Virginia Department of Planning and Budget

Economic Impact Analysis

12 VAC 35-105 Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services
Department of Behavioral Health and Developmental Services
Town Hall Action/Stage: 5565/9365
December 17, 2021

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). The analysis presented below represents DPB's best estimate of these economic impacts.[1]

Summary of the Proposed Amendments to Regulation

The State Board of Behavioral Health and Developmental Services (Board) proposes to align the licensing regulation with changes to Medicaid behavioral health regulations by: 1) removing provisions that would conflict with newly funded behavioral health services and 2) establishing new licensed services for those newly funded behavioral health services that cannot be nested under an existing department license. The proposed amendments were mandated by the 2020 Appropriation Act and implemented via an emergency regulation; the Board now seeks to make those changes permanent. The proposed changes are intended to ensure that the licensing regulation supports high quality community-based mental health services.

Background

Item 313.YYY of Chapter 1289, 2020 Virginia Acts of Assembly, included the following requirements for the Department of Medical Assistance Services (DMAS):[2]

[1] Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] See https://budget.lis.virginia.gov/item/2020/1/HB30/Chapter/1/313/

- Effective on or after January 1, 2021, DMAS shall implement programmatic changes and reimbursement rates for the following services: assertive community treatment, multi-systemic therapy and family functional therapy.
- Effective on or after July 1, 2021, DMAS shall implement programmatic changes and reimbursement rates for the following services: intensive outpatient services, partial hospitalization programs, mobile crisis intervention services, 23 hour temporary observation services, crisis stabilization services and residential crisis stabilization unit services.

In addition, item 318.B of Chapter 1289, 2020 Virginia Acts of Assembly, directs the Department of Behavioral Health and Developmental Services (DBHDS) to promulgate emergency regulations to: "ensure that licensing regulations support high quality community-based mental health services and align with the changes being made to the Medicaid behavioral health regulations for the services funded in this Act that support evidence-based, trauma-informed, prevention-focused and cost-effective services for members across the lifespan... The department shall seek input from [DMAS] and other stakeholders to align with the implementation plan for changes being made to the Medicaid behavioral health regulations."[3] Accordingly, the proposed changes were initially implemented via an emergency regulation that became effective February 2021.[4]

The most substantive amendments are summarized below:

1. The following definitions would be added to explain each type of service:
   i. Assertive community treatment service (ACT)
   ii. Mental health partial hospitalization service
   iii. Mental health intensive outpatient service (MH-IOP)
   iv. Mental health outpatient service
   v. Substance abuse partial hospitalization service
   vi. Substance abuse intensive outpatient service

[3] See https://budget.lis.virginia.gov/item/2020/1/HB30/Chapter/1/318/. This chapter is being amended concurrently via another action to align it with the American Society of Addiction Medicine Levels of Care Criteria. See: https://townhall.virginia.gov/L/ViewAction.cfm?actionid=5563.

[4] See https://townhall.virginia.gov/L/ViewStage.cfm?stageid=9017. The emergency regulation is currently scheduled to expire on August 19, 2022.

vii. Substance abuse outpatient service

2. Definitions for intensive community treatment (ICT) service, program of assertive community (PACT) service, outpatient service and partial hospitalization service would be removed.
3. In section 30, *Licensing*, ACT and MH-IOP would be added to the list of licenses issued by DBHDS. License titles for ICT and PACT would be removed.[5] Licenses corresponding to the three substance abuse definitions are addressed in a concurrent action (per footnote 3.)
4. Sections 1360-1410, which currently pertain to ICT and PACT would be revised to reflect the requirements for ACT instead. These requirements cover admission and discharge, treatment teams and staffing requirements, contacts, daily operation and progress notes, and service requirements. The proposed changes include:
    i. Adding personality disorder and brain injury to the list of sole diagnoses that render an individual ineligible for ACT services.
    ii. Requiring that a Vocational Specialist be a registered qualified mental health professional (QMHP) with demonstrated expertise in vocational services through experience or education.
    iii. Requiring that the ACT co-occurring disorder specialist be a licensed mental health professional (LMHP), registered QMHP, or Certified Substance Abuse Specialist with training or experience working with adults with co-occurring serious mental illness and substance use disorder.
    iv. Requiring that a peer recovery specialist must be a Certified Peer Recovery Specialist (CPRS) or certify as a CPRS within the first year of employment.
    v. Allowing a Psychiatric Nurse Practitioner practicing within the scope of practice of a Psychiatric Nurse Practitioner to fill the psychiatrist position on an ACT team.
    vi. Requiring that the ACT team leader be a LMHP or a registered Qualified Mental Health Professional-Adult if already employed as a team leader prior to July 1, 2020.
5. Minimum staff to individual ratios for ACT teams would be defined based on the size of the team and the team's caseload. The proposed maximum caseloads are 50 individuals for a

[5] Unlike occupational and professional licensing boards, DBHDS licenses apply to residential facilities that "offer services to individuals who have mental illness, a developmental disability, or substance abuse (substance use disorders) or have brain injury." A facility (provider) has multiple licenses depending on the services they provide.

small team, 74 individuals for a medium team, and 120 individuals for a large team. The corresponding staffing requirements would be at least one staff member per eight individuals for the small teams, and at least one staff member per nine individuals for the medium and large teams, in addition to a psychiatric care provider and a program assistant. The proposed amendments also include specific requirements for the number of generalist clinical staff and nurse staff based on team size.

