



Virginia Department of Planning and Budget **Economic Impact Analysis**

12 VAC 35-105 Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services

Department of Behavioral Health and Developmental Services

Town Hall Action/Stage: 5563/9364

December 17, 2021

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). The analysis presented below represents DPB's best estimate of these economic impacts.¹

Summary of the Proposed Amendments to Regulation

The State Board of Behavioral Health and Developmental Services (Board) proposes to amend the licensing regulation for providers of substance use disorder treatment to align with the American Society of Addiction Medicine (ASAM) Levels of Care Criteria. The proposed amendments were mandated by the 2020 Appropriation Act and implemented via an emergency regulation; the Board now seeks to make those changes permanent. The proposed changes are intended to ensure individualized, clinically driven, participant-directed, and outcome-informed treatment.

Background

Item 318.B of Chapter 1289, 2020 Virginia Acts of Assembly, directs the Department of Behavioral Health and Developmental Services (DBHDS) to promulgate emergency regulations to: “i) ensure that licensing regulations support high quality community-based mental health

¹ Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

services and align with the changes being made to the Medicaid behavioral health regulations for the services funded in this Act that support evidence-based, trauma-informed, prevention-focused and cost-effective services for members across the lifespan; and ii) amend the licensing regulations to align with the American Society of Addiction Medicine Levels of Care Criteria or an equivalent set of criteria into substance use licensing regulations to ensure the provision of outcome-oriented and strengths-based care in the treatment of addiction.”² Accordingly, the proposed changes were initially implemented via an emergency regulation that became effective February 2021.³

DBHDS reports that in addition to the mandate from the General Assembly, this regulatory action is needed to incorporate best practices into the licensing regulation in order to promote recovery from substance-related disorders, which affect individuals, their families, their workplaces, and the general community. Executive Order 9 (2016) issued by former Governor McAuliffe declared the opioid addiction crisis a public health emergency in Virginia. In November 2016, the State Health Commissioner declared the Virginia opioid addiction crisis a Public Health Emergency.⁴ The declaration largely came in response to the growing number of overdoses attributed to opioid use.⁵ In September 2018, Governor Northam issued Executive Order 21 (2018) establishing an Advisory Commission on Opioids and Addiction.⁶

DBHDS reports that ASAM Levels of Care Criteria are the “most widely used and comprehensive guidelines” for addiction treatment.⁷ In addition, the federal Substance Abuse

² See <https://budget.lis.virginia.gov/item/2020/1/HB30/Chapter/1/318/>. This chapter is being amended concurrently via another action to align it with new Medicaid behavioral health requirements: <https://townhall.virginia.gov/l/ViewAction.cfm?actionid=5565>.

³ See <https://townhall.virginia.gov/l/ViewStage.cfm?stageid=9015>. The emergency regulation is currently scheduled to expire on August 19, 2022.

⁴ See <https://www.vdh.virginia.gov/commissioner/declaration-of-public-health-emergency/>.

⁵ See <https://www.governor.virginia.gov/newsroom/all-releases/2018/february/headline-822715-en.html>. Also from this release: “The infectious disease consequences of addiction in terms of poor health, death, and costs extend well beyond the more publicized overdoses, fractured lives and social networks,” said Jack Barber, MD, Interim Commissioner of the Department of Behavioral Health and Developmental Services. “Without effective prevention and treatment strategies, infectious diseases can make recovery from addiction almost impossible.”

⁶ See <https://www.hhr.virginia.gov/commissions-and-working-groups/governors-advisory-commission-on-opioids/>.

⁷ ASAM’s website indicates that it is a professional medical society, founded in 1954, representing over 6,000 physicians, clinicians and associated professionals in the field of addiction medicine. ASAM describes its mission as being dedicated to increasing access and improving the quality of addiction treatment, educating physicians and the public, supporting research and prevention, and promoting the appropriate role of physicians in the care of patients with addiction. For additional information, see <https://www.asam.org/about-us>.

and Mental Health Services Administration (SAMHSA) also recommends ASAM standards.⁸ Department staff state that ASAM standards would ensure individualized, clinically driven, participant-directed and outcome-informed treatment and this would improve the quality of care provided in affected facilities.

The most substantive amendments are summarized below.

