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Proposed Regulation Agency Background Document

Agency name	Board of Counseling, Department of Health Professions
Virginia Administrative Code (VAC) citation(s)	18VAC115-20 18VAC115-30 18VAC115-50 18VAC115-60
Regulation title(s)	18 VAC 115-20 Regulations Governing the Practice of Professional Counseling 18 VAC 115-30 Regulations Governing the Certification of Substance Abuse Counselors 18 VAC 115-50 Regulations Governing the Practice of Marriage and Family Therapy 18 VAC 115-60 Regulations Governing the Licensure of Substance Abuse Professionals
Action title	Unprofessional conduct – conversion therapy
Date this document prepared	8/23/19

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please 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.

The Board proposes to specify in regulations that the standard of practice requiring persons licensed, certified or registered by the Board to "*Practice in a manner that is in the best interest of the public and does not endanger the public health, safety, or welfare*" precludes the provision

of conversion therapy and to define what conversion therapy is and is not. The goal is to align regulations of the Board with the stated policy and ethics for the profession of counseling.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

N/A

Mandate and Impetus

Please 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, board decision, etc.). 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."

During the 2018 General Assembly session, Delegate Hope introduced HB 363 which would prohibit a person licensed by a health regulatory board from engaging in sexual orientation change efforts with a person under 18 years of age. During discussion before a subcommittee of the House, the question arose as to why licensing boards had not addressed this issue in regulation. Subsequently, the President of the Board of Psychology made the recommendation to the Director of the Department of Health Professions to convene a workgroup to discuss the issue.

The workgroup met on October 5, 2018 and included representatives from the boards and professional associations of Counseling, Medicine, Nursing, Psychology, and Social Work. A substantial amount of testimony was heard from proponents and opponents of a prohibition on conversion therapy. While there was not a complete consensus that additional regulation was necessary, most members concurred that there was a need for more protection for children. It was agreed that each board would have to make the decision whether to promulgate regulation.

Legal Basis

Please identify (1) the agency or other promulgating entity, 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 entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity'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 Counseling the authority to promulgate regulations to administer the regulatory system:

§ 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 (§ 9-6.14:1 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. ...

Chapter 1 specifies that a regulation shall not be imposed except for the purpose of protection of the health, safety, and welfare of the public, which is the intent of this action.

§ 54.1-100. Regulations of professions and occupations.

The right of every person to engage in any lawful profession, trade, or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when (i) it is clearly found that such abridgment is necessary for the protection or preservation of the health, safety, and welfare of the public and (ii) any such abridgment is no greater than necessary to protect or preserve the public health, safety, and welfare.

No regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interest when:

1. The unregulated practice of the profession or occupation can harm or endanger the health, safety or welfare of the public, and the potential for harm is recognizable and not remote or dependent upon tenuous argument;

Purpose

Please 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 specify in regulations the interpretation of the Board that conversion therapy has the potential for significant harm if practiced with persons under the age of 18. The regulations will define the term consistent with accepted usage within the profession and consistent with policy statements by state and national professional organizations.

Substance

Please 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.

For the purposes of the regulatory action, "conversion therapy" or "sexual orientation change efforts" is defined as any practice or treatment that seeks to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of any gender.

"Conversion therapy" does not include counseling that provides assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change an individual's sexual orientation or gender identity in any direction.

Issues

Please 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 primary advantage to the public is protection for children who might otherwise be subjected to reparative or conversion therapy; the Board does not believe there are disadvantages because practitioners can provide assistance to a person undergoing gender transition or counseling that offers acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development.

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 “promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary to administer effectively the regulatory system.”

Any restraint on competition as a result of promulgating this regulation is a foreseeable result of the statutory obligation of the Board to protect the safety and health of clients/patients in the Commonwealth.

Requirements More Restrictive than Federal

Please 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.

There are no applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Please 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, please 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. Please 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	There are no costs to the state for implementation or enforcement; all funding for the Board is derived from fees charged to applicants and licensees.
<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.	There are no costs to other agencies
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	There are no benefits to agencies.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	There are no costs to localities
Benefits the regulatory change is designed to produce.	No benefits

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.	Persons affected by this regulation are licensed professional counselors, licensed marriage and family therapists, licensed substance abuse practitioners, and certified substance abuse counselors.
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<p>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> 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. 	<p>There is no estimate of the number who may be affected but it is likely very small. Conversion therapy has been considered by the professional to be contrary to its Code of Ethics, so it is likely that the vast majority of practitioners are not practicing in such a manner.</p> <p>Overall numbers are: LPC: 5,784 MFT: 840 LSATP: 260 CSAC: 1,876</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> 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. 	<p>There are no costs to affected individuals.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>There are no economic benefits to this regulatory change.</p>

Alternatives

Please 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.

For the purpose of public protection, the Board also adopted a guidance document on February 8, 2019 stating that conversion therapy may be interpreted as being harmful to a client. However, specific language in its regulation will more clearly state the professionally accepted standard for ethical practice, so it concurrently supported the issuance of a Notice of Intended Regulatory Action for that purpose.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) 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.

The Board has adopted guidance for its practitioners on the practice of conversion therapy, but health, safety and welfare of minor children receiving counseling services requires a regulatory standard for which practitioners can be held accountable.

Public Comment

Please summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Ensure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency or board. If no comment was received, enter a specific statement to that effect.