6. The proposed amendments would require ACT teams to have responsibility for directly responding to psychiatric crises, including meeting the following criteria:
   i. The team must be available to individuals in crisis 24 hours per day, seven days per week, including in person when needed as determined by the team;
   ii. The team must be the first-line crisis evaluator and responder for individuals serviced by the team; and
   iii. The team must have access to the practical, individualized crisis plans developed to help them address crises for each individual receiving services.
7. The proposed amendments would add the following three additional services that providers must provide and document consistent with the individual's assessment and individual treatment plan:
   i. Assistance in developing and maintaining natural supports and social relationships;
   ii. Medication education, assistance, and support; and
   iii. Peer support services, such as coaching, mentoring, assistance with self-advocacy and self-direction, and modeling recovery practices.

Estimated Benefits and Costs

The proposed amendments are intended to benefit individuals receiving publicly funded behavioral health services by providing high quality, community-based services. By providing a continuum of community-based behavioral health services, DBHDS and DMAS aim to reduce the need for more costly inpatient hospitalization.[6] Individuals receiving these services may also benefit from avoiding inpatient hospitalization, which may be more disruptive to their lives and/or be more heavily stigmatized.

[6] The changes in this action are part of a broader redesign of the state's behavioral health services that is expected to create savings for the Medicaid program. See https://www.virginiaaba.org/wp-content/uploads/2021/03/MSR-2021-059-002-W-Attachment-Medicaid-Bulletin-V1.0-dtd-030121.pdf.

DBHDS reports that they would incur costs related to the promulgation of regulations, training for providers, and conducting additional inspections. Specifically, DBHDS would issue conditional licenses for six months and conduct an inspection to ensure regulatory compliance. DBHDS anticipates needing to conduct approximately 250 initial inspections after the first six month period. The outcome of those inspections would determine if an additional inspection is required later that year. Additional new initial inspections may be required if there are new providers as a result of this regulatory change. The agency would also need to provide technical assistance to providers, to include issuing corrective action plans and confirming implementation of the plans.

DBHDS-licensed providers of ICT or PACT who participate in the state's Medicaid program would have to transition their care model to ACT. These providers would likely face one-time costs for additional staff training on ACT and new ongoing costs associated with staffing requirements for the treatment teams, including the provision of 24-hour crisis services. Providers are likely to face challenges recruiting and retaining trained professionals. DBHDS reports that positions such as the psychiatrist, nursing staff, and licensed mental health professionals have long been difficult to recruit and retain due to a) overall nationwide workforce shortage, b) the intensive nature of the model and c) the significant disparity in salary that one with the aforementioned qualifications could secure in less intensive, more traditional settings. While inspections have not yet occurred, the Office of Licensing has had individual meetings with the vast majority of ACT providers in conjunction with DMAS to discuss transition plans and work through potential barriers.[7]

Businesses and Other Entities Affected

The proposed amendments affect community services boards (CSB) and private providers in the Commonwealth. Prior to the transition, DBHDS licensed approximately 12 ICT teams (six private providers and six CSBs) and 32 PACT teams (all CSBs). The Department's Office of Licensing licenses approximately 42 ACT Teams. Of those, 38 are operated by CSBs. One ICT team is still licensed and operated by a CSB.[8]

[7] Email to DPB from DBHDS, December 21, 2021.
[8] Email to DPB from DBHDS, December 22, 2021. The email also noted that DBHDS does not collect information on whether providers accept Medicaid and that some CSBs operate multiple ACT teams.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[9] An adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. As noted above, the proposed amendments would require providers to invest in training and likely expand their staff to meet the treatment team staffing requirements. Thus, an adverse impact is indicated.

Small Businesses[10] Affected:[11]

The proposed amendments appear to adversely affect small businesses; however, the number of affected entities that are small businesses is unknown.

Types and Estimated Number of Small Businesses Affected

The proposed amendments could affect the four private providers that have ACT licenses if they accept Medicaid; however, DBHDS does not have any data to indicate the number of affected entities that are small businesses.

Costs and Other Effects

Providers that participate in Medicaid and are licensed by DBHDS to provide mental health treatment services as described above would face additional costs relating to training and hiring staff. Thus, an adverse economic impact[12] on these providers is indicated.

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[9] Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[10] Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "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."

[11] If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[12] Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

Alternative Method that Minimizes Adverse Impact

There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

Localities[13] Affected[14]

Many CSBs (which are funded in part by local governments) provide behavioral health services, including PACT and ICT, and would be affected similarly to private providers. Most teams run by CSBs appear to have already transitioned to the ACT license and treatment model. Additional funds may be needed to support the staffing requirements in the proposed amendments; however, those costs may be covered by Medicaid reimbursements for the new licensed services. Thus, the total cost to localities as a result of the proposed amendments is unknown. DBHDS reports that no locality would be disproportionately affected. Consequently, an adverse economic impact[15] is indicated for local governments in general.

Projected Impact on Employment

Based on the treatment team staffing requirements in the proposed amendments, the proposed amendments would likely increase the demand for credentialed mental health professionals, allied health professionals, and nurses by CSBs and private providers. However, there are only 42 licensed ACT teams so far and positions such as the psychiatrist, nursing staff, and licensed mental health professionals have long been difficult to recruit and retain. Thus, although the proposed changes require more hiring, any practical impact on employment is likely to be small in magnitude.

Effects on the Use and Value of Private Property

The proposed requirements increase costs to private DBHDS licensed providers, but also allow them to continue receiving reimbursements from DMAS. Consequently, the value of these providers is unlikely to be affected. The proposed amendments do not affect real estate development costs.

[13] "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

[14] § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

[15] Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.