1. The following definitions would be added to explain each type of service under the ASAM Levels of Care Criteria:
 - i. Medically managed intensive inpatient service
 - ii. Medically monitored intensive inpatient treatment
 - iii. Medication assisted opioid treatment services
 - iv. Clinically managed high-intensity residential care
 - v. Clinically managed population-specific high-intensity residential services
 - vi. Clinically managed low-intensity residential care
 - vii. Substance abuse partial hospitalization service
 - viii. Substance abuse intensive outpatient service
 - ix. Substance abuse outpatient service
 - x. Mental health partial hospitalization service
 - xi. Mental health intensive outpatient service
 - xii. Mental health outpatient service
2. Other new definitions proposed include credentialed addiction treatment professional, allied health professional, intensity of service, medication assisted treatment, and motivational enhancements.⁹ Definitions for outpatient service and partial hospitalization would be removed.

⁸ SAMHSA is an agency within the U.S. Department of Health and Human Services whose mission is to reduce the impact of substance abuse and mental illness on America's communities. For more information about SAMHSA, see their website: <https://www.samhsa.gov/>.

⁹ "Medication assisted treatment" and "medication assisted opioid treatment services" listed in point 1 are distinct terms.

3. In section 30, *Licensing*, the new license titles that correspond to the new service definitions (listed in point 1) would be added to the list of licenses issued by DBHDS.¹⁰ License titles that are no longer used would be removed.
4. Sections 925-1010, relating to medication assisted opioid treatment services, would be revised extensively to add specific requirements as per the ASAM Criteria and remove older requirements that would be superseded. These sections would also be updated to incorporate the federal Certification and Treatment Standards for Opioid Treatment Programs (42 CFR Part 8 Subpart C), which are already required of opioid treatment providers.¹¹
5. Sections 1430-1820 would be added to the regulation. These sections cover the requirements for staffing, programming, admission, discharge, and co-occurring enhanced programs for each of the services listed in point 1, except medication assisted opioid treatment services (addressed in point 4) and the three mental health related services, which are addressed in a separate concurrent action (see footnote 2.)
6. Two new documents would be partially incorporated by reference into the regulation, making those specific sections of the documents a legally enforceable part of the Virginia Administrative Code: the *ASAM: Treatment for Addictive, Substance-Related and Co-Occurring Conditions, Third Edition* and the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition*.¹²

DBHDS reports that many providers are already familiar with ASAM levels of care because this is how they must bill to receive reimbursement for addiction treatment services from the Department of Medical Assistance Services (DMAS). This has been the case since April 1, 2017, when DMAS promulgated its *Addiction and Recovery Treatment Services (ARTS)*, a regulation that adopted ASAM level of care for billing purposes.¹³ The ARTS program offers an

¹⁰ Unlike occupational and professional licensing boards, DBHDS licenses apply to residential facilities that “offer services to individuals who have mental illness, a developmental disability, or substance abuse (substance use disorders) or have brain injury.” A facility (provider) has multiple licenses depending on the services they provide.

¹¹ In an email to DPB dated December 15, 2021, DBHDS specifically reported that they are incorporating the federal requirements into the regulation for clarity and to ensure all requirements are in one place for providers, making the requirements easier to understand.

¹² This appears to be the same as *The ASAM Criteria: Treatment Criteria for Addictive, Substance-Related, and Co-Occurring Conditions, Third Edition*.

¹³ See <https://townhall.virginia.gov/L/ViewAction.cfm?actionid=4692>. The changes made in that action simply indicate that facilities will be reimbursed as per 12VAC30-130-5000 *et seq.*

enhanced substance use disorder treatment benefit to Medicaid recipients by expanding access to a comprehensive continuum of addiction treatment services for all enrolled members in Medicaid, Family Access to Medical Insurance Security (FAMIS), FAMIS MOMS (for uninsured pregnant women), including expanded community-based addiction and recovery treatment services and coverage of inpatient detoxification and residential substance use disorder treatment.¹⁴

Estimated Benefits and Costs¹⁵

DBHDS staff state that ASAM standards would ensure individualized, clinically driven, participant-directed, and outcome-informed treatment. From a licensing standpoint, the Department's Office of Licensing welcomes these standards as it would be easier to hold providers accountable and to issue a corrective action plan if a deficiency is identified. This office observes that these standards are much more service specific than the current regulation and believes they will increase the quality of services provided. Thus, the proposed amendments would directly benefit individuals seeking treatment for substance-related disorders, as well as their families, workplaces, and the general community.

