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Final Regulation Agency Background Document

Agency name	State Mental Health, Mental Retardation and Substance Abuse Board
Virginia Administrative Code (VAC) citation	12 VAC 35-210-10 et seq.
Regulation title	Regulations to Govern Temporary Leave from State Mental Health and State Mental Retardation Facilities
Action title	New regulation governing leave or temporary absences from state mental health and mental retardation facilities
Date this document prepared	April 4, 2007

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

The regulations govern the general process and establish requirements for granting temporary leave to individuals receiving services in state mental health and mental retardation facilities. The provisions require state facilities to include plans for temporary leave as part of individual treatment planning and give the state facility director final authority to grant this leave. The regulations define the types and duration of leave that may be authorized by the state facility director; establish planning and documentation requirements; and define a "responsible person" for individuals on leave status. The provisions also guide state facilities in managing situations when individuals become ill or injured during leave or fail to return to the state facility as scheduled.

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 April 3, 2007 the State Mental Health, Mental Retardation and Substance Abuse Services Board adopted the final *Regulations to Govern Temporary Leave from State Mental Health and Mental Retardation Facilities* 12 VAC 35-210-10 et seq. for final promulgation.

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 has the authority under Va. Code § 37.2-837.B to promulgate the *Regulations to Govern Temporary Leave from State Mental Health and Mental Retardation Facilities* and is required to do so if the Department of Mental Health, Mental Retardation and Substance Abuse Services (Department) uses temporary leave.

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.

The regulations meet statutory requirements to govern the process for state facilities to grant trial or home visits to persons who are admitted to those facilities. The Department believes that these regulations are essential to protect the health, safety, and welfare of individuals on temporary leave from state facilities. The regulations will promote successful home or community visits that support the treatment and training goals of individuals receiving services in state facilities; resolve inconsistencies in decision-making with regard to leave practices; and promote appropriate care for individuals who are on leave status. The regulations also reflect services system values of self-sufficiency, empowerment, and community integration for individuals receiving state facility services.

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.

The regulations identify the types of temporary leave that may be authorized for individuals receiving services in state facilities, including day passes for periods that do not extend overnight and family or trial visits that are granted for longer time periods. Time limits and rationales for granting each type of leave are defined. The regulations require state facilities to plan temporary leave episodes in collaboration with the individual, his family, and others, including the appropriate community services board or behavior health authority (hereinafter referred to as a CSB). State facilities also must document the specific authorization and justification for temporary leave episodes and ensure that the leave is consistent with the individual's individualized service plan. State facilities may grant extensions to time limits for episodes of leave under certain limited conditions. In addition, the regulations identify who may qualify as

a “responsible person” to provide oversight or care to an individual during temporary leave from state facilities.

The regulations also contain provisions for addressing emergencies or unexpected events that may occur when an individual is on leave from a state facility, including illness, injury, or death, or when an individual fails to return to the facility on schedule.

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.*

The regulations should be advantageous to the public because they establish process requirements for individuals, family members, CSBs, and facility staff to work together to plan leave episodes that are consistent with the individual’s needs and preferences and are reflected in his individualized services plan. The regulations also require facilities to implement standard processes for intervening and assisting individuals and their families or responsible persons to resolve problems that may occur during leave. As such, the regulations should not be burdensome to the public.

The regulations will promote agency accountability by requiring all leave to be appropriately authorized and documented. Provisions will standardize leave practices and provide means to enhance therapeutic options available to individuals receiving services in state facilities by granting temporary leave.

These regulations should not have any impact on businesses. There are no known disadvantages to this regulatory action.

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.

Section number	Requirement at proposed stage	What has changed	Rationale for change
10	States the legal authority and purpose of the regulations.	The following language was inserted “...to facilitate community integration...” and terms were revised in the purpose statement.	These revisions have been made to clarify, reflect and emphasize the values of the service delivery system and clarify terms.

