



Proposed Regulation Agency Background Document

Agency name	State Mental Health, Mental Retardation and Substance Abuse Services Board
Virginia Administrative Code (VAC) citation	12 VAC 35 -105
Regulation title	Rules and Regulations for the Licensing of Providers of Mental Health, Mental Retardation and Substance Abuse Services
Action title	Amend the Regulations to include provisions for licensing providers of brain injury services
Date this document prepared	April 14, 2006

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*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

This action will amend the existing Rules and Regulations for the Licensing of Providers of Mental Health, Mental Retardation and Substance Abuse Services to include provisions for licensing providers of brain injury services. The amendment adds a definition of "brain injury" and incorporates brain injury service providers into the definition of service "provider" that is subject to the licensing provisions. Several other definitions have been added or revised to encompass the providers of brain injury services. The description of providers that are issued licenses has also been expanded to include providers offering residential services to persons with brain injury under the Brain Injury Waiver, although presently there is no Brain Injury Waiver in Virginia. The amended regulation also includes requirements for provider staffing and supervision of brain injury services and adds requirements for the individualized services plan that address the specific needs individuals receiving brain injury services.

Legal basis

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., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The State Mental Health, Mental Retardation and Substance Abuse Services Board (Board) has the statutory authority to adopt the proposed regulations under Va. Code § 37.2-203 and Chapter 725 of the 2005 Virginia Acts of Assembly. The authority is mandatory.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

This regulatory action will add provisions to the existing licensing regulations to enable the Department of Mental Health, Mental Retardation and Substance Abuse Services (Department) to license providers of residential services for individuals with brain injuries. Virginia does not currently have a Brain Injury Waiver.

In December 2005, the Board adopted emergency regulations to implement the provisions of the new legislation. Prior to that there was no designated licensing authority for residential services serving individuals with brain injuries and some applicants had been denied licensing as a result. This action will allow these services to continue to operate in Virginia. Before this specific licensing authority was implemented, some residential brain injury services were licensed as assisted living facilities by the Department of Social Services. This licensing authority has been or will be transferred to the Department.

The agency developed the regulations in collaboration with the Department of Rehabilitative Services and representatives of various stakeholder groups. The regulations are intended to establish a framework for licensing providers of brain injury services to ensure appropriate and consistent oversight, support, and resources to provide an acceptable standard of care for persons who receive services. Prior to this, there has been no single authority responsible for oversight of this residential service. Therefore, this regulatory action is essential to protect the welfare of residents of Virginia with brain injuries and to ensure fair and consistent monitoring of providers of this service.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

Existing definitions have been modified and new definitions have been added to identify providers of brain injury services to be subject provisions for licensing. New definitions include "qualified brain injury professional (QBIP)" and "qualified paraprofessional in brain injury (QPPBI)" to identify the specific qualifications necessary for staff positions to provide services to persons with a diagnosis of brain injury.

The provider staffing plan requirements are changed to require that brain injury services be supervised by a QBIP and direct care performed by a QPPBI. There are new requirements for assessment of services plans that are applicable to persons with a diagnosis of brain injury.

Issues

Please identify the issues associated with the proposed regulatory action, 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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

These regulatory provisions help to ensure that providers of services to persons with brain injury maintain an acceptable standard of care by requiring them to comply with specific licensing requirements. The Department will monitor such providers to ensure that they are accountable and will be available to provide technical assistance to resolve any deficiencies. This should be advantageous to persons with brain injury and their families and ensure fair and consistent monitoring of services for providers.

The Department's existing Office of Licensing will be responsible for licensing providers of brain injury services in accordance with the new regulations. This is a cost-efficient and effective means to implement the new licensing requirements because this Office has the administrative support and experience to perform the required functions. Therefore, these regulations should be advantageous to the Department, providers of brain injury services, and the public.

