



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

12 VAC 35-46 Regulations for Children’s Residential Facilities Department of Behavioral Health and Developmental Services Town Hall Action/Stage: 5849/9581

August 12, 2022; updated September 12, 2022 to clarify the proposed changes and September 27, 2022 to update the number of facilities. These edits do not affect the overall analysis.

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).¹ The analysis presented below represents DPB’s best estimate of these economic impacts.²

Summary of the Proposed Amendments to Regulation

The State Board of Behavioral Health and Developmental Services (Board) proposes to amend the licensing regulation for children’s residential facilities to align with the requirements of the federal Family First Prevention Services Act (FFPSA) for providers that accept Title IV-E funding. The proposed amendments were mandated by the 2021 Appropriation Act and implemented via an emergency regulation; the Board now seeks to make those changes permanent. The proposed changes would establish a new license type for qualified residential treatment programs (QRTPs) and would allow children’s residential facilities that meet the standards for QRTPs to maintain their eligibility for IV-E funding.

¹ This stage was submitted to DPB on June 30, 2022, when Executive Order 14 was still in effect.

² 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.

Background

The FFPSA, enacted in 2018, restructured federal spending on services for families and youth so as to prioritize keeping children with their families over placing them in foster care.³ The law authorized new optional Title IV-E funding for time-limited mental health services, substance use treatment, and parenting skill-based programs.⁴ It also changed the role of community service providers, how courts make decisions for families, and the types of placements that can be made.⁵

Item 318.D of the 2021 Appropriation Act requires the Board to promulgate emergency regulations to amend the children's residential facility licensing regulation to align with the requirements of the federal FFPSA for children's residential service providers to meet the standards as QRTPs.⁶ Because FFPSA has changed the funding streams for some children's residential facilities, item 318.D directs the Department of Behavioral Health and Development Services (DBHDS) to seek input from the Department of Social Services (DSS) and the Department of Medical Assistance Services (DMAS) to ensure that the regulation aligns with these changes. Item 318.D also specifies that "any regulation changes promulgated pursuant to this authority shall be budget neutral and must not exceed the funding appropriated in the Act for these services."

The proposed changes were initially implemented via an emergency regulation that became effective on January 10, 2022.⁷ This action adds two new sections to the chapter: 12 VAC 35-46-1260 *Qualified residential treatment programs* and 12 VAC 35-46-1270 *Additional requirements for QRTP placements for children within the custody of local social service boards*. Section 1260 requires QRTPs to have a trauma-informed model that is "designed to address the needs, including clinical needs as appropriate, of children with serious emotional or behavioral disorders or disturbances" and be able to implement the treatment identified for the child. In addition to the existing staffing requirements for children's residential facilities, QRTPs are also

³ See <https://familyfirstact.org/about-law>.

⁴ See <https://www.acf.hhs.gov/cb/title-iv-e-prevention-program>.

⁵ See <https://www.childwelfare.gov/topics/systemwide/laws-policies/federal/family-first/>.

⁶ See Chapter 552 or the 2021 Acts of Assembly (Special Session I) at <https://budget.lis.virginia.gov/item/2021/2/HB1800/Chapter/1/318/>.

⁷ See <https://townhall.virginia.gov/L/ViewStage.cfm?stageid=9439>. The emergency regulation is scheduled to expire on July 9, 2023.

required to have registered or licensed nursing staff and other licensed clinical staff who (i) provide care on-site according to the treatment model, and (ii) are available 24 hours a day, seven days a week. The text specifies that QRTPs are not required to acquire nursing or other clinical staff solely through a direct employer-employee relationship. This means that the additional staffing requirements could be sub-contracted through nursing agencies or met through other contractual agreements.⁸

To further the goals of the FFPSA, QRTPs must facilitate and document outreach to family members (known biological family, including siblings, and fictive kin⁹) and the ways in which family members are integrated into the treatment process for the child. QRTPs must also provide or ensure discharge planning and family-based aftercare support for at least six months following discharge. Finally, QRTPs must be licensed in accordance with and accredited by an independent, nonprofit, accrediting organization approved by the United States Secretary of Health and Human Service.

