Virginia Regulatory Town Hall

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Notice of Intended Regulatory Action (NOIRA)
Agency Background Document

Agency name	Board of Nursing, Department of Health Professions
Virginia Administrative Code (VAC) citation	18 VAC 90-20
Regulation title	Regulations Governing the Practice of Nursing
Action title	Funding shortfall for CNA program
Document preparation date	July 20, 2004

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

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.

Funding provided to the Department of Health Professions from the Department of Medical Assistance Services (DMAS) through Medicaid for the Certified Nurse Aide (CNA) program has been reduced dramatically beginning with the fiscal year (FY 2003-04). The reduction will result in a revenue shortfall averaging approximately $446,200 per year over the next six fiscal years. Based on our FY 2002-03 expenditures, this would represent a reduction of approximately 25% of the total program expenditures. If no action is taken, by FY 2009-10 the effect of the reduction in Medicaid funding would be a cumulative shortfall in the Nurse Aide budget of over $2.7 million.

As a special fund agency, the Board of Nursing is mandated to levy fees sufficient to cover all expenses for the administration and operation of the board and the Department of Health Professions. Therefore, action must be taken to address the current and projected shortfall in the Nurse Aide budget.

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the 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 (5) provides the Board with a duty to levy and collect fees and (6) provides 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:*
>
> *5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
>
> *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.*

The federal mandate for a nurse aide registry is found in the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), which set out certain requirements for long term care that must be met in order to receive Medicare and Medicaid funding. States are directed to establish a Nurse Aide Registry, set minimal standards for nurse aide education and competency testing for certification, and keep permanent records of findings of abuse, neglect and misappropriation of resident property. The federal legislation also prohibits a state from charging any fee to place a nurse aide on the registry. In 1989, the General Assembly directed the Board of Nursing to implement OBRA requirements (see Article 4 of Chapter 30 of Title 54.1).

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed. Include the specific reasons why the regulation is essential to protect the health, safety, or welfare of citizens. Delineate any potential issues that may need to be addressed as the regulation is developed.

The certified nurse aide program and its funding stream are managed administratively through an interagency agreement between DHP, DMAS, and the Virginia Department of Health (DOH).

Initially, funding to carry out the program was provided solely through the state's Medicare and Medicaid allocations and was adequate to cover program expenditures. In 1994, federal Medicare and Medicaid funding was cut. As part of this reduction, the Centers for Medicare and Medicaid Services[1], the federal agency responsible for the oversight of Medicare and Medicaid funding, established a formula to be used in allocating the CNA funding between Medicare and Medicaid. For all intents and purposes, this formula capped the amount of federal funds Virginia can allocate to the CNA program.

To address the reduced funding, DHP implemented a number of cost-reduction actions. The agency also examined requiring initial application and certification fees for CNAs as is required of all other health care professions in Virginia. However, because federal law prohibits a state from charging CNAs a fee to be placed on the registry, that effort was forestalled.

States may, however, charge CNAs for those costs associated with state requirements that are beyond those established by the federal program. In consultation with the U.S. Department of Health and Human Services, it was determined that Virginia law, particularly the due process requirements of the Administrative Process Act, contained sufficient requirements above the federal mandates to justify charging a renewal fee. Consequently, a renewal fee was instituted in 1995. (The current renewal fee is $45.00 every two years.)

Despite these actions, the CNA program did not have sufficient revenue to avoid running a deficit. Accordingly, a series of meetings was held between representatives of DHP, DMAS, and DOH and the office of the Virginia Secretary of Health and Human Resources. The result of those meetings was a decision for additional support to be provided to the nurse aide program through funds appropriated to DMAS. This funding mechanism has remained in place since the mid-1990s, but cannot continue past FY 2003-04.

Certified Nurse Aides provide the bulk of day-to-day patient care for the elderly and disabled, particularly in long-term care facilities. CNAs are also the lowest paid of all health care professionals, some making little more than minimum wage. Essentially, the most vulnerable patients are being cared for by the lowest paid and least trained staff. Prior to the federal requirements, the nursing home industry was beset by reports of abuse and neglect of patients at the hands of unregulated nurse aides with little formal training, many of whom had felony records.

Since the implementation of the federal mandates, much has been done to improve the system. Moreover, Virginia is a leader in the region in regulating the profession. It would appear incumbent on the state, therefore, not to let its investment in the program lapse. Unfortunately, the options available are very limited.