Section number	Requirement at proposed stage	What has changed	Rationale for change
20	The regulations included definitions of “case management community services board,” “services plan” and “legally authorized representative.”	The definitions and terms have been clarified, revised and reorganized in Section 20. “Legally authorized representative has been replaced with “authorized representative” or “AR.” “Case management community services board has been replaced with “community services board.” “Services plan” has been deleted and replaced with “Individualized services plan or ISP”, “Services record” is deleted. (These terms have been changed consistently throughout the regulations)	These changes have been made for consistency with the Code of Virginia, to reflect the recent recodification of Title 37.1 to Title 37.2, and for consistency with other agency regulations.
30.A.	The provision required development of “policies.”	The provision was revised to require “operating policies and procedures.”	The change was made to clarify the requirement.
30.C	The provision granted the facility director or designee authority to extend the established time limits for family or trial visits at his discretion in advance of the visit.	* The provision (30.C) was eliminated and the remaining sections were re-numbered.	The change was made for clarity and consistency with other parts of the regulations. Sections 90 and 120 provide specific provisions for extending periods of leave and indicate that extensions may not be granted in advance of the leave.
30.D.1.a	This section identified persons who may be responsible for individuals placed in their care during temporary leave.	* The section was re-numbered 30.C.1.a and “a facility licensed by the Department” was added to the list of those who may provide placements and care for persons during leave.	This change was made to expand the provision to include trial visits that are arranged for individuals who may be preparing for discharge to a facility in the community.
80.E	This provision assigned responsibility for the payment of medical expenses that are incurred by an individual during a trial visit or family visit.	The provisions have been clarified and relocated to section 30.D.	The changes have been made to clarify the provision and to be consistent with Virginia Code § 37.2-837.B.
90.B.2 and 120.B.2	These provisions referenced requirements for granting time extensions in advance of a family or trial visit.	*The references were deleted.	The change was made to be consistent with other parts of the regulations (see 30.C).
120.F	This section provides for the return of individuals who are legally committed to the facility.	Language has been revised and reference to Virginia Code §37.2-834 has been inserted.	This change was made to clarify the provision and to be consistent with the relevant Code requirements.

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.

Commenter	Comment	Agency Response
<p>Leslie Katz, LCSW Director of Social Work, Northern Virginia Training Center</p>	<ul style="list-style-type: none"> ■ Expresses concern that the training center staff are required to contact the community services board or behavioral health authority (hereinafter referred to as CSB) every time a person goes on leave. Indicates that this requirement is burdensome because CSBs do not have case managers assigned to track persons who are in training centers. ■ Expresses concern that it would be “complicated” to enforce the provisions regarding the payment of medical expenses required in 12 VAC 35-210-80E. 	<ul style="list-style-type: none"> ■ By statute, CSBs are the single point of entry into publicly funded mental health, mental retardation and substance abuse services, including state facilities. CSBs are responsible for case management and discharge planning services in coordination with state facilities. The regulations provide that CSBs collaborate with state facilities in planning leave, arranging medical services, and responding to emergencies when it becomes necessary for individuals who are on leave. Therefore, it is appropriate for state facilities to provide a simple notification to the CSB responsible for the individual’s care when he is released on temporary leave from a state facility. No change has been made in response to this comment. ■ This provision has been revised to be more consistent with the requirements in Virginia Code §37.2-837.B, which state that state facilities are not responsible for any expenses incurred by a person who is on temporary leave from the facility. In order to clarify and facilitate compliance, the provision has been relocated to 12 VAC 35-210-30 C and the language has been simplified.
<p>Rebecca Ward, Assistant Program Director, REACH</p>	<p>Recommends that the provisions be revised to ensure that individuals are consulted and have input into all planning for home and family visits e.g. 12 VAC 35-210-50.</p>	<p>A statement has been inserted in 12 VAC 35-210-50 to require the treatment team to consult with the individual and consider his preferences when arranging trial visits.</p>
<p>L. William Yolton</p>	<p>Recommends that terms used in this regulation be revised to be consistent with the Virginia Code and other agency regulations. The term “legally authorized representative” should be replaced with “authorized representative” and “ case management community services board” should be replaced with “community services board or behavioral health authority.”</p>	<p>Changes have been made throughout the regulations to reflect the recent recodification of Title 37.1 to Title 37.2 and recent amendments to other Department regulations.</p>