Section 1270 contains additional requirements that would apply for children in the custody of local social service boards. For these children, QRTPs must coordinate with local departments of social services (LDSS,) the child's family members, and other professionals who have provided services or served as a resource for the child. QRTPs are also required to maintain all documents pertaining to the child's need for placement in the child's record including the initial assessment and any written documentation of the approval or disapproval of the placement by a court or administrative body.

Estimated Benefits and Costs¹⁰

Before FFPSA was enacted, children in foster care with serious emotional and behavioral disorders who were eligible for Title IV-E funding were placed at children's residential facilities,

⁸ In response to a comment received at the Emergency/NOIRA stage, DBHDS clarified that after hours care can be supplied either in person, via telehealth, or via telephone as needed. DBHDS plans on issuing guidance regarding this provision when the permanent regulation takes effect. See Agency Background Document (ABD) p. 7 at https://townhall.virginia.gov/L/GetFile.cfm?File=65\5849\9581\AgencyStatement_DBHDS_9581_v4.pdf.

⁹ "Fictive kin" both here and in the regulation means "persons who are not related to a child by blood or adoption but have an established relationship with the child or his family." See <https://law.lis.virginia.gov/vacode/title16.1/chapter11/section16.1-228/>.

¹⁰ 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

which may operate Therapeutic Group Homes (TGH) or other institutional (congregate care) settings, or at Psychiatric Residential Treatment Facilities (PRTFs).¹¹ Depending on the specific nature of the child’s medical needs and other eligibility criteria, the cost of their treatment would have been covered by a combination of funds from the Department of Medical Assistance Services (DMAS) and IV-E funding via the Department of Social Services (DSS).¹² However, once FFPSA was enacted, these facilities became ineligible for Title IV-E funds because they did not meet the new standards.¹³ Establishing the QRTP license with the FFPSA standards allows children’s residential facilities to become QRTPs and thus maintain their eligibility for Title IV-E funding. According to DSS, the types of programs that should be QRTPs are, “Non-family based residential programs who care for children in foster care who are eligible for IV-E funding. Any type of [non-family based residential] program licensed by DSS, DBHDS or DJJ [Department of Juvenile Justice]; regardless of whether it is or is not a Medicaid provider; can apply to be a QRTP.”¹⁴

DBHDS reports that 52 facility locations have obtained QRTP designation by DSS since the emergency regulation went into effect.¹⁵ Of these facilities, 50 are licensed by DBHDS and two are licensed by DSS.¹⁶ DSS reports that at the end of fiscal year 2022 there were 189 QRTP placements: 89 placements were in facilities that operate a PRTF, and it is likely that the bulk of their placement costs are covered by Medicaid; 85 placements were in facilities that operate a TGH, and part of their placement costs were covered by Medicaid; and 15 placements were in VDSS facilities where none of their placement costs were covered by Medicaid.¹⁷

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.

¹¹ PRTFs fall under Title XIX (Medicaid) and are licensed differently although they serve a very similar population. For a discussion of the impact of FFPSA on congregate care settings vs. PRTFs, see <https://www.macpac.gov/wp-content/uploads/2021/08/Medicaid-Coverage-of-Qualified-Residential-Treatment-Programs-for-Children-in-Foster-Care.pdf>

¹² The Office of Children’s Services (OCS) also provides funding in some cases, either directly or via DMAS.

¹³ These payments have been covered in the interim by OCS; funds that were allocated for these payments at DSS were transferred over to OCS. However, since these payments do not fall under Title IV-E, the state does not receive any federal reimbursement for them.

¹⁴ See https://familyfirstvirginia.com/foster_care/qrtp_faq.html.

¹⁵ ABD, p. 5. Updated information received via email from DBHDS dated October 27, 2022.

