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## Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

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| <b>Agency name</b>                                 | Board of Medicine, Department of Health Professions                                |
| <b>Virginia Administrative Code (VAC) citation</b> | 18VAC85-150-10 et seq.   |
| <b>Regulation title</b>                            | Regulations Governing the Practice of Behavior Analysis                            |
| <b>Action title</b>                                | New regulations for licensure of behavior analysts and assistant behavior analysts |
| <b>Date this document prepared</b>                 | 7/5/12   |

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Preamble

*The APA (Code of Virginia § 2.2-4011) states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006.*

- 1) Please explain why this is an emergency situation as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

Chapter 3 (House Bill 1106) of the 2012 Acts of the Assembly mandates that the Board of Medicine promulgate regulations to implement the provisions of the act within 280 days of its enactment, which is November 13, 2012. The bill defines the practice of behavior analysis and requires licensure for behavior analysts and assistant behavior analysts. The Board is required to

establish criteria for licensure and to promulgate regulations for applications, standards of practice, requirements and procedures for the supervision of assistant behavior analysts and for supervision of unlicensed individuals who assist in the provision of applied behavior analysis.

**Legal basis**

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’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 Medicine 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. ...*

In the § 54.1-2957.16, the Board of Medicine is mandated to promulgate regulations for the licensure of behavior analysts and assistant behavior analysts.

In addition, Section 2.2-4011 of the Code of Virginia states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006.

**Purpose**

*Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

The intent of the Board of Medicine is to adopt regulations for the licensure of behavior analysts and assistant behavior analysts as mandated by legislation passed by the 2012 General Assembly. The purpose of the regulations is to set out criteria for licensure, fees for applicants and licensees, renewal and continuing education requirements, rules for supervision and professional standards of practice. The Board has adopted regulations that are consistent with standards and criteria of the Behavior Analyst Certification Board (BACB), the professional credentialing body of applied behavior analysis and with rules for other professions currently licensed by the Board of Medicine. It is the intent and goal of the regulation that those who are currently certified by

the BACB and who engage in the ethical, professional practice of applied behavior analysis be able to continue providing services to those children diagnosed with autism spectrum disorder, as licensees of the Board of Medicine.

**Need**

*Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.*

Since behavior analysts and assistant behavior analysts seeking licensure are providing services to a very vulnerable population (children with autistic spectrum disorder), the Board has adopted regulations for ethical practice and supervisory responsibilities that may protect the health and safety of those clients. Specific criteria for supervision by behavior analysts and standards of professional conduct for both types of licensee will provide a framework for ethical, responsible practice in which the welfare of the client is foremost.

For potential issues to be addressed, refer to the “Alternatives” section of this document. The issue that continues to be problematic is the supervision and activities of unlicensed persons. While the Board believes its proposed action is compliant and consistent with the Code of Virginia and not intended to restrict services to autistic children, there remains concern and misinformation within the community.

**Substance**

*Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.*

| <b>Section number</b> | <b>Proposed requirements</b>   | <b>Other regulations and law that apply</b> | <b>Intent and likely impact of proposed requirements</b>                  |
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| 10                    | A. The following words and terms when used in this chapter shall have the meanings ascribed to them in § 54.1-2900 of the Code of Virginia:<br>Board<br>Practice of behavior analysis<br>B. The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:<br>BACB means the Behavior Analyst Certification Board, Inc.<br>BCBA® means a Board Certified Behavior Analyst®.<br>BCaBA® means a Board Certified Assistant | § 54.1-2900                                 | The intent is clarification of terms and acronyms used in the regulation. |