The Board and DHP have had a long-standing problem with securing funding necessary to accomplish the total range of responsibilities related to the CNA program. Funding needs were addressed in recent years by introduction of a renewal fee and then an increase in that fee. However, as shown in the budget projections below, the budget for the CNA program operated with a deficit in FY'04 and shortfall in funding is expected to grow significantly.

[1] CMS was then called the Health Care Financing Administration (HCFA)

CNA Direct and Allocation Expenditures w\ Cash Balances
Budget FY 05 & FY06 and Projected FY07 through FY10

CNA Current Fee Structure

	CNA State	Annual Shortfall (a)
Projected FY04		
Cash Balance as of June 30, 2003	503,872	
Revenue Fees	**576,000**	
Federal Reimbursement	**625,000**	
Anticpated Additional Federal Revenue	**374,938**	
Prior Year Unfunded Expenditures	466,921	
Less: Total Expenditures	1,612,889	
Projected Cash Balance as of June 30, 2004	-	(36,951)
Budget FY05		
Projected Cash Balance as of June 30, 2004	-	
Revenue Fees	**778,040**	
Federal Reimbursement	**625,158**	
Direct Expenditures	496,640	
Allocated Expenditures	1,180,049	
Total Expenditures	1,676,689	
Projected Cash Balance as of June 30, 2005	(273,491)	(273,491)
Budget FY06		
Projected Cash Balance as of June 30, 2005	(273,491)	
Revenue Fees	**622,610**	
Federal Reimbursement	**625,158**	
Direct Expenditures	506,095	
Allocated Expenditures	1,200,775	
Total Expenditures	1,706,870	
Projected Cash Balance as of June 30,		

2006	(732,593)	(459,102)
Projected FY07		
Projected Cash Balance as of June 30, 2006	(732,593)	
Revenue Fees	**797,400**	
Federal Reimbursement	**625,158**	
Projected Direct Expenditures	521,278	
Projected Allocated Expenditures	1,236,798	
Total Projected Expenditures	1,758,076	
Projected Cash Balance as of June 30, 2007	(1,068,111)	(335,518)
Projected FY08		
Projected Cash Balance as of June 30, 2007	(1,068,111)	
Revenue Fees	**637,290**	
Federal Reimbursement	**625,158**	
Projected Direct Expenditures	536,916	
Projected Allocated Expenditures	1,273,902	
Total Projected Expenditures	1,810,818	
Projected Cash Balance as of June 30, 2008	(1,616,481)	(548,370)
Projected FY09		
Projected Cash Balance as of June 30, 2008	(1,616,481)	
Revenue Fees	**819,990**	
Federal Reimbursement	**625,158**	
Projected Direct Expenditures	553,024	
Projected Allocated Expenditures	1,312,119	
Total Projected Expenditures	1,865,143	
Projected Cash Balance as of June 30, 2009	(2,036,476)	(419,995)

Projected FY10 Projected Cash Balance as of June 30, 2009	(2,036,476)	
Revenue Fees	**655,110**	
Federal Reimbursement	**625,158**	
Projected Direct Expenditures	569,614	
Projected Allocated Expenditures	1,351,483	
Total Projected Expenditures	1,921,097	
Projected Cash Balance as of June 30, 2010	(2,677,306)	(640,829)
(a) Annual Shortfall = current revenue less current expenditures		(446,218)

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.

To address the shortfall in the CNA budget, there appear to be four basic options:

1. Reduce program expenditures
2. Increase the Medicare/Medicaid funding cap
3. Obtain a general fund appropriation
4. Increase fees charged by the Board of Nursing

Reduce Expenditures

Reducing expenditures related to the nurse aide program is very problematic. The single biggest cost driver is the investigation and adjudication of allegations of misconduct. The following chart illustrates the nurse aide disciplinary caseload trend.

Biennium	Cases Received	Cases Closed
1992-94	836	638
1994-96	678	893
1996-98	521	749
1998-00	1089	934
2000-02	1329	1187
2002-04	1210	1286

Certified nurse aides are accused of misconduct at a significantly higher rate than any other profession regulated by the Board of Nursing. One out of every 32 certified nurse aides had a complaint made against him or her in 2002-04. For nurses (RNs and LPNs), however, only 1 out of every 83 licensees generated a complaint in that same time period. Clearly, therefore, the per capita cost of regulating nurse aides is significantly more than any other profession within the Board of Nursing. Moreover, the investigation and adjudication of allegations of misconduct against nurse aides represents more than 40% of the total CNA program expenditures.

