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Fast-Track Regulation Agency Background Document

Agency name	Board of Nursing, Department of Health Professions
Virginia Administrative Code (VAC) Chapter citation(s)	18VAC90-26
VAC Chapter title(s)	Regulations for Nurse Aide Education Programs
Action title	Amendments to regulations governing Nurse Aide Education Programs
Date this document prepared	March 22, 2022

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

In response to a petition for rulemaking and following a review of the regulations governing Nurse Aide Education Programs, the Board is issuing a Fast-Track Regulatory Action to do the following: 1) amend 18VAC90-26-10, 90-26-20, and 90-26-50 to allow nurse aide training to occur outside of a nursing home facility focusing on geriatric care; 2) amend 18VAC90-26-30 to update requirements of the program coordinator, primary instructor, and other instructional personnel to clarify roles and duties of each, to remove requirements for geriatric care experience for RN and LPN instructors, and to allow instructional personnel from other health professions to supplement the primary instructor; 3) amend 18VAC90-26-50 to require program documentation be maintained for 2 years following each site visit; and 4) amend 18VAC90-26-70 to update procedures for program closures.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

N/A

Statement of Final Agency Action

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 March 22, 2022, the Board met and adopted the fast-track action included in this submission.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

The changes were specifically prompted by a petition for rulemaking which requested that the Board amend regulations which currently limit the locations nurse aide program training can occur and who could provide training, as well as by a review by Board staff of the regulations to search for potential changes that could improve training, the accessibility of training, and the ability of nurse aide education programs to hire qualified instructional personnel. Board staff also reviewed the regulations for lack of clarity, particularly among roles of instructional personnel and maintenance of program records.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

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 Nursing the authority to promulgate regulations to administer the regulatory system states, in pertinent part:

§ 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 (§ 2.2-4000 et seq.) that are reasonable and necessary to administer effectively the regulatory system, which shall include provisions for the satisfaction of board-required continuing education for individuals registered, certified, licensed, or issued a multistate licensure privilege by a health regulatory board through delivery of health care services, without compensation, to low-income individuals receiving health services through a local health department or a free clinic organized in whole or primarily for the delivery of those health services. 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.).

The specific authority for the Board to regulate Nurse Aide Education Programs is found in § 54.1-3028.1, which states:

§ 54.1-3028.1. Nurse Aide Education Programs.

Nurse aide education programs designed to prepare nurse aides for certification shall be a minimum of 120 clock hours in length. The curriculum of such programs shall include communication and interpersonal skills, safety and emergency procedures, personal care skills, observational and reporting techniques, appropriate clinical care of the aged and disabled, skills for basic restorative services, clients' rights, legal aspects of practice as a certified nurse aide, occupational health and safety measures, culturally sensitive care, and appropriate management of conflict. The Board shall promulgate regulations to implement the provisions of this section.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The purpose of this regulatory action is to ensure nurse aide programs are able to continue providing education to students in a timely manner and in a manner which protects the public by ensuring students receive appropriate clinical training by qualified instructors. Nurse aide education programs have struggled to place nurse aide students in nursing home facilities given the restrictions that have been in place for several years due to the COVID-19 pandemic. In addition, programs have had difficulty in obtaining and retaining qualified personnel to teach in nurse aide education programs. The regulatory action is to allow other qualified health professionals to serve as instructors to nurse aide students as well as provide increased latitude that accounts for the newer nursing workforce. The amendments to definitions provide clarity for all regulations in 18VAC90-26.

Substance

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.

The Board is amending section 10 to provide definitions of “clinical setting” and “direct client care,” and to specify that the acronym NNAAP stands for “National Nurse Aide Assessment Program.” The Board is amending section 20 to clarify that a nurse aide education program must implement a Board-approved curriculum to maintain approval and to ensure that students employed by or with an offer of employment by a facility are not charged a fee by the education program. The Board is amending section 30 to clarify and further define roles and decrease requirements for the Program Coordinator, Primary Instructor, and other instructional personnel. The Board is amending section 50 to include a requirement that educational programs retain documentation listed in 18VAC90-26-50(A) for two years following a site or survey visit; the Board is also amending 18VAC90-26-50(B) to eliminate the restriction on the number of hours of clinical instruction that may be provided outside of a geriatric care facility. The Board is amending section 70 to require that programs which have not held classes for a period of one year notify the Board.

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

- 1) The advantages to the public include nurse aide programs that can produce more and better trained nurse aides, retain more qualified instructors, and provide nurse aides with clinical training that matches the reality of nurse aide practice in the Commonwealth.
- 2) There are no advantages or disadvantages to the agency or the Commonwealth.
- 3) The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. The Board is authorized under § 54.1-2400 to “To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 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.” There is no restraint on competition as a result of promulgating this regulation.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.

The regulations changed by this action are currently more restrictive than federal requirements, which are found in 42 C.F.R. §483.152. The amendments in this action will make the regulations consistent with federal requirements, in that they will no longer be more restrictive than federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected – none.

Localities Particularly Affected – none.