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|    | Behavior Analyst®.   |  |  |
| 20 | A separate board regulation, 18VAC85-10-10 et seq., provides for involvement of the public in the development of all regulations of the Virginia Board of Medicine.  | 18VAC85-10-10 et seq.                  | The intent is consistency with other regulations promulgated by the Board.   |
| 30 | Each licensee shall furnish the board his current name and address of record. All notices required by law or by this chapter to be given by the board to any such licensee shall be validly given when mailed to the latest address of record provided or served to the licensee. Any change of name or change in the address of record or public address, if different from the address of record, shall be furnished to the board within 30 days of such change.   |  | The intent is consistency with other regulations promulgated by the Board and to ensure that licensees maintain a current name and address.  |
| 40 | <p>A. The following fees have been established by the board:</p> <ol style="list-style-type: none"> <li>1. The initial fee for the behavior analyst license shall be \$130; for the assistant behavior analyst, it shall be \$70.</li> <li>2. The fee for reinstatement of the behavior analyst license that has been lapsed for two years or more shall be \$180; for the assistant behavior analyst, it shall be \$90.</li> <li>3. The fee for active license renewal for a behavior analyst shall be \$135; for any assistant behavior analyst, it shall be \$70. The fees for inactive license renewal shall be \$70 for a behavior analyst and \$35 for an assistant behavior analyst. Renewals shall be due in the birth month of the licensee in each odd-numbered year.</li> <li>4. The additional fee for processing a late renewal application within one renewal cycle shall be \$50 for a behavior analyst and \$30 for an assistant behavior analyst.</li> <li>5. The fee for a letter of good standing or verification to another state for a license shall be \$10.</li> <li>6. The fee for reinstatement of licensure pursuant to §54.1-2408.2 of the Code of Virginia shall be \$2,000.</li> <li>7. The fee for a returned check shall be \$35.</li> <li>8. The fee for a duplicate license shall be \$5, and the fee for a duplicate wall certificate shall be \$15.</li> <li>9. The fee for an application or for the biennial renewal of a restricted volunteer license shall be \$35, due in the licensee's birth month. An additional fee for late renewal of licensure shall be \$15 for each renewal cycle.</li> </ol> <p>B. Unless otherwise provided, fees established by the board shall not be refundable.</p> | § § 54.1-2400 (5) and 54.1-2957.16 (E) | The intent is consistency with other regulations promulgated by the Board and to have sufficient revenue to cover the licensure and disciplinary processes associated with regulation of these professions. Applicants and licensees will have additional costs for obtaining and maintaining licensure for the practice of their professions. |
| 50 | <p>An applicant for licensure shall submit the following on forms provided by the board:</p> <ol style="list-style-type: none"> <li>1. A completed application and a fee as</li> </ol>   | §§ 54.1-2915 and 54.1-2957.16          | The intent is consistency with other regulations promulgated by the Board and to provide sufficient  |