As mentioned previously, providers that participate in the state's Medicaid program have already adopted the ASAM Criteria. DMAS has required third-party administrative verification that providers were in compliance with the ASAM criteria for payment. Therefore, any provider utilizing Medicaid as a payer should be in compliance with these regulations and not incur any costs. However, some providers could incur some costs if a DBHDS inspection reveals that the ASAM Criteria were not being implemented correctly and recommends changes. Providers who do not participate in Medicaid and whose services do not meet these requirements may incur some costs related to hiring and training staff in the use of the ASAM criteria. Hiring costs may

(<https://law.lis.virginia.gov/admincodefull/title12/agency30/chapter130/partXX/>) The amendments proposed by DBHDS do not appear to be more stringent than DMAS' requirements.

¹⁴ For additional information on ARTS, see <https://www.dmas.virginia.gov/for-providers/addiction-and-recovery-treatment-services/>.

¹⁵ The Economic Impact Analysis compares the proposed regulation to the regulation in the Virginia Administrative Code. The emergency regulation is: 1) not in the Virginia Administrative Code (see <http://law.lis.virginia.gov/admincode>) and 2) temporary. Thus, the Economic Impact Analysis assesses the impact of changing the permanent regulations. Consequently, to the extent that the proposed text matches the emergency text, some of the benefits and costs described here have likely already accrued.

be mitigated to the extent that providers were previously offering the same services under a different license title.¹⁶

DBHDS has reported that they would incur costs related to the promulgation of regulations, training for providers, and conducting additional inspections. They expect to absorb these costs with existing resources.

Businesses and Other Entities Affected

The Department's Office of Licensing reports that there are 256 residential facilities that have transitioned to the new ASAM licenses, including 41 licensed opioid treatment providers.¹⁷ As mentioned previously, the extent to which any given facility would be affected by the proposed changes depends on whether they had already implemented ASAM requirements.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.¹⁸ An adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. As noted above, aligning the regulation with the ASAM Criteria would create costs related to hiring and training staff for DBHDS-licensed providers who do not participate in Medicaid. Thus, an adverse impact is indicated.

Small Businesses¹⁹ Affected:²⁰

The proposed amendments appear to adversely affect small businesses; however, the number of affected entities that are small businesses is unknown.

¹⁶ DBHDS provided the following crosswalk mapping the new ASAM licenses with prior DBHDS licenses: <https://www.dbhds.virginia.gov/assets/document-library/archive/library/licensing/ol%20-%20arts%20asam%20crosswalk%20to%20license%20from%20provider%20manual%20with%20license%20numbers.pdf>

¹⁷ Email to DPB from DBHDS dated December 22, 2021. The email also noted that DBHDS does not collect information on whether providers accept Medicaid.

¹⁸ Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

¹⁹ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "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."

²⁰ If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses

Types and Estimated Number of Small Businesses Affected

The proposed amendments would affect up to 256 substance use disorder treatment providers; however, the number of affected entities that are small businesses is unknown.

Costs and Other Effects

Substance use disorder treatment providers that do not participate in Medicaid would face the highest costs since they would face new requirements. Providers that participate in Medicaid would only face higher costs if they are found to be implementing the ASAM Criteria incorrectly and need to invest in training or hire additional personnel to correctly implement the requirements. Thus, an adverse economic impact²¹ on providers of substance use disorder treatment is indicated to the extent that they face new requirements that result in new costs.

Alternative Method that Minimizes Adverse Impact

There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

Localities²² Affected²³

The proposed amendments potentially affect all 132 localities, since the facilities serve individuals from all parts of the state. The proposed amendments do not introduce costs for local governments. Consequently, an adverse economic impact²⁴ is not indicated for any localities.

Projected Impact on Employment

The proposed amendments do not appear to affect total employment.

subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

²¹ Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

²² "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

²³ § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

²⁴ Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

Effects on the Use and Value of Private Property

The proposed amendments would not affect the value of substance use disorder treatment providers. Even if some facilities incur costs to implement changes or provide training, they would benefit by maintaining compliance with DMAS' reimbursement requirements and/or the requirements of this regulation. The proposed amendments do not affect real estate development costs.