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Final Regulation Agency Background Document

Agency name	Board of Nursing; Department of Health Professions
Virginia Administrative Code (VAC) Chapter citation(s)	18VAC90-26-10 et seq.
VAC Chapter title(s)	Regulations for Nurse Aide Education Programs
Action title	Periodic review
Date this document prepared	December 2, 2020

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 (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

Amendments to Chapter 26 will:

- Clarify the definition of select terms used in the Chapter
- Require all programs to implement the Board-approved curriculum
- Require programs to have at least 140 hours of instruction within two years of the effective date of the regulations
- Clarify requirements for instructional personnel
- Designate a skills acquisition minimum requirement and increase total program hours
- Move *advanced* nurse aide education program regulations to this Chapter

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

CNA = certification nurse aide

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On December 2, 2020, the Board of Nursing adopted final amendments to 18VAC90-26-10 et seq., Regulations for Nurse Aide Education Programs.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

The mandate for this action is a periodic review that was posted on Townhall and published in the Register of Regulations. The comment period on the periodic review began on April 16, 2018 and ended on May 8, 2018; there were no comments on this chapter at that time. There are no changes to the mandate for regulatory action.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency'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 (6), which provides the Board of Nursing 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:

1. *To establish the qualifications for registration, certification, licensure or the issuance of a multistate licensure privilege in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
2. *To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
3. *To register, certify, license or issue a multistate licensure privilege to qualified applicants as practitioners of the particular profession or professions regulated by such board.*
4. *To establish schedules for renewals of registration, certification, licensure, and the issuance of a multistate licensure privilege.*
5. *To levy and collect fees for application processing, examination, registration, certification or licensure or the issuance of a multistate licensure privilege 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 (§ 2.2-4000 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 specific statutory authority for approval of nurse aide education programs is found in:

§ 54.1-3005. Specific powers and duties of Board.

In addition to the general powers and duties conferred in this title, the Board shall have the following specific powers and duties: ...

8. *To certify and maintain a registry of all certified nurse aides and to promulgate regulations consistent with federal law and regulation. The Board shall require all schools to demonstrate their compliance with § [54.1-3006.2](#) upon application for approval or reapproval, during an on-site visit, or in response to a complaint or a report of noncompliance. The Board may impose a fee pursuant to § [54.1-2401](#) for any violation thereof. Such regulations may include standards for the authority of licensed practical nurses to teach nurse aides;*

§ 54.1-3006.2. Nurse aide education program.

All approved nurse aide education programs shall provide each student applying to or enrolled in such program with a copy of applicable Virginia law regarding criminal history records checks for employment in certain health care facilities, and a list of crimes which pose a barrier to such employment.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

Certified nurse aides often provide care to the most vulnerable of our citizens in long-term care, home health, and other health care settings. The workgroup convened in 2016 to review and standardize curriculum found that persons who train nurse aides need to be better trained themselves, that additional topics need to be taught in the educational programs, and that students need a sufficient number of hours of clinical training to be prepared to pass the examination and practice safely. Amendments are adopted to improve the training of nurse aides so they can be competent in their skills and knowledge to protect the health and safety of patients in their care.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

As a result of periodic review of Chapter 26, the Board adopted amendments to clarify and update regulations for approval of nurse aide education programs. Substantive changes include:

- 1) A requirement that all clinical sites must be within 50 miles of the educational program or have Board approval (current policy of the Board);
- 2) A requirement for the certificate of completion to include specific information on the name of the program, the approval number from the Board, and the signature of the primary instructor or program coordinator;
- 3) A requirement for the primary instructor that states that while on-site to instruct students, that person cannot assume other duties within the school (such as serving as the school nurse and teaching the CNA course simultaneously) unless the Board has granted an exception on a case-by-case basis;
- 4) A requirement for nurse aide education programs to follow the Board-approved curriculum with the addition of training in mental health and substance abuse;
- 5) A refresher course every three years for instructors to remain qualified to teach the nurse aide curriculum;
- 6) A change in the length of program to add 20 hours, from 120 to 140, with 20 hours specifically designated for skills acquisition; and
- 7) Two new sections 80 and 90 to move the provision of 18VAC90-25-130 and 18VAC90-25-140 (advanced nurse aide education programs) to Chapter 26 so all regulations for nurse aide education are included in one chapter.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth;