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|    | <p>prescribed in 18VAC85-150-40.</p> <p>2. Verification of certification as required in 18VAC85-150-60.</p> <p>3. Verification of practice as required on the application form.</p> <p>4. If licensed or certified in any other jurisdiction, verification that there has been no disciplinary action taken or pending in that jurisdiction.</p> <p>5. Verification from the BACB on disciplinary action taken or pending by that body.</p>  |   | <p>information to determine whether there may be cause to deny licensure under the provisions of § 54.1-2915.</p>  |
| 60 | <p>An applicant for a license to practice as a behavior analyst or an assistant behavior analyst shall hold current certification as a BCBA® or a BCaBA® obtained by meeting qualifications and passage of the examination required certification as a BCBA® or a BCaBA® by the BACB.</p>  | §54.1- 2957.16                                  | <p>Current certification by the Behavior Analyst Certification Board is a requirement of statute for licensure by the Board of Medicine.</p>   |
| 70 | <p>A. Every behavior analyst or assistant behavior analyst who intends to maintain an active license shall biennially renew his license each odd-numbered year during his birth month and shall:</p> <ol style="list-style-type: none"> <li>1. Submit the prescribed renewal fee;</li> <li>2. Attest to having met the continuing education requirements of 18VAC85-150-100.</li> </ol> <p>B. The license of a behavior analyst or assistant behavior analyst which has not been renewed by the first day of the month following the month in which renewal is required is lapsed. Practice with a lapsed license may be grounds for disciplinary action. A license that is lapsed for two years or less may be renewed by payment of the renewal fee, a late fee as prescribed in 18VAC85-150-40, and documentation of compliance with continuing education requirements.</p> | §§ 54.1-2400 (4), 54.1-2912.1 and 54.1- 2957.16 | <p>For consistency with other regulations and professions under the board, the renewal cycle is biennial and the licensee is allowed to renew for up to two years by payment of a late fee and documentation of compliance with CE requirements.</p>   |
| 80 | <p>A behavior analyst or assistant behavior analyst who holds a current, unrestricted license in Virginia shall, upon a request on the renewal application and submission of the required fee, be issued an inactive license. The holder of an inactive license shall not be entitled to perform any act requiring a license to practice as a behavior analyst or assistant behavior analyst in Virginia.</p>  | § 54.1-2400 (12)                                | <p>The intent is consistency with other regulations promulgated by the Board and with powers and duties of health regulatory boards.</p>   |
| 90 | <p>A. To reactivate an inactive license or to reinstate a license that has been lapsed for more than two years, a behavior analyst or assistant behavior analyst shall submit evidence of competency to return to active practice to include one of the following:</p> <ol style="list-style-type: none"> <li>1. Information on continued practice in another jurisdiction as a licensed behavior analyst or a licensed assistant behavior analyst or with certification as a BCBA® or the BCaBA®</li> </ol>   | § 54.1-2400 (12)                                | <p>The intent is consistency with other regulations promulgated by the Board. Reactivation or reinstatement requires some evidence of competency to return to active practice in Virginia. If an individual has continued to practice in another jurisdiction or has maintained BACB certification, the Board will</p> |

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|            | <p>during the period in which the license has been inactive or lapsed;</p> <p>2. Twelve hours of continuing education for each year in which the license has been inactive or lapsed, not to exceed three years; or</p> <p>3. Recertification by passage of the BCBA® or the BCaBA® certification examination from the BACB.</p> <p>B. To reactivate an inactive license, a behavior analyst or assistant behavior analyst shall pay a fee equal to the difference between the current renewal fee for inactive licensure and the renewal fee for active licensure.</p> <p>C. To reinstate a license which has been lapsed for more than two years, a behavior analyst or assistant behavior analyst shall file an application for reinstatement and pay the fee for reinstatement of his licensure as prescribed in 18VAC85-150-40. The board may specify additional requirements for reinstatement of a license so lapsed to include education, experience or reexamination.</p> <p>D. A behavior analyst or assistant behavior analyst whose licensure has been revoked by the board and who wishes to be reinstated shall make a new application to the board, fulfill additional requirements as specified in the order from the board and make payment of the fee for reinstatement of his licensure as prescribed in 18VAC85-150-40 pursuant to § 54.1-2408.2 of the Code of Virginia.</p> <p>E. The board reserves the right to deny a request for reactivation or reinstatement to any licensee who has been determined to have committed an act in violation of § 54.1-2915 of the Code of Virginia or any provisions of this chapter.</p> |                     | <p>accept such evidence. If not, continuing education or recertification will be required.</p>   |
| <p>100</p> | <p>A. In order to renew an active license, a behavior analyst shall attest to having completed 24 hours of continuing education and an assistant behavior analyst shall attest to having completed 16 hours of continuing education as approved and documented by a sponsor recognized by the BACB within the last biennium.</p> <p>B. A practitioner shall be exempt from the continuing education requirements for the first biennial renewal following the date of initial licensure in Virginia.</p> <p>C. The practitioner shall retain in his records the completed form with all supporting documentation for a period of four years following the renewal of an active license.</p> <p>B. The board shall periodically conduct a random audit of its active licensees to determine compliance. The practitioners</p>   | <p>§54.1-2912.1</p> | <p>The Code (§54.1-2912.1) mandates the Board to prescribe by regulation requirements to ensure continued competence which may include continuing education. The requirement for 24 hours within two years for the BCBA or 16 hours for the BCaBA is consistent with the maintenance of certification by the BACB (36 hours/3 years for BCBA and 24 hours/3 years for BCaBA). Therefore, if a licensee chooses to remain board-certified, he will fulfill the CE requirement for renewal of licensure.</p> |