Even a cursory review of the preceding table reveals a continuing upward trend in both cases received and cases closed. Between the 1992-94 and the 2002-04 biennia, the number of cases received and the number of cases closed increased by 45% and 102%, respectively.

To put this into perspective, as indicated previously, the projected total accumulated shortfall between FY 2004-05 and FY 2009-10 is $2.7 million. The annual average shortfall is estimated to be $446,200, or about 25% of the total annual expenditures. Because of their nature, non-disciplinary related expenditures are fixed costs that can not be changed without impacting the other boards within DHP. Only those expenses related to the investigation and adjudication of allegations of misconduct have any discretionary elements. Effectively, therefore, reducing program expenditures can only be accomplished at the expense of the investigation and adjudication of complaints against nurse aides.

In FY 2002-03, the Enforcement Division received 538 complaints concerning nurse aides. Of that, 280 complaints were associated with allegations of abuse, neglect, and misappropriation of patient property. To cope with a $446,200 reduction in program expenditures, the agency would have to forego the investigation and adjudication of dozens of nurse aide cases each year – upwards of 100 cases annually. Considering the population served by nurse aides – particularly those in long-term care and assisted living facilities where nurse aides provide the bulk of direct, day-to-day patient and resident care – the public fallout associated with such a reduction in disciplinary effort and the associated negative publicity could be very significant.

One of the factors intertwined in the issue of funding for the CNA program is the fact that Virginia law requires a more stringent assurance of due process than is required in federal regulations. For example, under the federal regulations, a CNA accused of a violation must request a due process hearing. If a request is not made and there is an adverse finding of abuse, neglect, or misappropriation of property, under federal regulations the nurse aide can, without additional due process action, be permanently prohibited from employment in a long term care facility that receives federal funds. Further, under the federal regulations, if a due process hearing is requested, only one such hearing is required.

Under the Virginia Administrative Process Act, allegations against CNA's must be adjudicated just like disciplinary cases for all other health professionals regulated by DHP. Therefore, DHP is obligated to conduct a due process hearing (what we call an informal conference) in order to take action against a CNA – whether the respondent requests the conference or not. Further, under Virginia law a respondent also has the right to appeal an adverse decision from an informal conference to a formal administrative hearing. While federal regulations do permit the use of Medicare or Medicaid funds to reimburse DHP for costs associated with an informal conference,

they do not permit the use of Medicare or Medicaid funds to reimburse the agency for costs associated with a formal hearing.

Moreover, both Virginia statute and case law require that evidence meet the clear-and-convincing standard before an adverse action can be taken against a regulated health care provider. In order to meet that standard, the quality and depth of the investigatory effort put forth for a nurse aide must be of the same caliber as that afforded to an allegation of a standard of care violation against a registered nurse.

Increase Funding Cap

The situation facing the CNA program has its roots in the reduction in Medicaid and Medicare funding in the mid-1990s, which led to the initiation of the allocation formula by CMS. As noted previously, this formula effectively capped the funding provided by Medicare and Medicaid.

One potential option to address this situation is to seek an increase in the Medicare/Medicaid allocation formula. Such an action, though, may not be accomplished without some significant statewide policy changes regarding Medicare and Medicaid programs, and would require the approval of CMS.

It should be noted, also, that there is a related issue which could affect future Medicaid reimbursements. Medicaid funding is intended to support the certification of nurse aides working in long-term care facilities. Not all nurse aides who are certified by DHP work in nursing homes. While there is no hard data to quantify the number and no existing mechanism to gather such data, there is sufficient anecdotal information to indicate that a significant percentage of CNAs work in other venues, such as home health care, assisted living facilities, and hospitals. Moreover, many CNAs appear to change jobs during the year, moving from long-term care and assisted living facilities to home care and back again. Determining and tracking the work venues of CNAs would be very difficult and expensive. There is some question, therefore, as to the extent Medicaid funding can be increased without fully addressing this issue.

General Fund Appropriation

It is readily acknowledged that nurse aides are in the lowest paid profession regulated by the Department of Health Professions. It is not an exaggeration to say that cashiers at local grocery stores are paid at higher hourly rates than are many nurse aides. Nevertheless, it is the nurse aide who provides the majority of direct, day-to-day care of residents of nursing homes and assisted living facilities.