Commenter	Comment	Agency Response
<p>Jennifer G. Fidura, Virginia Network of Private Providers also representing (i) Virginia Association of Community Services Boards MR Council; and (iii) State MR facility directors.</p>	<ul style="list-style-type: none"> ■ Recommends that all Code references be updated to be consistent with current Virginia Code. ■ Recommends that terms “legally authorized representative” and “case management community services board” be revised to be consistent with current Code and other agency regulations. ■ Recommends that provisions be included to allow an individual to be placed in care of “facilities licensed by the department” when they are granted a day pass, family visit, or trial visit (12 VAC 35-210-30). ■ Recommends that specific provisions be inserted for trial visits that are intended to help prepare individuals for discharge and placements funded by the MR Home and Community Based Services (HCBS) Waiver. 	<ul style="list-style-type: none"> ■ Changes have been made (see response to above comment). ■ See above ■ Changes have been made in 12 VAC 35-210-30.1.a. in response to comment. ■ No change was made. The regulations include requirements for service planning, documentation, and supervision for trial visits that would reasonably apply to persons who receive placements under the HCBS. The Department will be able to provide operational guidance to prepare for placements under the HCBS.
<p>Heidi Lawyer, Director and Lisbet Ward, Chair; Virginia Board for People with Disabilities</p>	<ul style="list-style-type: none"> ■ Expresses concern that 12 VAC 210-30 allows the facility director to extend time limits for family visits without limits on the length of the extension or requirements for documenting the consistency of the extension with the individual’s service plan. ■ Suggests adding language to ensure person centered planning is occurring and to ensure that facilities obtain responsible party and emergency contact information. ■ Recommends inserting a timeframe in which notification to the state medical examiner is required for persons who die while on leave. 	<ul style="list-style-type: none"> ■ The provision that allowed the facility director sole discretion to extend time limits in advance of the leave has been eliminated. The regulations provide in 12 VAC 35-210-120.B that a facility director may grant a 72 hour extension to temporary leave in very limited circumstances. ■ Language has been inserted in 12 VAC 35-210-50 to require a treatment team member to discuss preferences and options with the individual when using trial visits in conjunction with discharge planning. ■ No change was made. In 12 VAC 210-50.B and 12 VAC 35-210-60.B.1 the regulations require the facility to develop plans to address potential emergencies or unexpected events, in collaboration with the individual, his family, or other appropriate persons, prior to granting leave to an individual. Specific provisions for emergency contacts are not needed. ■ No change was made. It is not necessary to prescribe a timeframe for notification in these regulations. The regulations require that state facilities file the appropriate documentation of death in accordance with Department policies and procedures.

