illness, mental	The provision has been expanded to include persons with brain injury served under the Brain Injury Waiver or in a residential service.

		retardation, substance abuse related problems, or persons with related conditions served under the IFDDS Waiver.	
590		The current section describes staffing plan requirements for providers.	Staffing plan requirements are added to apply to providers of brain injury services. The regulations require services to be supervised by a QBIP and direct care performed by a QPPBI. The credentials for both of these staff positions are defined in Section 20 of the regulations.
660		The current section provides requirements for individualized services plans.	A new provision has been inserted to require individualized services plans for brain injury services to be reassessed and revised more frequently than annually, consistent with the individual's course of recovery.

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.

These regulations for the most part will apply only to small businesses and have been used to regulate small businesses providing mental health, mental retardation, and substance abuse services for several years. Most of the regulations apply to health and safety. The regulations are largely generic and compliance is based on the provider's own policies with some exemptions for smaller services. This design minimizes any adverse impact on small businesses.

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.

This regulatory action will implement requirements for licensing providers of services for persons with brain injury. The licensing standards will provide a means for regulatory oversight and accountability of service providers. This should have a positive impact on the stability the families of persons with brain injury by promoting the quality of service and an acceptable standard of care. The regulations should not have any significant impact on the authority or rights of parents, self-sufficiency or individual responsibility, marital commitment, or family income.