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|     | <p>selected for the audit shall provide all supporting documentation within 30 days of receiving notification of the audit.</p> <p>C. Failure to comply with these requirements may subject the licensee to disciplinary action by the board.</p> <p>D. The board may grant an extension of the deadline for continuing competency requirements, for up to one year, for good cause shown upon a written request from the licensee prior to the renewal date.</p> <p>F. The board may grant an exemption for all or part of the requirements for circumstances beyond the control of the licensee, such as temporary disability, mandatory military service, or officially declared disasters.</p>  |                              |   |
| 110 | <p>Scope of practice. The practice of a behavior analyst includes:</p> <ol style="list-style-type: none"> <li>1. Design, implementation, and evaluation of environmental modifications using the principles and methods of behavior analysis to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior; and</li> <li>2. Supervision of licensed assistant behavior analysts and unlicensed personnel.</li> </ol>  | §§54.1-2900 and 54.1-2957.16 | The scope of practice is consistent with the definition of practice of behavior analysis found in the Code.   |
| 120 | <p>A. The licensed behavior analyst is ultimately responsible and accountable for client care and outcomes under his clinical supervision.</p> <p>B. There shall be a written supervisory agreement between the licensed behavior analyst and the licensed assistant behavior analyst that shall address:</p> <ol style="list-style-type: none"> <li>1. The domains of competency within which services may be provided by the licensed assistant behavior analyst; and</li> <li>2. The nature and frequency of the supervision of the practice of the licensed assistant behavior analyst by the licensed behavior analyst.</li> </ol> <p>A copy of the written supervisory agreement shall be maintained by the licensed behavior analyst and the licensed assistant behavior analyst and made available to the board upon request.</p> <p>C. Delegation shall only be made if, in the judgment of the licensed behavior analyst, the task or procedures can be properly and safely performed by an appropriately trained assistant behavior analyst or other person, and the delegation does not jeopardize the health or safety of the client.</p> <p>D. Supervision activities by the licensed behavior analyst include:</p> | § 54.1-2957.16 (D)           | The Code requires promulgation of regulations for the “requirements and procedures for the supervision of a licensed assistant behavior analyst by a licensed behavior analyst.” The regulations adopted are consistent with the standard of the BACB which requires that the BCaBA demonstrate competency with the procedures involved under the direct supervision of a BCBA and that an assistant practice under the supervision of a BCBA. The specific requirements for supervisory activities were recommended by a BCBA member of the Workgroup and are considered to be minimal standards for adequate supervision. |