Commenter	Comment	Agency Response
<p>Heidi Lawyer, Director and Lisbet Ward, Chair; Virginia Board for People with Disabilities <i>(continued)</i></p>	<ul style="list-style-type: none"> ■ Believes that the facility director should be required to classify an individual as “missing” rather than extending the visit for 24 hours when he is unable to contact a responsible person for a person on leave (12 VAC 35-210-90). ■ Suggests that consideration be given to adding provisions to address situations when individuals with mental retardation do not wish to return to state training centers. 	<ul style="list-style-type: none"> ■ No change has been made in response to this comment. The provision allows the facility director the flexibility to extend the visit for <u>up to 24 hours</u>, if in his judgment, the extension is justified. This means that the facility director has the discretion to temporarily delay initiating a widespread search for an individual on leave when he does not believe it is timely or appropriate. (Missing person search procedures involve all levels of staff and notification to local authorities). The facility is required to continue to make efforts to contact the responsible person during the period of any extension. The Department believes that this provision is reasonable and affords flexibility to consumers of services and persons who are responsible for them in the event that they are delayed for reasons beyond their control. ■ No change has been made. The regulations afford flexibility to the facility to initiate the discharge process for individuals with mental retardation, in conjunction with the CSB and the responsible persons, if he does want to return to the facility after being placed on temporary leave.
<p>Sherry Confer, Director; Virginia Office for Protection and Advocacy</p>	<ul style="list-style-type: none"> ■ Recommends using the terms: “recovery,” “community integration,” “consumer direction”, and “empowerment” throughout the regulations to reflect the values of the service delivery system. ■ The terms “parent, legal guardian and LAR” should be used consistently throughout the regulations. ■ Suggests that when the regulations require that facilities have policies, they should also be required to have operational procedures to implement the policies. ■ Recommends inserting a timeframe for length of time extension for family visits and trial visits (12VAC35-210-30.C.1); 	<ul style="list-style-type: none"> ■ The regulations are intended to reflect these values by promoting successful home and community leave in conjunction with person centered planning. Language has been inserted in 12 VAC 35-210-10, 12 VAC 35-210-30 B and 12 VAC 35-210-30 C to promote these values. ■ LAR (“legally authorized representative”) has been replaced with the term “authorized representative” or “AR”. The terminology has been revised to be consistent throughout the regulations. ■ The requirements in 12 VAC 35 –210-30 have been revised to state that “...facilities shall develop written <u>operating policies and procedures</u> for implementing temporary leave. ■ 12 VAC 35-210-30.C has been eliminated. Specific requirements for extensions of time for family and trial visits are provided in 12 VAC 35-90.B and 12 VAC 35-120.B.

Commenter	Comment	Agency Response
<p>Sherry Confer, Director; Virginia Office for Protection and Advocacy (continued)</p>	<ul style="list-style-type: none"> ■ Recommends specifying the individual’s preferences for residential setting when trial visits are used in conjunction with discharge planning (12VAC35-210-50A.1) and requiring facilities to follow discharge planning protocols and best practices rather than simply discharging an individual (12VAC35-210-80.D and 12VAC35-210-120.D). 	<ul style="list-style-type: none"> ■ Provisions have been inserted in 12 VAC 210-50.A to require consideration of an individual’s preference for residential setting when planning trial visits for discharge planning. ■ The provisions in 12 VAC 35-210-80.D and 12 VAC 35-210-120.D require the facilities to discharge individuals in collaboration with the appropriate CSB when the individual no longer meets admission criteria. Virginia Code §37.2-505 and §37.2-837 requires CSBs in collaboration with state facilities to prepare discharge plans for all individuals prior to discharge. The Code prescribes the specific aspects of the discharge plan to address the needs and preferences of the individual upon discharge. Therefore, it is not necessary to add provisions to these regulations regarding discharge planning or protocols.

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.

These are new regulations to comply with § 37.2-837.B of the Virginia Code. The regulations require each state facility to develop specific written policies for authorizing and implementing three types of leave for individuals receiving services in the facilities: day passes, trial visits, and family visits. The regulations require facilities to plan for trial or family visits as part of the individual’s treatment planning; to involve the individual, his family or legally representative when appropriate, and the case management CSB in this planning; and to document the rationale for leave episodes in the individualized services plan. The regulations define who may be a “responsible person” for an individual who is granted leave from a state facility and include provisions for managing situations when the individual becomes ill or injured during a family or trial visit or fails to return to the facility as scheduled.

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 govern the process for planning and granting temporary home and community visits for individuals in state mental health or mental retardation facilities. The regulations apply to individuals who are admitted to state facilities, their families or authorized representatives, and the staff of state facilities and CSBs. The regulations do not impose any compliance or reporting requirements or standards 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 action to promulgate regulations should have a positive impact on the stability of families with members who are receiving services in state facilities. The regulations are intended to ensure that leave practices are consistent, promote successful home or community visits for individuals and their families, and respond to the individual's preferences and treatment goals. In this way, the regulations should help promote the individual's self-determination, empowerment, and community integration. The regulations are not expected to have any impact on disposable family income.