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

Agency name	Board of Medicine, Department of Health Professions
Virginia Administrative Code (VAC) citation	18 VAC 85-80
Regulation title	Regulations Governing the Practice of Occupational Therapy
Action title	Credential required for use of title, occupational therapy assistant
Document preparation date	6/24/04

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 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 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.

The adoption of an “emergency” regulation by the Board of Medicine is required to comply with amendments to § 54.1-2956.1 and the second enactment clause in HB 309 passed by the 2004 General Assembly (Chapter 61 of the Acts of the Assembly). § 54.1-2956.1 mandates that the Board “designate in regulation those credentialing organizations from which a person may obtain initial certification as an occupational therapy assistant in order to hold himself out to be

or advertise that he is an occupational therapy assistant or use the designation "O.T.A." or any variation thereof."

The second enactment clause of Chapter 61 states *"That the Board of Medicine shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment,"* requiring the adoption of the regulation as an emergency in accordance with the Administrative Process Act, § 2.2-4011, which states that an "emergency situation" is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date. Chapter 61 was enacted on March 8, 2004, the day HB 309 was signed by the Governor.

Section 61 is added to Part II to establish the Certified Occupational Therapy Assistant issued by the National Board for Certification in Occupational Therapy (NBCOT) as the credential that must be held by a person who calls himself an occupational therapy assistant or uses the designation of O.T.A. or any derivation thereof.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

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 Medical Practice Act (§ [54.1-2900 et seq.](#)), the Board of Medicine is mandated to set in regulation the credentialing organizations from which a person may obtain initial certification as an occupational therapy assistant in order to use the title or initials, O.T.A.

§ [54.1-2956.1](#). Powers of Board concerning occupational therapy.

The Board shall be empowered to take such actions as may be necessary to ensure the competence and integrity of any person who practices occupational therapy or claims to be an

occupational therapist or who holds himself out to the public as an occupational therapist or who engages in the practice of occupational therapy, and to that end it may license practitioners as occupational therapists.

In addition, the Board shall designate in regulation those credentialing organizations from which a person may obtain initial certification as an occupational therapy assistant in order to hold himself out to be or advertise that he is an occupational therapy assistant or use the designation "O.T.A." or any variation thereof.

In addition, § 54.1-2956.5 requires initial certification from a credentialing organization approved in regulation in order for a person to use the title of occupational therapy assistant or use the designation, O.T. A.

§ 54.1-2956.5. Unlawful to practice occupational therapy without license; restriction of titles for occupational therapy assistants.

A. It shall be unlawful for any person not holding a current and valid license from the Board to practice occupational therapy or to claim to be an occupational therapist or to assume the title "Occupational Therapist," "Occupational Therapist, Licensed," "Licensed Occupational Therapist," or any similar term, or to use the designations "O.T." or "O.T.L." or any variation thereof. However, a person who has graduated from a duly accredited educational program in occupational therapy may practice with the title "Occupational Therapist, License Applicant" or "O.T.L.-Applicant" until he has taken and received the results of any examination required by the Board or until one year from the date of graduation, whichever occurs sooner.

B. In addition, no person shall hold himself out to be or advertise that he is an occupational therapy assistant or use the designation "O.T.A." or any variation thereof unless such person has obtained initial certification as an occupational therapy assistant from a credentialing organization approved in regulation by the Board.

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 purpose of the action is to comply with the statutory mandate in § 54.1-2956.1 which requires the Board to establish the credentialing body and initial certification required for a person to hold himself out to be an occupational therapy assistant or to use the designation O.T.A. or any derivation thereof. While the credential of OTA is not required for practice, its use does imply some education and training for practice and does provide measure of minimal competency to the public. The intent of the legislation, implemented by this regulation, was to ensure that those persons who go by the protected title have a credential based on educational preparation, a practice component and an examination. The National Board on Certification in Occupational Therapy (NBCOT) is the only such credentialing body through which one can currently obtain initial certification.

Substance

Please detail any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons why the regulation is essential to protect the health, safety, or welfare of Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
n/a	61	n/a	<p>This new section provides that , effective one year from the effective date of the regulation, a person who holds himself out to be or advertises that he is an occupational therapy assistant or uses the designation "O.T.A." or any variation thereof must have obtained initial certification by the National Board on Certification in Occupational Therapy (NBCOT) as a certified occupational therapy assistant.</p> <p>The regulation and the law specify that only initial certification is required, an occupational therapy assistant is not required to maintain certification with NBCOT in order to continue to use the protected title. However, the designation of COTA is copyrighted by NBCOT and reserved for those who hold current certification. It is not required that one use the designation of COTA in order to call oneself an occupational therapy assistant.</p> <p>The third enactment for HB 309 provides "That, notwithstanding the effective date of this act, initial compliance with the provisions herein shall be as established by the Board of Medicine pursuant to its regulations." Therefore, the Board has provided in regulation a delayed effective date of one year to give persons who were not initially certified by NBCOT time to obtain the credential. In the meantime, the Act does not prevent a person from using the protected title, and thereafter, the Act does not prevent a person from assisting with provision of OT services provided he does not use the protected title.</p>

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.

There are no alternatives to the adoption of regulations for the designation of the credentialing organization from which a person may obtain initial certification as an occupational therapy assistant, as it is mandated by Chapter 61 of the 2004 Acts of the Assembly.

While adoption of a credentialing organization is mandated, the Board is not authorized to register or regulate those persons who have obtained certification and who use the designated title or initials after their names. Chapter 61 only establishes title protection and specifically provides that an individual can continue to assist in the “provision of occupational therapy services under the supervision of an occupational therapist pursuant to such requirements as may be imposed by the Board” (§ 54.1- 2956.5 C of the Code of Virginia). While the Board does not have regulatory authority vis-à-vis occupational therapy assistants or the ability to take disciplinary action against their credential, it can exercise its regulatory and disciplinary authority over the practice of occupational therapists under whom the assistants are required to perform their duties.

In development of an emergency regulation, the Board considered the recommendation of the Advisory Board on Occupational Therapy and the Study of the Appropriate Level of Regulation of Occupational Therapy Assistants in Senate Document 7 (2001). In the study of OTA’s, conducted by the Board of Health Professions in response to SJR 153 of the 2000 General Assembly, the only credentialing organization for occupational therapists or occupational therapy assistants was the National Board for Certification in Occupational Therapy. The NBCOT offers an examination and certification for assistants which entitles them to use of the title Certified Occupational Therapy Assistant or COTA. According to the SJR 153 study, there are 170 accredited OTA programs in the U.S. with four located in Virginia – Community Hospital of Roanoke Valley, J. Sargeant Reynolds Community College, Southwest Virginia Community College and Tidewater Community College. Occupational therapy assistants complete a supervised clinical internship during their academic preparation, and the majority of the OTA graduates elect to take the national examination from NBCOT so they can use the recognized credential of COTA.

In addition, the examination and credential accepted for licensure as an occupational therapist in Virginia are those prescribed and provided by NBCOT. Therefore, the Advisory Board and the Board of Medicine did not find another alternative to identification of NBCOT as the credentialing organization through which a person must obtain initial certification in order to call themselves an occupational therapy assistant or an OTA.

Family impact

Please assess the impact of the emergency regulatory action on the institution of the family and family stability.

There is no impact of the emergency regulatory action on the institution of the family and family stability.