



townhall.virginia.gov

Fast-Track Regulation Agency Background Document

Agency name	Department of Behavioral Health and Developmental Services
Virginia Administrative Code (VAC) citation(s)	12 VAC35-210
Regulation title(s)	Regulations to Govern Temporary Leave from State Mental Health and State Mental Retardation Facilities
Action title	Amend Regulations Following Periodic Review
Date this document prepared	June 22, 2018 (revised)

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*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

Chapter 210 provides guidance including definitions, policy, and documentation expectations related to temporary leave from mental health hospitals and training centers operated by the Department of Behavioral Health and Developmental Services (collectively, "state facilities"). Specifically, the regulation is designed to:

- Inform individuals, authorized representatives, DBHDS employees, community services board (CSB) staff, and pertinent stakeholders of the process and procedures related to temporary leave from state facilities;
- Establish the conditions for granting leave, including provisions to ensure accountability and appropriate care for persons who are on leave status.

This action is the result of a periodic review. No comments were received during the review. The proposed amendments are not substantive and merely update language to mirror language in the Code of Virginia or in 12VAC35-115, *Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department Of Behavioral Health and Developmental Services* (“Human Rights Regulations”).

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

“State Board” means the State Board of Behavioral Health and Developmental Services.

Statement of final agency action

Please 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.

The State Board approved promulgation of these amendments to 12VAC35-210 *Regulations to Govern Temporary Leave from State Mental Health and Sate Mental Retardation Facilities* using the fast-track process at its meeting on April 11, 2018.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

Section 37.2-203 of the Code of Virginia authorizes the State Board to adopt regulations that may be necessary to carry out the provisions of Title 37.2 and other laws of the Commonwealth administered by the commissioner and the department.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

Chapter 210 provides guidance including definitions, policy, and documentation expectations related to temporary leave from mental health hospitals and training centers operated by the Department of Behavioral Health and Developmental Services (“DBHDS,” or “department”). Collectively, these hospitals and training centers are referred to as “state facilities.” As long as the department operates state facilities, this regulation is needed to ensure the safety of the individuals on leave.

This action is the result of a periodic review. The proposed amendments are not substantive and merely update language to mirror language in the Code of Virginia or in the Human Rights Regulations.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

This action is the result of a periodic review. No comments were received during the review. The proposed amendments merely update language to mirror current language in state law, regulation, or practices that have been in place for many years.

Substance

Please 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.

There are no substantive amendments. However, subsection F of Section 100 is deleted as it is unnecessary because there is no other reference to how to "revoke" a trial visit; and also, it is redundant with D 2:

- ~~F. When it is determined that an individual who has been legally committed to the facility must be returned to the facility and the individual refuses to return on his own accord, the facility director or his designee shall:~~
 - ~~1. Issue a warrant for the individual's return under § 37.2-834 of the Code of Virginia to the hospital; and~~
 - ~~2. Contact the CSB upon revocation of the trial visit.~~

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 there are no disadvantages to the public or the Commonwealth, please indicate.

This action is the result of a periodic review, which includes a public comment period. The proposed amendments will provide clarity for the system by providing updated language to mirror language in the Code of Virginia, 12VAC35-115, and current practice.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is 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 is no requirement in the amendments that is more restrictive than 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 are no localities particularly affected by this action.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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.

There is no reason to delay the adoption of these changes by using the standard process. Having updated clarifications in the regulation will be helpful to those in the system using or seeking state hospital or training center services.

These regulations need to remain in place to ensure the health, safety, and welfare of the individuals receiving services in state facilities and to ensure appropriate use of those services.

These regulations apply to state facilities; therefore, small businesses are not directly affected.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>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</p>	<p>There are no costs to the state.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There are no costs to localities.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the new</p>	<p>Entities likely to be affected are:</p> <ul style="list-style-type: none"> • DBHDS facilities;

<p>regulations or changes to existing regulations.</p>	<ul style="list-style-type: none"> Individuals receiving services in DBHDS facilities and their families.
<p>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: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There is no way to estimate the number of people who will be affected.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>There are no projected costs.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>Updating language to be consistent and current with today’s vernacular related to state facilities, individuals receiving services in state facilities, and authorized representatives of individuals receiving services in state facilities.</p>

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 viable alternatives to this regulatory proposal.

