



townhall.virginia.gov

Periodic Review and Small Business Impact Review Report of Findings

Agency name	Department of Behavioral Health and Developmental Services
Virginia Administrative Code (VAC) Chapter citation(s)	12 VAC35-210
VAC Chapter title(s)	Regulations to Govern Temporary Leave from State Facilities
Date this document prepared	02/15/22

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**.

Acronyms and Definitions

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

DBHDS – Department of Behavioral Health and Developmental Services
dLCV - disAbility Law Center of Virginia

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 or 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.

Section 37.2- 203 of the Code of Virginia gives the State Board of Behavioral Health and Developmental Services the authority to adopt regulations that may be necessary to carry out the provisions of Title 37.2 of the Code and other laws of the Commonwealth administered by the DBHDS commissioner.

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

As long as the Code of Virginia requires the existence of state facilities as defined in Title 37.2 of the Code of Virginia, and allows for temporary leave from state facilities (§ 37.2-837), there is no alternative to this regulation.

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
Colleen Miller, Executive Director, disAbility Law Center of Virginia (dLCV)	<p>Section 12VAC35-210-50 (Trial visits) states that “[a]ll plans for trial visits shall be documented in the ISP and include consideration of . . . The individual’s essential support needs and supervision requirements” along with an individual’s stated preferences. dLCV has encountered a troubling trend in recent years of treatment teams failing to complete Uniform Assessment Instruments (UAI) and other empirical assessments to help guide the team in determining an appropriate placement type. dLCV’s experience is that the treatment team often recommends a higher level of care than the individual actually wants or needs. The regulations should clearly state that an individual shall be placed in the least restrictive setting possible, given the individual’s current, measured needs, and the individual’s preferences.</p>	<p>Thank you for your comment. The use of empirical assessments are an integral and important part of determining the needs of the individual upon discharge. Uniform Assessment Instruments (UAI) are utilized frequently for nursing home or other long-term care placements. Other standardized assessments are also used for determining an individual’s level of functioning and independent living skills. DBHDS supports the use of objective measures, where available and appropriate, for use in these assessments.</p> <p>Thank you for your comment. DBHDS will propose amending the regulation to ‘least restrictive setting most appropriate to meet the individual’s needs and desires.’</p>
	<p>In addition, this regulatory section does not address “virtual visits” or the extent to which such visits may be used in lieu of in-person visits.</p>	

	<p>During the COVID pandemic, many individuals were effectively barred from visiting potential placements due to disease precautions. Even before the pandemic, however, dLCV had seen many hospitals promote virtual visitation over in-person visitation, due to staffing limitations, proximity to the placement, and challenges with discharging the individual. The Commonwealth should make explicitly clear that virtual visits are not an adequate substitute for in-person visits, and that in-person visitation should be promoted whenever it is safe to do so, pursuant to the individual's wishes.</p> <p>Finally, § 12VAC35-210-90 (Failure to Return to Training Centers) assumes that every individual has an authorized representative (AR) who must consent to visitation on their behalf. Not all individuals with ID/DD have or need these supports, and may be their own decision makers. The regulation should be changed to reflect this.</p>	<p>DBHDS is in agreement that virtual trial visits are not substitutes for in person visits. During the pandemic, measures were taken to provide virtual visits to maintain discharge planning to accommodate the restrictions related to COVID infection management. Virtual interviews are occasionally held with potential providers to assure that individuals have access to as many potential living situations as possible but DBHDS agrees that in-person visitation is the preferable alternative.</p> <p>Thank you for your comment. DBHDS will propose amending the regulation to make this change.</p> <p>Thank you for your comment. The application of the term 'authorized representative' is based on a determination of lack of capacity to give informed consent per the requirements in Section 46 of the <i>Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department of Behavioral Health and Developmental Services</i> [12VAC35-115, "Human Rights Regulations."]. DBHDS will look for ways to clarify the use and reference to authorized representatives in the regulation.</p>
--	--	--

Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

This regulation is necessary to carry out the requirements of § 37.2-837 of the Code of Virginia, and meets the requirements of EO14 in that the regulation helps to protect the health, safety, and welfare of individuals needing state facility services as it clearly articulates the general process and requirements related to temporary leave from state facilities. It establishes the conditions for granting leave and includes provisions to ensure accountability and appropriate care for persons who are on leave status.

Decision

Explain the basis for the promulgating agency's decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

There are amendments expected in an action to be brought for promulgation in 2022, including clarifications around the role of authorized representatives.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (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. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

-
- (1) The regulation is needed to carry out the requirements of § 37.2-837 of the Code of Virginia.
 - (2) One comment was received concerning the regulation.
 - (3) The regulation is straightforward and minimal while establishing requirements for leave from state facilities.
 - (4) The regulation does not overlap, duplicate, or conflict with federal or state law or regulation.
 - (5) It has been four years since the regulation was reviewed; technology, economic conditions, or other factors have not changed in the area affected by the regulation.

The agency's decision will have no economic impact on small businesses.
