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Notice of Intended Regulatory Action (NOIRA) 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	2/12/19

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 VAC 7-10), 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 the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

The Board intends 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 or technical definitions used in the Agency Background Document. .

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the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."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 Psychology 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 describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.

The propose 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 that are being considered, the substantive changes to existing sections that are being considered, or both.

For the purposes of the regulatory action, "conversion therapy" or "sexual orientation change efforts" will be 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.

One of the standards of practice established in regulation is that persons licensed, certified or registered by the board shall:

"Practice in a manner that is in the best interest of the public and does not endanger the public health, safety, or welfare"

[Regulations Governing the Practice of Marriage and Family Therapy (18VAC115-50-110), Regulations Governing the Practice of Licensed Substance Abuse Treatment Practitioners (18VAC115-60-130), and Regulations Governing the Certification of Substance Abuse Counselors and Substance Abuse Counseling Assistants (18VAC115-30-140) have the same standard of practice.]

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.”

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.

Public Participation

Please indicate how the public should contact the agency to submit comments on this regulation, including ideas to assist the agency in the development of the regulation and the costs and benefits of the alternatives stated in this notice or other alternatives.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and 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: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and 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 Townhall website , www.townhall.virginia.gov, or by mail, email or fax to Elaine Yeatts, Agency Regulatory Coordinator, 9960 Mayland Drive, Henrico, VA 23233 or 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 the last day of the public comment period.

After the adoption of proposed regulations, a public hearing will be held to receive comments. A regulatory advisory panel will not be used for this action.