Public participation notice

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Periodic review and small business impact review report of findings

If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Commenter	Comment	Agency response

1. No comments were received during the review.
2. The regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable.
3. As long as the Commonwealth has state facilities, there is a continued need for the regulation. No comments were received during the review. The regulation is six pages long and is very straightforward.
4. The regulation does not overlap, duplicate, or conflict with federal or state law or regulation.
5. The last periodic review was in 2011. Since that time, technology, economic conditions, or other factors have had no impact on Virginia's need for the regulation.

Family impact

Please assess the impact of this 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.

Having updated clarifications in the regulation will be helpful to those in the system using or seeking services in state facilities. Otherwise, there is no impact on individual families or family stability.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being

proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.

For changes to existing regulation(s), please use the following chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10		Department of Mental Health, Mental Retardation and Substance Abuse Services.	§ Updating to the current name of the agency.
20			<p>§ 'Authorized representative' is amended to match 12VAC35-105 (Licensing Regulations): "Authorized representative" or "AR" means a person permitted by law or the State Mental Health, Mental Retardation, and Substance Abuse Services Board's regulations to authorize the disclosure of information; <u>or</u> to consent to treatment and services, or participation in human research; and to authorize the disclosure of information on behalf of an individual who lacks the mental capacity to make these decisions.</p> <p>§ Community services board: Add language to mirror the definition in 37.2-100: "Community services board" or "CSB" means the public body established pursuant to § 37.2-501 of the Code of Virginia that provides mental health, mental retardation developmental, and substance abuse services to individuals within each city or county that established it. For the purpose of these regulations, community services board also includes a behavioral health authority established pursuant to § 37.2-602 of the Code of Virginia.</p> <p>§ Day pass: adding 'a state' before facility to appropriately mirror the defined term of 'state facility' used in the regulation: "Day pass" means authorized leave from the a state facility without a staff escort generally occurring during the day and not extending overnight.</p> <p>§ ISP: Update language to remove unnecessary terms, and to reflect current practice, and language</p>

			<p>associated with ISP development and purpose; mirror 12VAC35-105, except in the last sentence a non-substantive clarifying edit is made: <u>The ISP is developed through a partnership between the individual and the provider. An individual's treatment plan, functional plan, habilitation plan, person-centered plan, or plan of care are all considered individualized services plans that meets the needs and preferences of an individual and describes the measurable goals, objectives, and expected outcomes.</u></p> <p>§ Responsible person: Clarifying edits, adding 'spouse' and 'legal' in front of 'guardian' in the definition and removing it from Subsection 30 C 2., and adding 'state' before facility.</p> <p>§ State facility or facility: Updating the term in the body of the definition with 'state' in front of 'hospital or training center' and changing the term 'mental retardation' to 'intellectual disability' as it relates to training centers.</p>
30			<p>§ Subsection B: Changing to 'objective or objectives' to <u>outcome or outcomes</u> to better reflect proper usage of terms. Objectives are steps that lead to outcomes.</p> <p>§ Clarification in C. 1. a. of in whose care a person may be placed while on leave to simply refer back to the definition of 'responsible person'</p> <p>§ In C. 2., clarifying amendments to add the need for prior written consent of the authorized representative, and to simply language to refer back to 'responsible person or persons' rather than a list of different types.</p> <p>§ Strike 'family' and insert 'home' before 'visit/s' in multiple places in this section and throughout the regulation.</p> <p>§ In D, insert 'resided' to make clear which local Department of Social Services is responsible to incur expenses of visits, pursuant to § 37.2-837 B of the Code of Virginia.</p>
50		A.2. 2. The individual's needs for support and supervision.	<p>§ Changing the terminology in A.2. to add the term 'essential support needs' to mirror language in the U.S. Department of Justice's Settlement Agreement with Virginia:</p>