One of the tenets of public safety is the societal interest in assuring that vulnerable persons are safe. Vulnerability is the hallmark of persons in long-term nursing and assisted living facilities and those in need of daily care in the home. They are the most vulnerable of patients. Yet, it is these persons who are every day left in the care and supervision of the lowest paid and least trained health care providers – nurse aides. Actions taken to discipline nurse aides are analogous to the prosecution of criminals who abuse, assault, or rob citizens. If it is in the public's interest

to spend general fund dollars in the investigation and prosecution of those who prey on otherwise healthy and able-bodied victims, then it is also in the public's interest to protect the chronically feeble and infirm through the investigation and adjudication of certified nurse aides.

The high rate of reported misconduct against nurse aides demonstrates a compelling argument for the need for public safety. Because the rate of reported misconduct among nurse aides exceeds the rate of complaints against other care givers and because of the very limited ability of nurse aides as a group to fund activities intended to improve discipline within their profession, general fund consideration may be viewed as an acceptable exception to the traditional funding mechanisms for successful occupational regulation. A general fund appropriation would be tempered by fee increases as discussed below.

Increase Renewal and Program Fees

The current biennial renewal fee for a Certified Nurse Aide is $45.00. Without any supplemental funding, to prevent an accumulated shortfall of $2.7 million by FY 2009-10, the biennial renewal fee would have to be increased to approximately $90.00 by the end of FY 2004-05. This would double the current renewal fee – a tremendous burden for the lowest paid health care providers regulated by the department. There is a significant concern that such a large increase would cause a major reduction in the number of nurse aides willing to renew their certificates. Given the fact that the hourly rate for many nurse aides is no more than is paid to clerks by local retail stores, there is little career investment exhibited in the nurse aide profession. As a result, there is ample reason to be concerned about the potential impact of a large increase in renewal fees, particularly at time when there is an acknowledged shortage in the nursing field.

There is a variation on this theme that could be employed. Traditionally, the Board of Nursing has held CNA revenues and expenditures completely separate from the other professions regulated by the Board. State law[2], however, only requires the various health regulatory boards to balance their revenues and expenditures by board, not by individual professions within each board. This creates the opportunity to discontinue the traditional accounting distinction within the Board of Nursing, thus allowing the management of BON revenues and expenditures as one combined "pot" of money. This, in turn, would allow the agency to use fees collected from the other professions regulated by the BON – principally RNs and LPNs – to help support the CNA program.

If this option is implemented, a fee increase would still be required for CNAs, but at a much lower level. Current projections indicate that recent fee increases for RNs and LPNs adopted to accommodate the requirements of HB 1441 (2003) and to implement of the Nurse Compact will be sufficient over the next 3 biennia to provide supplemental funding for the CNA program. If these fee revenues are applied to the CNA program, CNA renewal fees would have to be increased by approximately $20/biennium, rather than by the $45/biennium increase currently projected to be needed to balance the program through FY 2009-10.

[2] See §§ 54.1-113 and 54.1-2400 (5), *Code of Virginia*

Precedence for this action currently exists within the Board of Nursing and within the Board of Medicine. It is not, however, an action that can be taken solely by DHP management. Approval by a majority vote of the members of Board of Nursing would be required.

Another option that is available to the Board of Nursing is to institute fees for the oversight of nurse aide education programs. There are approximately 250 nurse aide educational programs in Virginia. State law requires that the course requirement, curriculum content, and objectives for each of these programs be approved by the Board of Nursing. The approval process includes an on-site visit of each facility once every two years. Presently, there is no fee required for the approval and review process for nurse aide educational programs. Instituting a fee for these programs could offset the cost of their oversight.

Increasing renewal fees is the only option that can be implemented solely by the Board to address the impending shortfall in the CNA program without violating federal requirements. While there clearly needs to be continued exploration of other solutions, none of the other options are within the sole purview of the department. Therefore, the Board is seeking to amend its regulations so renewal fees for Certified Nurse Aides can be increased.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability.

There is a potential impact on the institution of the family or on family stability for failure to take regulatory action, which would likely result in a significant reduction in expenditures related to the investigation and adjudication of complaints against nurse aides for abuse, neglect, and misappropriation of property. That would leave the most vulnerable members of families subject to neglect or mistreatment by some persons who should have been removed from the Registry but would be able to continue in practice. On the other hand, any significant increase in fees for certified nurse aides will have a negative effect on their ability to support themselves and their families and could represent a real hardship to persons who are making little more than minimum wage.