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|            | <p>1. Direct, real-time observation of the supervisee implementing behavior analytic assessment and intervention procedures with clients in natural environments and/or training others to implement them, with feedback from the supervisor.</p> <p>2. One-to-one real-time interactions between supervisor and supervisee to review and discuss assessment and treatment plans and procedures, client assessment and progress data and reports, published research, ethical and professional standards and guidelines, professional development needs and opportunities, and relevant laws, regulations, and policies.</p> <p>3. Real-time interactions between a supervisor and a group of supervisees to review and discuss assessment and treatment plans and procedures, client assessment and progress data and reports, published research, ethical and professional standards and guidelines, professional development needs and opportunities, and relevant laws, regulations, and policies.</p> <p>4. Informal interactions between supervisors and supervisees via telephone, electronic mail, and other written communication are encouraged but may not be considered formal supervision.</p> <p>For the purposes of this subsection, “real-time” shall mean live and person-to-person.</p> <p>E. The frequency and nature of supervision interactions are determined by the individualized assessment or treatment plans of the clients served by the licensed behavior analyst and the assistant behavior analyst, but shall occur not less than once every four weeks, with each supervision session lasting no less than one hour.</p> |                                     |  |
| <p>130</p> | <p>A. Unlicensed personnel may be supervised by a licensed behavior analyst or an assistant behavior analyst.</p> <p>B. Unlicensed personnel may be utilized to perform:</p> <ol style="list-style-type: none"> <li>1. Nonclient-related tasks including, but not limited to, clerical and maintenance activities and the preparation of the work area and equipment; and</li> <li>2. Certain routine client-related tasks that, in the opinion of and under the supervision of a licensed behavior analyst, have no potential to adversely impact the client or the client's treatment plan and do not constitute the practice of behavior analysis.</li> </ol>   | <p>§§54.1-2901 and 54.1-2957.16</p> | <p>§54.1-2901 specifies exemptions licensure under the Board of Medicine. Number 6 allows a “practitioner licensed or certified by the Board from delegating to personnel supervised by him, such activities or functions as are nondiscretionary and do not require the exercise of professional judgment for their performance and which are usually or customarily delegated to such persons by practitioners of the healing arts, if such activities or functions are authorized by and performed for such practitioners of the healing arts</p> |



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|            |  |  | <p>and responsibility for such activities or functions is assumed by such practitioners of the healing arts.”</p> <p>Consistent with the statutory exemption for delegation to unlicensed persons, the Board has adopted regulations that permit delegation of client-related tasks that do not constitute the practice of behavior analysis. Unlicensed persons may assist in the provision of services provided those tasks do not require the exercise of professional judgment and are usually delegated to unlicensed persons.</p> |
| <p>140</p> | <p>A practitioner shall not willfully or negligently breach the confidentiality between a practitioner and a client. A breach of confidentiality that is required or permitted by applicable law or beyond the control of the practitioner shall not be considered negligent or willful.</p>   |  | <p>The Standards of Professional Conduct in Part V are identical to all professions under the Board of Medicine.</p> <p>The intent is consistency with other regulations promulgated by the Board and to provide standards for practice to protect public health and safety.</p>  |
| <p>150</p> | <p>A. Practitioners shall comply with the provisions of § 32.1-127.1:03 of the Code of Virginia related to the confidentiality and disclosure of client records.</p> <p>B. Practitioners shall provide client records to another practitioner or to the client or his personal representative in a timely manner in accordance with provisions of § 32.1-127.1:03 of the Code of Virginia.</p> <p>C. Practitioners shall properly manage and keep timely, accurate, legible and complete client records.</p> <p>D. Practitioners who are employed by a health care institution, educational institution, school system or other entity in which the individual practitioner does not own or maintain his own records shall maintain client records in accordance with the policies and procedures of the employing entity.</p> <p>E. Practitioners who are self-employed or employed by an entity in which the individual practitioner owns and is responsible for client records shall:</p> <p>1. Maintain a client record for a minimum of six years following the last client encounter with the following exceptions:</p> <p>a. Records of a minor child shall be maintained until the child reaches the age of 18 or becomes emancipated, with a minimum time</p> |  | <p>The intent is consistency with other regulations promulgated by the Board and to provide standards for practice to protect public health and safety.</p>   |