			2. The individual's <u>essential support</u> needs for support and supervision requirements.
60			<p>§ In A 1 and 2: Strike 'when appropriate' because collaboration should always involve the CSB:</p> <p>A. Family visits may include visits with the individual's immediate or extended family, AR, friends, or other persons arranged by the family or AR.</p> <p>1. Training centers shall plan family visits in collaboration with the individual, his family or AR, and when appropriate, the CSB;</p> <p>2. State hospitals shall plan family visits in collaboration with the individual and his family or AR, and when appropriate, the CSB.</p> <p>§ Insert a new #1 Subsection B to make clear the responsible person is expected to know the essential support needs of the individual to ensure continuity of care:</p> <p>B. When planning family visits facilities shall:</p> <p>1. <u>Ensure all identified essential support needs are reviewed with the responsible person or persons;</u></p>
70			Add the term 'day passes' as one of the possible ways an individual could be on leave.
80			<p>§ Update the subsection title to strike 'family' and include 'day, home:'</p> <p>12VAC35-210-80. Illness or injury occurring during a <u>family day, home</u> or trial visit.</p> <p>§ In A, adding a new (iii) to include risk managers in the list of those who shall be notified by the facility director or designee when the individual is injured or ill and requires medical attention.</p> <p>A. When a facility is notified that an individual is injured or ill and requires medical attention while on a <u>day pass,</u> trial, or family visit, the facility director or designee shall notify the (i) facility medical</p>

			<p>director, (ii) treatment team leader, (iii) <u>risk manager</u>, (iv) facility human rights advocate, and (iv) (v) the CSB. The facility director shall also ensure that all events are reported in accordance with department and facility policy and protocol for risk management.</p> <p>§ In D, where commitment is mentioned: The term 'state facility' is changed to 'state hospital.' to clarify the type of setting.</p> <p>§ In E, add clarifying amendments in 1. that other department staff beyond facility staff should be notified, as appropriate. Also, in 2., clarifying that both the CSB <u>and AR</u> should receive notification.</p>
90			<p>§ Clarifying amendment in C to add 'day pass' as one of the possible ways an individual could be on leave.</p>
100		<p>D. If an individual is unwilling to return to the facility, the facility director or his designee shall contact the responsible person to determine whether continued hospitalization is appropriate or the individual should be discharged.</p> <p>1. If there is no evidence that the individual meets the criteria for hospitalization then the facility shall discharge the individual in collaboration with the CSB.</p> <p>2. If the individual has been legally committed to the hospital and the facility director determines that the individual may require further hospitalization and he currently meets commitment criteria, or that the individual</p>	<p>§ Nonsubstantive clarifying amendments are made in A and B.</p> <ul style="list-style-type: none"> ○ In A, striking 'family' and inserting 'home.' ○ In B.2., adding 'if applicable' before 'his AR' so that it is clear an individual may not need an AR. <p>§ Clarifying edits are made in D:</p> <p>1. <u>Except for an individual receiving services in a state hospital who is held upon an order of a court for a criminal proceeding, # if</u> there is no evidence that the individual meets the criteria for hospitalization then the facility shall discharge the individual in collaboration with the CSB.</p> <p>2. If the individual has been legally committed to the hospital and the facility director determines that the individual may require further hospitalization and he currently meets commitment criteria and requires further hospitalization, or that the</p>

	<p>cannot be located, the facility director shall:</p> <ul style="list-style-type: none"> a. Ensure that the commitment order is valid; b. Classify the individual as a missing person; c. Alert the CSB pursuant to the department's policies and procedures for managing of individuals who are missing from state facilities; d. Issue a warrant for the individual's return under § 37.2-834 of the Code of Virginia; and e. Arrange for a physical examination at the time of the individual's return to the facility. <p>3. If the individual is on voluntary status or the commitment order is no longer valid the facility director, after consulting with the appropriate clinical staff, shall:</p> <ul style="list-style-type: none"> a. Discharge the individual; and b. Alert the CSB of the individual's status. <p>F. When it is determined that an individual who has been legally committed to the facility must be returned to the facility and the individual refuses to return on his own accord, the facility director or his designee shall:</p> <ul style="list-style-type: none"> 1. Issue a warrant for the individual's return under § 37.2-834 of the Code of Virginia to the hospital; and 2. Contact the CSB upon revocation of the trial visit. 	<p>individual cannot be located, the facility director shall:</p> <ul style="list-style-type: none"> c. Alert the CSB pursuant to the department's policies and procedures for managing <u>management</u> of individuals who are missing from state facilities; <p>§ Subsection F of Section 100 is deleted as it is unnecessary because there is no other reference to how to "revoke" a trial visit; and also, it is redundant with D 2:</p> <p>F. When it is determined that an individual who has been legally committed to the facility must be returned to the facility and the individual refuses to return on his own accord, the facility director or his designee shall:</p> <ul style="list-style-type: none"> 1. Issue a warrant for the individual's return under § 37.2-834 of the Code of Virginia to the hospital; and 2. Contact the CSB upon revocation of the trial visit.
--	--	--