Other Entities Particularly Affected – none.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	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 or entities for necessary functions of regulation. There are no on-going expenditures associated with this change.
<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	No impact.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	No impact.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	None.
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Benefits the regulatory change is designed to produce.	None.
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Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Businesses and individuals affected are the nurse aide education programs and their students. Nurse aide education programs would be able to attract and retain more qualified instructors and would be able to educate and graduate more students. Students would be able to obtain the required clinical practice for their programs more easily without the restriction that clinical instruction occur in geriatric care facilities.
Agency's best estimate of the number of such entities that will be affected. 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.	There are currently 236 nurse aide programs in Virginia. The Board does not track or regulate students, so an estimate of the number of students that would be affected is not available. There were 3,767 students testing for certification as a nurse aide in 2021, but that number is not comprehensive as many students do not test because they are able to work without certification.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	There would be no projected costs for businesses or individuals. These changes would likely increase profits for nurse aide education programs.
Benefits the regulatory change is designed to produce.	The change would allow programs to attract and retain qualified instructors and would allow programs to efficiently place nurse aide students in required clinical training. Additionally it will allow nurse aide students to obtain clinical training more reflective of current nurse aide employment situations in the Commonwealth.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

In order for the Board to lessen the regulatory burden on nurse aide education programs and make education more accessible to students, the Board must amend its regulations. There is no

alternative to a regulatory action. This action is partially in response to a petition for rulemaking, which generated 9 public comments that were generally in favor of the requested changes.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

There is no alternative to amendment of nurse aide education requirements under the Board of Nursing.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

As required by § 2.2-4011 of the Code of Virginia, 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.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Board of Nursing is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail or email to Erin Barrett at erin.barrett@dhp.virginia.gov or at 9960 Mayland Drive, Henrico, VA 23233 or by fax at (804) 527-4434. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and

on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
18VAC90-26-10		Provides definitions used in Chapter 26.	<p>The changes include three new definitions.</p> <p>Clinical setting, a term used in Chapter 26, is defined as “a location in which clinical practice occurs in a setting comparable in which the practice of a nurse aide may occur.” This change is intended to clarify the use of this term within the Chapter.</p> <p>Direct client care, a term used in Chapter 26, is defined as “nurse aide care provided to patients or clients in a clinical setting supervised by a qualified instructor.” This change is intended to clarify the use of this term within the Chapter.</p> <p>“NNAAP,” an acronym that appears in Chapter 26, is defined as the “National Nurse Aide Assessment Program.” This change is intended to clarify the use of this term within the Chapter.</p>
18VAC90-26-20		Provides requirements for establishing a nurse aide education program and maintaining compliance with state and federal regulations.	The phrase “Curriculum content as approved by the board and as set forth in subsection A of 18VAC90-26-40” is amended to read “Implementation of the board approved curriculum as set forth in

			<p>18VAC90-26-40(A).” This does not change any requirements. The change is merely for clarity of regulations.</p> <p>18VAC90-26-20(B)(1)(e) is amended to change the undefined term “nursing facility” to the newly defined term “clinical setting. Additionally, this provision is amended to separate the final sentence in the current provision from the requirement to comply with federal regulations in that subsection. The requirement to obtain Board approval for use of a clinical setting located 50 miles or more from the school is not a federal requirement. Because this requirement was combined with federal requirements in (e), the Board was unable to waive this regulation during the COVID-19 health emergency. To avoid this potential problem in the future and enable the Board to waive the requirement for Board approval to use a clinical setting more than 50 miles from the school if emergency circumstances require it, the Board has separated that requirement into a separate provision. The term “nursing facility” was replaced with “clinical setting,” consistent with the previous change.</p> <p>(B)(2) is amended to include the description of fees disallowed by federal regulations. This phrase is identical to language in 42 C.F.R. § 483.152(c).</p> <p>Citations to other regulations within Chapter 26 are amended for citation consistency within the regulations.</p>
<p>18VAC90-26-30</p>		<p>Lists requirement for instructional personnel at nurse aide programs.</p>	<p>These amendments change the requirements for program coordinators, primary instructors, and other instructional personnel in a way to make the requirements less restrictive.</p> <p>Currently, the program coordinator and primary instructor must hold a license as a registered nurse. Under the amendments, only the program coordinator or primary instructor is required to hold a license as a</p>

			<p>registered nurse. The amendments clarify the responsibilities of the program coordinator and remove redundant language in the subsection allowing the director of nursing services in a facility-based program.</p> <p>In each description of roles within a nurse aide education program, except where required by federal law, the requirement for direct client care in geriatric services to instruct nurse aide students is removed. Additionally, the requirements for other instructional personnel are amended to permit health professionals other than registered nurses and licensed practical nurses to become instructors.</p> <p>Subsection (F) is deleted because it is redundant of language added in the requirements for other instructional personnel.</p>
<p>18VAC90-26-50</p>		<p>This chapter includes various other program requirements.</p>	<p>The amendment in this section requires nurse aide education programs to maintain documentation for 2 years following a site or survey visit. There is no change to the substance of the records the programs are currently required to keep.</p> <p>Subsection (C) lists specific hour requirements of nurse aide education programs. The amendments delete the limitation on hours of clinical training outside of geriatric long-term care facilities, thereby removing the requirement that the majority of clinical training occur in geriatric long-term care facilities. Additionally, the word "skills" is replaced with "clinical" for consistent usage of the word "clinical" throughout the subsection.</p>
<p>18VAC90-26-70</p>		<p>Details requirements for the closure or interruption of a nurse aide education program.</p>	<p>The amendments require a program which has not held classes for one year to notify the Board of the program's inactivity. This change is necessary because the Board, under the current regulatory language, is required to place the program's approval on inactive status if a program is inactive for one year. However, there is currently no reporting requirement for the</p>

			<p>education programs. This leads the Board to discover program closures well after the program has been inactive for one year.</p> <p>A regulation citation is amended for consistency of citations within the regulations.</p>
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