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|            | <p>for record retention of six years from the last client encounter regardless of the age of the child;</p> <p>b. Records that have previously been transferred to another practitioner or health care provider or provided to the client or his legally authorized representative; or</p> <p>c. Records that are required by contractual obligation or federal law may need to be maintained for a longer period of time.</p> <p>2. Post information or in some manner inform all clients concerning the time frame for record retention and destruction. Client records shall only be destroyed in a manner that protects client confidentiality, such as by incineration or shredding.</p> <p>3. When closing, selling or relocating his practice, meet the requirements of § 54.1-2405 of the Code of Virginia for giving notice that copies of records can be sent to any like-regulated provider of the client's choice or provided to the client or legally authorized representative.</p>  |  |   |
| <p>160</p> | <p>A. Communication with clients.</p> <p>1. Except as provided in § 32.1-127.1:03 F of the Code of Virginia, a practitioner shall accurately present information to a client or his legally authorized representative in understandable terms and encourage participation in decisions regarding the client's care.</p> <p>2. A practitioner shall not deliberately make a false or misleading statement regarding the practitioner's skill or the efficacy or value of a treatment or procedure provided or directed by the practitioner.</p> <p>3. Before an initial assessment or intervention is performed, informed consent shall be obtained from the client or his legally authorized representative. Practitioners shall inform clients or their legally authorized representative of the risks, benefits, and alternatives of the recommended procedure that a reasonably prudent practitioner would tell a client.</p> <p>a. Informed consent shall also be obtained if there is a significant change to a therapeutic procedure or intervention performed on a client that is not part of routine, general care and which is more restrictive on the continuum of care.</p> <p>b. In the instance of a minor or a client who is incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to a physical or mental disorder, the legally</p> |  | <p>The intent is consistency with other regulations promulgated by the Board and to provide standards for practice to protect public health and safety.</p> |

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|            | <p>authorized person available to give consent shall be informed and the consent documented.</p> <p>c. An exception to the requirement for consent prior to performance of a procedure or intervention may be made in an emergency situation when a delay in obtaining consent would likely result in imminent harm to the client.</p> <p>4. Practitioners shall adhere to requirements of § 32.1-162.18 of the Code of Virginia for obtaining informed consent from clients prior to involving them as subjects in human research with the exception of retrospective chart reviews.</p> <p>B. Termination of the practitioner/client relationship.</p> <p>1. The practitioner or the client may terminate the relationship. In either case, the practitioner shall make the client record available, except in situations where denial of access is allowed by law.</p> <p>2. A practitioner shall not terminate the relationship or make his services unavailable without documented notice to the client that allows for a reasonable time to obtain the services of another practitioner.</p> |  |   |
| <p>170</p> | <p>A. A practitioner shall not:</p> <p>1. Perform procedures or techniques that are outside the scope of his practice or for which he is not trained and individually competent;</p> <p>2. Knowingly allow subordinates to jeopardize client safety or provide client care outside of the subordinate's scope of practice or area of responsibility. Practitioners shall delegate client care only to subordinates who are properly trained and supervised;</p> <p>3. Engage in an egregious pattern of disruptive behavior or interaction in a health care setting that interferes with client care or could reasonably be expected to adversely impact the quality of care rendered to a client; or</p> <p>4. Exploit the practitioner/client relationship for personal gain.</p> <p>B. Advocating for client safety or improvement in client care within a health care entity shall not constitute disruptive behavior provided the practitioner does not engage in behavior prohibited in subdivision A 3 of this section.</p>   |  | <p>The intent is consistency with other regulations promulgated by the Board and to provide standards for practice to protect public health and safety.</p> |
| <p>180</p> | <p>A practitioner shall not knowingly and willfully solicit or receive any remuneration, directly or indirectly, in return for referring an individual to a facility or institution as defined in § 37.2-100 of the Code of Virginia or hospital as defined in § 32.1-123 of the Code of Virginia.</p>   |  | <p>The intent is consistency with other regulations promulgated by the Board and to provide standards for practice to protect public health and safety.</p> |