and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

- 1) The primary advantage of the regulatory changes would be greater competency among certified nurse aides who have challenges in working with a vulnerable population of patients. There could also be an advantage to nurse aide students if instructors are better trained and more knowledgeable and there is more time in the curriculum for developing clinical skills – it may improve their opportunity to pass the required examination. The disadvantage of the regulatory changes may be an increase in the number of hours may necessitate a modest increase in staff in some situations.
- 2) There are no advantages or disadvantages to the agency or the Commonwealth, except clearer regulations may result in greater compliance.
- 3) There are no other pertinent matters of interest. The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. The Board is authorized under § 54.1-2400 to “promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary to administer effectively the regulatory system.”
The proposed amendments are a foreseeable result of the statute requiring the Board to protect the health and safety of citizens of the Commonwealth.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There are federal requirements for nurse aides in nursing facilities to be on a nurse aide registry maintained by the state. There are some specific requirements for nurse aide educational programs relating to curriculum and other instructional personnel, so the Board’s regulations are consistent with those. There is also a prohibition on charging a fee for approval of a program by a nursing board or other state entity, and there is a prohibition against an entity that accepts Medicaid or Medicare funds on charging a person to enroll in a facility-based program.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. “Particularly affected” are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected – To the extent a few of the community college programs do not meet proposed requirements pertaining to a minimum number of hours (increase from 120 to 140), there would be some impact on those state-supported programs.

Localities Particularly Affected - To the extent a few of the high school programs do not meet proposed requirements pertaining to a minimum number of hours (increase from 120 to 140), there would be some impact on those programs supported by local funds. One commenter noted that the restriction on the instructor also serving as the school nurse could be problematic, so the Board adopted language to permit the Executive Director to grant an exception to a restriction on the primary instructor assuming other duties.

Other Entities Particularly Affected – the largest number of current nurse aide programs that are currently below the proposed level of 140 hours are proprietary (for-profit) schools.

Public Comment

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

Proposed amendments to Chapter 26 were published in the Virginia Register of Regulations on September 14, 2020 with public comment requested for a 60-day period ending November 13, 2020. A public hearing was held before the Board on October 14, 2020 at which there was no comment.

One comment was posted on the Virginia Regulatory Townhall:

Mike Ketron, Botetourt County Public Schools	Commented that proposed regulation change would limit or eliminate CNA programs in many Virginia school divisions due to the fact that many CNA programs are held at CTE technical centers and the CNA instructor also serves as the school nurse for emergencies.	In response, the Board amended proposed regulations to allow a program to request an exception to the restriction on the primary instructor assuming other duties.
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Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
26-30	In subsection B, there is a restriction on the	The amended language allows a program to	During the periodic review by a large workgroup of educators, concern was

	<p>primary instructor assuming other duties while instructing or supervising students.</p>	<p>request an exception to that restriction. The request may be granted by the executive director or referred to an information fact-finding conference.</p>	<p>expressed about the negative effect of a primary instructor in a nurse aide education program also serving in other roles that takes him or her away from the classroom or clinical instruction. While the Board acknowledges that issue, it is concerned that a few programs might be unable to continue with that restriction. Therefore, an amendment was adopted that will allow for exceptions on a case-by-case basis. The intent is to review each situation to achieve a balance of access and availability with the need to ensure students are receiving instruction adequate to prepare them to pass the examination and to practice with competency in a long-term care facility.</p>
<p>26-30</p>	<p>In subsection C, the proposed regulation requires other instructional personnel to have experience in direct care with geriatric client in long-term care (one year for RNs and two years for LPNs).</p>	<p>The amendments adopted by the Board eliminated the requirement for the experience to be in long-term care but retained the requirement for experience with geriatric clients.</p>	<p>The workgroup discussed the critical need for instructors in nurse aide education to have actual experience in geriatric care. The vast majority of CNAs work in long-term care settings, so the requirement for experience in long-term care was added to the regulations. (Federal law does require the supervising or primary instructor have experience in long-term care.) In Board discussion on final regulations, it was noted that a requirement for experience in long-term care will be limiting for recruitment of instructors for nurse aide programs. It was acknowledged that experience in direct client care of geriatric patients is very important, but the experience may have occurred in an acute care setting and under the proposed regulations, that would disqualify a nurse from teaching in a nurse aide education program. So the term "long-term" was deleted in the qualifications for RNs and LPNs to serve as other instructors.</p>

Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
10		Sets out the definitions for words and terms used in the chapter	New definitions are added for “approval,” “conditional approval,” “site visit,” and “survey visit” - all terms more explicitly describe the meanings as used in the chapter. The term “program provider” is amended to clarify that it is an entity that conducts a “board-approved” education program.
20		Sets out requirements for establishing and maintaining a nurse aide education program	<p>Subsection A is amended to specify that the application that is required to be filed at least 90 days in advance of an opening must be a <u>complete</u> application, which is necessary for the Board to make a determination of compliance and grant approval. The Board has added the specific requirement for a site visit, which is currently conducted prior to granting approval to ensure that the essential elements for conducting an approved program are in place. There is also a specific restriction on advertising the program until approval has been granted to prevent misrepresentation by a provider.</p> <p>Subsection B is amended to specify that programs must implement the Board-approved curriculum to ensure consistency with the content set out in sections 40 and 50. <i>The amendment is necessary to ensure consistency and accountability in the program content. Development of the curriculum was a primary function of the Workgroup over a two-year period.</i></p> <p>Other amendments are:</p> <ol style="list-style-type: none"> 1) Requirement that any nursing facility used for skills training that is more than 50 miles from the program must have board approval. <i>The requirement is consistent with nursing education and is necessary to prevent an undue hardship on students.</i> 2) Amendment to specify that reports required must be submitted within a time frame specified by the board. 3) Clarify that the fee restriction applies to a nurse aide student. 4) Clarify that the licensure status referenced is for the clinical facility rather than the instructors, etc.
30		Sets out the requirements for instructional personnel in a	Amendments to subsection A clarify that the program coordinator for a nurse aide

		<p>nurse aide education program.</p>	<p>education program has administrative responsibility and accountability for the program. An amendment will also clarify that the director of nursing services may serve as the program coordinator but cannot act as the engage in the actual classroom instruction or clinical teaching at the same time he/she is serving as the director. <i>While the rule has not changed, it has been misunderstood, so the restatement is clarifying and will benefit compliance. In a nursing facility, the director of nursing has be available at all times to handle patient needs and emergencies.</i></p> <p>Amendments in subsection B specify that the primary instructor must have two years of experience in provision of geriatric long-term care with at least one year of direct client care or supervisory experience. <i>The current rule is less specific about the experience requirement, and the Workgroup and the Board concurred that hands-on experience with the geriatric population is critical in training nurse aides. It is also consistent with federal rules for the training of nurse aides.</i></p> <p>There is an amendment specifying that the primary instructor cannot assume other duties while instructing or supervising students. <i>An amendment in the final regulation will allow a program to request an exception to that restriction. The request may be granted by the executive director or referred to an informal fact-finding conference for consideration.</i></p> <p>Subsection C is amended to clarify that an instructor may be practicing under a multistate licensure privilege and that experience in geriatric care is necessary to be qualified to teach the nurse aide curriculum. <i>While experience in geriatric care is essential for instructors, the requirement in proposed regulations that the care be in a long-term care setting was deleted in the final regulations.</i></p> <p>Subsection D is amended to include teaching high school students as evidence of competency along with completion of a train-the-training course of at least 12 hours. There are also additional competencies that must be</p>
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			<p>covered in a train-the-trainer course – including a review of current regulations and the Board-approved curriculum and a review of the skills evaluated on the examination. <i>A concern expressed by persons knowledgeable about current nurse aide instructor training courses is the variability in the courses – some of which are inadequate in content and length. Therefore, the Board is setting a minimum number of 12 hours for a training course and specifying additional topics that must be covered for minimal competency to teach in a program.</i> The alternative to taking a train-the-trainer course is evidence of prior teaching experience. That option is amended to specify that the experience must be in teaching the curriculum content and skills to adults or high school students and knowledge of current regulations. <i>Prior experience in teaching subjects not specific to nurse aide education is not adequate to ensure the competency of an instructor to teach in a nurse aide education program.</i> Subsection E is added to require a refresher course every three years to include a review of regulations and skills evaluated on the examination. <i>Initially, the Board intended to specify the number of hours in such a course but decided to leave the requirement open to the needs of the personnel for additional training.</i> Subsection G is amended to specify that the ratio of 10:1 for students to instructors also applies to the skills laboratory. <i>Since the skills portion of the examination has a low passage rate in Virginia, students may benefit from more close instruction in performance of skills. Patients who are ultimately the recipients of those skills will certainly benefit from more proficiency. In 2018, the passage rate in Virginia on the skills portion of the examination was only 64% (2nd lowest among all states in which nurse aide education is regulated by a board of nursing).</i></p>
40		Sets out requirements for the curriculum	Subsection A is amended to clarify that the curriculum includes the skills laboratory and that the requirement for hours of instruction before there is client contact by a student applies to any type of client, not just clients of a nursing