¹⁶ Email from DBHDS dated July 19, 2022.

¹⁷ These numbers are based on the Adoption and Foster Care Report pulled on June 29, 2022 and received in an email from DSS dated August 5, 2022.

The state benefits from the availability of licensed QRTP facilities because their presence allows for cost-sharing with the federal government via Title IV-E. Because children at these facilities often have severe emotional and behavioral disorders and must be placed in an institutional setting, at least in the short run, these expenditures would otherwise have to be paid for through DMAS, DSS, or OCS regardless of whether the facilities meet IV-E standards.¹⁸ Further, to the extent that QRTPs are able to facilitate the level of family integration that the FFPSA calls for, the proposed changes would also benefit children receiving residential treatment by providing them with a higher standard of care and mitigating the trauma of family separation.

In order to provide the higher standard of care, children's residential facilities must incur additional costs to obtain and maintain their QRTP license. These include direct costs in terms of staffing and accreditation requirements and indirect costs arising from the effort required to develop a trauma-informed model, maintain relationships with families, coordinate care with various parties, provide discharge planning and family-based aftercare for six months, and maintain additional paperwork, all of which require staff time. QRTPs may recover some of these costs through higher reimbursements via the rate-setting process. Neither DBHDS nor DSS, DMAS, or OCS have any discretion in the licensing standards since they stem from the FFPSA, which is federal law.

Due to the costs involved, some children's residential facilities may elect not to become licensed as QRTPs. DBHDS notes that this is an intended consequence of the FFPSA. By design, the FFPSA intends for fewer IV-E eligible children to be placed in institutional settings, and for such placements to be shorter in length, as family-based settings are prioritized and better supported through other interventions. However, if there are fewer licensed institutional providers able to accept IV-E funding, some IV-E eligible children who need residential treatment may have to be placed in locations that are farther away from their families than before, if facilities located closer to them are not licensed QRTPs. To the extent that this occurs and makes it more difficult to integrate the family in the child's care (through less frequent visits for example), this would be an unintended adverse consequence of the FFPSA.

¹⁸ In this sense, the emergency regulation is "budget neutral" as required by the 2021 Appropriations Act. The proposed changes would maintain that budget neutrality since the eligibility criteria for children receiving services would not be changed.

Businesses and Other Entities Affected

As mentioned previously, DBHDS reports that there are 52 residential treatment locations that have obtained designation by DSS as QRTPs. The 52 approved QRTP locations are operated by 17 unique provider organizations.¹⁹

Small Businesses²⁰ Affected:²¹

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

Types and Estimated Number of Small Businesses Affected

The proposed amendments would affect children's residential facilities that seek to become licensed QRTPs; however, the number of affected entities that are small businesses is unknown.

Costs and Other Effects

As mentioned previously, QRTPs incur direct costs in terms of staffing and accreditation requirements and indirect costs arising from the effort required to develop a trauma-informed model, maintain relationships with families, coordinate care with various parties, provide discharge planning and family-based aftercare for six months, and maintain additional paperwork, all of which require staff time. QRTPs may recover some of these costs through higher reimbursements via the rate-setting process.

Alternative Method that Minimizes Adverse Impact

These license standards are based on the FFPSA, which is federal law. Thus there is no appropriate alternative.

¹⁹ Email from DBHDS dated July 19, 2022.

²⁰ 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."

²¹ 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 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.

Localities²² Affected²³

The proposed amendments do not introduce costs for LDSS or for local governments. Consequently, an adverse economic impact²⁴ is not indicated for any localities.

Projected Impact on Employment

The proposed amendments could increase the employment of registered or licensed nursing staff or licensed clinical staff.

Effects on the Use and Value of Private Property

The proposed amendments would not affect the value of children's residential facilities. Some facilities will incur costs to be licensed as QRTPs, but they would benefit by being eligible to receive Title IV-E covered placements. The proposed amendments do not affect real estate development costs.

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.