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|            | <p>Remuneration shall be defined as compensation, received in cash or in kind, but shall not include any payments, business arrangements, or payment practices allowed by 42 USC § 1320 a-7b(b), as amended, or any regulations promulgated thereto.</p>   |  |   |
| <p>190</p> | <p>A. For purposes of § 54.1-2915 A 12 and A 19 of the Code of Virginia and this section, sexual contact includes, but is not limited to, sexual behavior or verbal or physical behavior that:</p> <ol style="list-style-type: none"> <li>1. May reasonably be interpreted as intended for the sexual arousal or gratification of the practitioner, the client, or both; or</li> <li>2. May reasonably be interpreted as romantic involvement with a client regardless of whether such involvement occurs in the professional setting or outside of it.</li> </ol> <p>B. Sexual contact with a client.</p> <ol style="list-style-type: none"> <li>1. The determination of when a person is a client for purposes of § 54.1-2915 A 19 of the Code of Virginia is made on a case-by-case basis with consideration given to the nature, extent, and context of the professional relationship between the practitioner and the person. The fact that a person is not actively receiving treatment or professional services from a practitioner is not determinative of this issue. A person is presumed to remain a client until the client-practitioner relationship is terminated.</li> <li>2. The consent to, initiation of, or participation in sexual behavior or involvement with a practitioner by a client does not change the nature of the conduct nor negate the statutory prohibition.</li> </ol> <p>C. Sexual contact between a practitioner and a former client after termination of the practitioner-client relationship may still constitute unprofessional conduct if the sexual contact is a result of the exploitation of trust, knowledge, or influence of emotions derived from the professional relationship.</p> <p>D. Sexual contact between a practitioner and a key third party shall constitute unprofessional conduct if the sexual contact is a result of the exploitation of trust, knowledge or influence derived from the professional relationship or if the contact has had or is likely to have an adverse effect on client care. For purposes of this section, key third party of a client means spouse or partner, parent or child, guardian, or legal representative of the client.</p> <p>E. Sexual contact between a supervisor and a trainee shall constitute unprofessional conduct if the sexual contact is a result of the exploitation of trust, knowledge or influence</p> |  | <p>The intent is consistency with other regulations promulgated by the Board and to provide standards for practice to protect public health and safety.</p> |

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|     | derived from the professional relationship or if the contact has had or is likely to have an adverse effect on client care.  |  |  |
| 200 | A practitioner shall not willfully refuse to provide information or records as requested or required by the board or its representative pursuant to an investigation or to the enforcement of a statute or regulation. |  | The intent is consistency with other regulations promulgated by the Board and to provide standards for practice to protect public health and safety. |

**Alternatives**

*Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.*

In the adoption of emergency regulations, the Board of Medicine accepted the vast majority of the regulations of the ABA Workgroup but departed on a few of its recommendations. The alternative language adopted by the Board involved requirements for renewal, supervisory responsibilities of the behavior analyst, and supervision of unlicensed persons.

1) Maintenance of BACB certification.

The Workgroup recommended that licensed behavior analysts and licensed assistant behavior analysts be required to maintain certification by the Behavior Analyst Certification Board (BACB) to renew licensure with the Board of Medicine. The Board did not adopt such a requirement but accepted a requirement for continuing education for renewal. To maintain licensure with the Board, licensees will have to attest to hours of continuing education and will have to follow the laws of Virginia and regulations of the Board of Medicine. Other licensed professions (e.g., occupational therapists, respiratory care practitioners, etc.) under the Board of Medicine follow the same format. Some members of the Workgroup advocated for BACB because it has professional standards and can discipline certificate holders for ethical violations. Maintenance of BACB certification requires continuing education and costs \$100 to \$150 per year.

If a licensee chooses to maintain BACB certification, the CE hours will fulfill regulatory requirements for renewal of licensure, but the Board did not believe it was necessary to require all licensees to incur the additional cost of BACB certification as evidence of continued competency to practice. The law that was enacted provides that the Board of Medicine should license, regulate and potentially discipline ABA's - hence it is the BOM's responsibility to protect the public and that responsibility cannot be abrogated or deferred to a private credentialing body.

2) Supervisory responsibilities of a behavior analyst.

The practice of a behavior analyst includes the practice as defined in the Code in § 54.1-2900 and the supervision of licensed assistant behavior analysts. The licensed behavior analyst is ultimately responsible for client care and outcomes under his/her supervision. The assistant behavior analyst must have a written supervisory agreement with the licensed behavior analyst

that spells out the domains of competency within which services by the assistant may be provided and the nature and frequency of the supervision.

