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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Psychology, Department of Health Professions
Virginia Administrative Code (VAC) citation(s)	18VAC125-20
Regulation title(s)	Regulations Governing the Practice of Psychology
Action title	Unprofessional conduct – conversion therapy
Date this document prepared	1/30/19

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

The Board intends to specify in section 150 that the standard of practice requiring licensed psychologists to “avoid harming patients or clients, research participants, students and others for whom they provide professional services and minimize harm when it is foreseeable and unavoidable” includes 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.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code

of Virginia or General Assembly chapter number(s), if applicable. Your citation should 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'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 the proposed regulatory action 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 regulation the interpretation of the Board that conversion therapy has the potential for significant harm if practiced with persons under the age of 18. The regulation 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.

Currently, 18VAC125-20-150 of the *Regulations Governing the Practice of Psychology* ("Regulations"), state that "[t]he protection of the public health, safety, and welfare and the best interest of the public shall be the primary guide in determining the appropriate professional conduct of all persons whose activities are regulated by the board. Psychologists respect the rights, dignity and worth of all people, and are mindful of individual differences."

One of the standards of practice established in the Regulations is that persons licensed or registered by the Board shall:

"Avoid harming patients or clients, research participants, students and others for whom they provide professional services and minimize harm when it is foreseeable and unavoidable."
18VAC125-20-150(B)(5).

Consistent with established positions by the American Psychological Association, National Association of School Psychologists, and Virginia Academy of Clinical Psychologists (see below), the Board will specify that "conversion therapy" or "sexual orientation change efforts" to be services that have the potential to harm patients or clients, especially minors. Thus, practicing conversion therapy/sexual orientation change efforts with minors could result in a finding of misconduct and disciplinary action against the licensee or registrant.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

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.

For the purpose of public protection, the Board adopted a guidance document on January 22, 2019 stating that conversion therapy may be interpreted as being harmful to a patient. 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 whether the agency is seeking comments on the intended regulatory action, including 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 hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

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.

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 (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

A regulatory panel will not be used to develop the proposed regulation, which will be drafted by the Regulatory Committee of the Board.