Committer	Comment	Agency response
256 persons supported the intended regulatory action	Commenters noted that conversion therapy has no scientific basis, is not supported by any mental health professional organization, and has been shown to be ineffective, harmful, unethical, and destructive to individuals and families.	The Board concurs with the comments. In particular, the Virginia Counselors Association reiterated its position that “that it is unprofessional and dangerous conduct for a counselor to engage in sexual orientation change efforts, known as ‘conversion therapy,’ especially in persons under age 18...Counselors provide evidence-based and effective treatments. There are no approved counselor education programs, in fact, there are <i>no programs approved by any mental health association</i> , which provide professional training in conversion therapy. To practice conversion therapy is therefore unethical and deserving of prohibition in the regulations.”
426 persons opposed the intended regulatory action	Commenters noted that any prohibition of practice is a violation of a counselor’s freedom of religion and free speech. Commenters also stated that clients should have the right to receive counseling for unwanted sexual feelings, and that parents should have a fundamental right to make decisions for their children.	The Board responds to comments in opposition, including comments that clients should be able to receive counseling for unwanted sexual feelings, by noting that it is charged with protection of public health, safety, and welfare. The Regulations Governing the Practice of Professional Counseling state that: “The protection of the public health, safety, and welfare and the best interest of the public shall be the primary guide in determining the appropriate professional conduct of all persons whose activities are regulated by the board. Regulations setting standards of practice in 18VAC115-20-130(B)(1) require a licensee to “Practice in a manner that is in the best interest of the public and does not endanger the public health, safety, or welfare.” The Board affirms the position of its profession, as expressed by the American Counseling Association, that conversion therapy does not work and can cause harm. In response to comments that the Board has exceeded its regulatory authority because bills that would have banned conversion therapy failed in the General Assembly, the Board responds that it

		<p>has statutory authority to take disciplinary action for violations of its regulations. The Board’s regulations provide that disciplinary action may be taken against a licensee for a violation of the Board’s standards, which include avoiding the endangerment of clients.</p> <p>In response to comments about the need to provide counseling support for minors, the Board responds that the guidance document states that "conversion therapy" does not include “counseling that provides assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development....” Such counseling support would not be considered “conversion therapy” provided such counseling does not seek to change an individual's sexual orientation or gender identity in any direction.</p> <p>The Board also responds that its authority and its regulations extend to persons to whom it issues a license. In § 54.1-3501 of the Code of Virginia, there are specific exemptions from requirements of licensure, for the activities of rabbis, priests, ministers or clergymen of any religious denomination or sect when such activities are within the scope of the performance of their regular or specialized ministerial duties.</p> <p>In response to comments that the guidance document violates the right to free exercise of religion, free speech, or parental rights, the Board responds that it does not believe its regulations that establish grounds for unprofessional conduct violates the free exercise of religion or free speech, or parental rights.</p>
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Public Participation

Please include a statement that in addition to any other comments on the regulatory change, the agency is seeking comments on the costs and benefits of the regulatory change and the impacts of the regulated community. Also, indicate whether a public hearing will be held to receive comments.

In addition to any other comments, the Board of Counseling is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Townhall website, www.townhall.virginia.gov, or by mail to Elaine Yeatts at Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or elaine.yeatts@dhp.virginia.gov or by fax to (804) 527-4434. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. 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 (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

Detail of Changes

Please 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.

Current section number	Current requirement	Change, intent, rationale, and likely impact of new requirements
Section 10 in all three chapters	Sets out definitions for words and terms used in the chapter	<p>A new definition for “conversion therapy” is necessary to define what the term means in the context of the counseling profession but to also clarify the counseling interventions that are not considered to be conversion therapy.</p> <p>Conversion therapy is any practice or treatment that is <u>aimed at changing</u> an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender. Another term often used in professional literature is “sexual orientation change efforts” or SOCE. While the regulation does not use that terminology the definition is inclusive of the meaning of SOCE.</p> <p>Equally important in the definition is a description of the type of counseling that is not considered conversion therapy and would be ethical practice. Conversion therapy is not 1) Counseling that provides assistance to a person undergoing gender transition; or 2) Counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change an individual's sexual orientation or gender identity.</p> <p>Many of the commenters in opposition to the action thought such counseling would be prohibited, but the definition clearly distinguishes between conversion therapy and counseling that is</p>

		intended to help minors navigate issues relating to sexual identify.
<p>Chapter 20, Section 130</p> <p>Chapter 30, Section 140</p> <p>Chapter 50, Section 110</p> <p>Chapter 60, Section 130</p>	Sets out the standards of practice for licensed or certified practitioners	<p>One of the standards of practice established in regulation is that persons licensed, certified or registered by the board shall:</p> <p><i>"Practice in a manner that is in the best interest of the public and does not endanger the public health, safety, or welfare"</i></p> <p>Many national behavioral health and medical associations have issued position and policy statements regarding conversion therapy/sexual orientation change efforts, especially with minors. The American Counseling Association (ACA) opposes conversion therapy because "it does not work, can cause harm, and violates our Code of Ethics."</p> <p>Consistent with the established position of the ACA, the Board considers "conversion therapy" or "sexual orientation change efforts" to be services that have the potential to harm patients or clients, especially minors. Therefore, the Board has added to the regulations for ethical practice that a license shall not engage in conversion therapy with any person under 18 years of age.</p> <p>Thus, under regulations governing practitioners licensed, certified, or registered by the Board, practicing conversion therapy/sexual orientation change efforts with minors could result in a finding of misconduct and disciplinary action against the licensee, certificate holder, or registrant.</p> <p>Adoption of regulatory language follows the provisions of Guidance Document 115-10, which was adopted by the Board in February, published for comment, and reaffirmed at its meeting on May 31, 2019.</p>