The Workgroup had recommended that draft language specifying the supervision of a licensed behavior analyst be stricken. However, the Board decided to retain specific requirements for direct, real-time observation and interaction to ensure that the licensed behavior analyst is aware of the assistant's work with clients and is able to delegate those tasks and procedures that can be safely performed by the assistant. The regulation states that the licensed behavior analyst is ultimately responsible and accountable for client care and outcomes under his clinical supervision. Therefore, the Board believed that specificity found in the standards for supervision initially drafted by the Workgroup was necessary to protect all parties concerned. The Board did make the initial recommendation on frequency of supervisory interactions less restrictive – from once every two weeks to once every four weeks.

### 3) Supervision of unlicensed personnel.

The Workgroup had recommended that the Board delete the language in regulation that does not allow the delegation of the “practice of behavior analysis. The regulation adopted by the Board allowed for delegation in accordance with the law in Chapter 29 of Title 54.1.

In § 54.1-2957.17, the law requires the Board to “promulgate such regulations as may be necessary to implement the provisions of this chapter related to...(v) requirements and procedures for supervision by licensed behavior analysts and licensed assistant behavior analysts of unlicensed individuals who **assist in the provision of applied behavior analysis services.**”

The Board does not interpret “assist in the provision of applied behavior analysis services” to be the same thing as the “practice of behavior analysis.”

Physicians delegate numerous acts to trained, supervised, unlicensed persons, but they cannot delegate the “practice of medicine” which requires a license. Likewise, only licensed ABA's and assistant ABA's can practice behavior analysis, but their practice includes the authority to supervise unlicensed individuals who perform client-related tasks and assist in the provision of applied behavior analysis services.

Language in the law [§ 54.1-2901 (4) and (6)] and in regulations of the Board do not prohibit the contribution of trained, supervised, unlicensed individuals who assist in the provision of services. They will be allowed to perform client-related services within the treatment plan, “if in the judgment of the licensed behavior analyst, the tasks or procedures can be properly and safely performed by an appropriately trained” person and the “delegation does not jeopardize the health or safety of the client.”

## Public participation

*Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.*

*Please also indicate, pursuant to your Public Participation Guidelines, whether a Regulatory Advisory Panel or a Negotiated Rulemaking Panel has been used in the development of the emergency regulation and whether it will also be used in the development of the permanent regulation.*

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The agency is seeking comments on the regulation that will permanently replace this emergency regulation, including but not limited to 1) ideas to be considered in the development of the permanent replacement regulation, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) the potential impacts of the regulation.

The agency is also 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) the probable effect of the regulation on affected small businesses, and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to Elaine Yeatts at Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov) or by fax to (804) 527-4434. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action 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 (<http://www.virginia.gov/cmsportal3/cgi-bin/calendar.cgi>). Both oral and written comments may be submitted at that time.

Recommendations to the Board of Medicine for this regulation were developed by an Applied Behavior Analysis Workgroup, as prescribed in the 4<sup>th</sup> enactment of HB1106. Appointed by the Board president, the Workgroup consisted of seven individuals, including three board certified behavior analysts and one board certified assistant behavior analyst who have practiced for not less than three years, one consumer or family member of a consumer of behavior analysis services, a member of the Board of Psychology who had previously served as a member of the Board of Medicine and a representative of the health plans. Its charge was “to develop recommendations for the inclusion in regulations promulgated by the Board related to (i) criteria for licensure as a behavior analyst or assistant behavior analyst, (ii) standards of professional conduct for behavior analysts or assistant behavior analysts, (iii) continued oversight of the practice of licensed behavior analysis and licensed assistant behavior analysis, and (iv) such other matters related to the licensure and practice of behavior analysts or assistant behavior analysts as the Board may deem necessary.” (HB1106).

### Family impact

*Assess the potential 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.*

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The proposed regulatory action will assist families that have children with autistic spectrum disorder.