			<p>facility. The one addition to the curriculum is instruction in substance abuse and opioid misuse, since aides are increasingly exposed to clients who have those issues.</p> <p>Subsection C is deleted because all programs will be required to follow the Board-approved curriculum. There will be no need for board approval for changes in a program's curriculum. <i>Consistency in the program offering will result in more qualified aides and should improve passage rates.</i></p>
50		Sets out other program requirements	<p>Subsection A is amended to specify more complete information to be included on the certificate of completion from a program. <i>Without information necessary to identify the program and confirm completion, the Board is unable to determine whether an applicant is qualified to be placed on the Registry.</i> Additionally, the "competency evaluation" is clarified to mean the national certification examination rather than an internal evaluation conducted by the program.</p> <p>Subsection B is amended to allow student identification in clinical settings to follow the policy of the facility (consistent with regulations for nurses and nursing students).</p> <p>Subsection C is amended to change the length of the program from 120 to 140 hours with the additional 20 hours designated for skills acquisition. <i>Since some programs (see economic impact for data) currently offer less than 140 hours, the proposed amendment would not be implemented until two years after the effective date of the regulation.</i></p> <p>Other amendments in subsection C are clarifying in nature.</p> <p>In subsection D on classroom facilities, the requirement for technology and equipment used for simulation is amended to clarify that it should be current and that the equipment and supplies should be sufficient for the size of the student cohort.</p>
60		Sets out the requirements for continued approval of an education program	<p>Subsection A is amended to use the terms defined – survey visit and site visit – and to make the distinction between the two. There is no change; the amendments are clarifying. Additionally, the Board's requirement that any</p>

			<p>additional information needed to evaluate a program's compliance must be submitted within a timeframe specified by the Board. The Board currently sets such a timeframe for submission of any additional information.</p> <p>Subsection B is amended to clarify the process for continued, conditional or withdrawal of approval. The process was more clearly defined for consistency with the APA, the process followed for nursing education programs, and with the advice of counsel.</p>
70		Sets out the process to be followed for interruption or closing of a program	<p>Subsection A is amended to allow a program that has been placed on inactive status to readmit students at any time during the following year by providing a list of admitted students and a start date. A program that does not hold classes for two consecutive years is considered to be closed. After closure of a program, a new approval application is required in order to reopen.</p>
	80	Sets out requirements for approved advanced certification education programs.	<p>Section 80 is identical to 18VAC90-25-130, which was repealed in the periodic review action for that chapter. Including this section in the chapter on nurse aide education provides for a more logical placement as it pertains to approval of a nurse aide education program for advanced CNAs. There are no changes in the requirements set out in this section.</p>
	90	Sets out requirements for curriculum content for an advanced certification education program	<p>Section 90 is identical to 18VAC90-25-140, which was repealed in the periodic review action for that chapter. Including this section in the chapter on nurse aide education provides for a more logical placement as it pertains to approval of a nurse aide education program for advanced CNAs. There are no changes in the requirements set out in this section.</p>