There are no known disadvantages to consumers, providers of services or the public.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements for the residential services. If a brain injury waiver is funded, there will be federal Medicaid regulations that cover standards for payment although they would not cover the health and safety of the services. In that respect, these regulations would exceed the federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There is no locality that is particularly affected by these regulations that will bear a disproportionate material impact, which would not be experienced by other localities.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the Department, on behalf of the State Mental Health, Mental Retardation and Substance Abuse Services Board, is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the Department is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Leslie Anderson, Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services, P. O. Box 1097, Richmond, Virginia, 23228, (804) 371-6885, (804) 692-0066, leslie.anderson@co.dmhmrsas.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	None
Projected cost of the regulation on localities	None
Description of the individuals, businesses or other entities likely to be affected by the regulation	The regulations apply to residential treatment centers and services providing brain injury services. If a brain injury waiver is funded, entities providing brain injury services would be affected.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	It is projected that there may be up to 10 residential facilities affected during this fiscal year, but the exact number is dependent on the number of providers of services who apply for licensing. All of the affected entities are small businesses.
All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other	For some providers, these will be new regulations, since there have been no regulations specifically for brain injury services and they could not operate in Virginia. Some service providers are currently

<p>administrative costs required for compliance by small businesses.</p>	<p>licensed by the Virginia Department of Social Services. For these providers, the proposed regulations will involve some additional record keeping and other service requirements.</p> <p>In both cases, the affected providers are generally small facilities that are medically based and the requirements that they must meet for insurance or medical standards are similar to the regulatory requirements imposed by the proposed regulations. The proposed regulations are essentially the same as the regulations that currently apply to mental health, mental retardation, substance abuse, and developmental disability providers in Virginia.</p>
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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.

There are no appropriate alternatives to this regulatory action. The agency is required to adopt regulations to implement the provisions of the Chapter 725 of the Virginia 2005 Acts of Assembly. The agency has developed the regulations in collaboration with a stakeholder group, which included representatives of the Virginia Department of Rehabilitative Services, providers, and community organizations with an interest in brain injury services. Some of these stakeholders represented small businesses that provide residential services to persons with brain injury. This group considered various alternatives for meeting the requirements of the legislation. The agency and stakeholders determined that the provisions of this regulation provide the least intrusive and most economical means to license providers of brain injury services and ensure the welfare of persons who are receiving services from licensed providers.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The regulations are written apply to very small (1-2 beds) facilities that are licensed by the Department and to very large facilities that are serving hundreds of individuals. As a result, the regulations are largely generic and compliance is based on the provider's own policies with some exemptions for smaller

services. In most cases, this framework provides the flexibility to apply the regulatory requirements based on the size of the service.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

There were no comments received following the publication of the NOIRA.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This regulatory action will implement requirements for licensing providers of services for persons with brain injury. The licensing standards will provide a means regulatory oversight and accountability of service providers. This should have a positive impact on the stability the families of persons with brain injury by promoting the quality of service and an acceptable standard of care. The regulations should not have any significant impact on the authority or rights of parents, self-sufficiency or individual responsibility, marital commitment, or family income.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
20		This section provides definitions of terms that are relevant to the current regulations. Terms that are specifically applicable to brain injury services and	Changes have been made to the definitions of “provider;” “community intermediate care facility/mental retardation;” “day support;” “instrumental activities of daily living (IADL);” “neglect;” “provider;” “residential service;” residential treatment service;” and “service.”

		providers are not used in the current regulations and not defined in this section.	<p>Each definition has been expanded to encompass brain injury services or providers, as appropriate. The definition of “provider” is expanded to include providers of services to persons who receive services under the Brain Injury Waiver or residential services for persons with brain injury. This will require brain injury service providers to be subject to licensing provisions under these regulations.</p> <p>Definitions are added for “activities of daily living;” “brain injury;” “neurobehavioral services;” “qualified brain injury professional (QBIP)” and “qualified paraprofessional in brain injury (QPPBI)” These terms are used in new provisions for brain injury services. The definitions are intended to clarify and facilitate the implementation of the new regulatory requirements.</p>
30		The current provision identifies the types of providers that are subject to licensing requirements under the regulations. These include providers of services to persons with mental illness, mental retardation, substance abuse related problems, or persons with related conditions served under the IFDDS Waiver.	The provision has been expanded to include persons with brain injury served under the Brain Injury Waiver or in a residential service.
590		The current section describes staffing plan requirements for providers.	Staffing plan requirements are added to apply to providers of brain injury services. The regulations require services to be supervised by a QBIP and direct care performed by a QPPBI. The credentials for both of these staff positions are defined in Section 20 of the regulations.
660		The current section provides requirements for individualized services plans.	A new provision has been inserted to require individualized services plans for brain injury services to be reassessed and revised more frequently than annually, consistent with the individual’s course of recovery.

No proposed changes have been made since the publication of the emergency regulation.