



**Virginia
Regulatory
Town Hall**

**Periodic Review and
Notice of Intended Regulatory Action
Agency Background Document**

Agency Name:	Board of Medicine
VAC Chapter Number:	18 VAC 85-80-10 et seq.
Regulation Title:	Regulations Governing the Practice of Occupational Therapy
Action Title:	Periodic review
Date:	

This information is required pursuant to the Administrative Process Act § 9-6.14:25, Executive Order Twenty-Five (98), and Executive Order Fifty-Eight (99) which outline procedures for periodic review of regulations of agencies within the executive branch. Each existing regulation is to be reviewed at least once every three years and measured against the specific public health, safety, and welfare goals assigned by agencies during the promulgation process.

This form should be used where the agency is planning to amend or repeal an existing regulation and is required to be submitted to the Registrar of Regulations as a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B).

Summary

Please provide a brief summary of the regulation. There is no need to state each provision; instead give a general description of the regulation and alert the reader to its subject matter and intent.

Regulations are promulgated to provide educational and examination requirements for the licensure of occupational therapists. Provisions also establish requirements for renewal or reinstatement of a license, responsibilities of licensees, standards for supervision of unlicensed occupational therapy personnel, and fees to support the regulatory and disciplinary activities of the board.

Basis

Please identify the state and/or federal source of legal authority for the regulation. The discussion of this authority should include a description of its scope and the extent to which the authority is mandatory or discretionary. Where applicable, explain where the regulation exceeds the minimum requirements of the state and/or federal mandate.

The statutory authority for this regulation is found in § 54.1-2400 and Chapter 29 of Title 54.1 of the Code of Virginia.

Section 54.1-2400 establishes the general powers and duties of health regulatory boards including the responsibility to establish qualifications for licensure, to set fees and schedules for renewal, to establish requirements for an inactive license and to promulgate regulations, in accordance with the Administrative Process Act, which are reasonable and necessary to effectively 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:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- 4. To establish schedules for renewals of registration, certification and licensure.*
- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 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 and Chapter 25 of this title.*
- 7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.*

8. *To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.*
9. *To take appropriate disciplinary action for violations of applicable law and regulations.*
10. *To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.*
11. *To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.*
12. *To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.*

Chapter 29 of Title 54.1 sets forth statutory provisions for the licensure and practice of occupational therapists, excerpts of which are listed below:

§ 54.1-2900. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Practice of occupational therapy" means the evaluation, analysis, assessment, and delivery of education and training in activities of daily living (ADL); the design, fabrication, and application of orthoses (splints); guidance in the selection and use of adaptive equipment; therapeutic activities to enhance functional performance; prevocational evaluation and training; and consultation concerning the adaptation of physical environments for individuals who have disabilities.

§ 54.1-2956.1. Powers of Board concerning occupational therapy.

The Board shall be empowered to take such actions as may be necessary to ensure the competence and integrity of any person who claims to be an occupational therapist or who holds himself out to the public as an occupational therapist or who engages in the practice of occupational therapy, and to that end it may license practitioners as occupational therapists.

§ 54.1-2956.2. Advisory Board of Occupational Therapy.

The Advisory Board of Occupational Therapy, referred to hereinafter as "Advisory Board," shall assist the Board in the manner set forth in this chapter.

§ 54.1-2956.3. Advisory Board of Occupational Therapy; composition; appointment.

The Advisory Board shall be comprised of five members appointed by the Governor for four-year terms. Three members shall be at the time of appointment occupational therapists who have practiced for not less than three years, one member shall be a physician licensed to practice medicine in the Commonwealth, and one member shall be appointed by the Governor from the Commonwealth at large. Any vacancy occurring during a member's term shall be filled for the unexpired balance of that term.

§ 54.1-2956.4. Advisory Board of Occupational Therapy; powers.

The Advisory Board shall, under the authority of the Board:

- 1. Recommend to the Board for its enactment into regulation the criteria for licensure as an occupational therapist and the standards of professional conduct for holders of licenses.*
- 2. Assess the qualifications of applicants for licensure and recommend licensure when applicants meet the required criteria. The recommendations of the Advisory Board on licensure of applicants shall be presented to the Board, which shall then issue or deny licenses. Any applicant who is aggrieved by a denial of recommendation on licensure of the Advisory Board may appeal to the Board.*
- 3. Receive investigative reports of professional misconduct and unlawful acts and recommend sanctions when appropriate. Any recommendation of sanctions shall be presented to the Board, which may then impose sanctions or take such other action as may be warranted by law.*
- 4. Assist in such other matters dealing with occupational therapy as the Board may in its discretion direct.*

§ 54.1-2956.5. Restriction of titles.

It shall be unlawful for any person not holding a current and valid license from the Board to claim to be an occupational therapist or to assume the title "Occupational Therapist," "Occupational Therapist, Licensed," "Licensed Occupational Therapist," or any similar term, or to assume the designations "O.T." or "O.T.L." However, a person who has graduated from a duly accredited educational program in occupational therapy may practice with the title

"Occupational Therapist, License Applicant" or "O.T.L.-Applicant" until he has taken and received the results of any examination required by the Board or until one year from the date of graduation, whichever occurs sooner. This section shall not be construed to prohibit any person operating under the supervision of an occupational therapist pursuant to such requirements as may be imposed by the Board from claiming to practice occupational therapy or from using the title "Certified Occupational Therapy Assistant" or any variation thereof, or from assuming the designations "O.T.A." or "C.O.T.A."

Public Comment

Please summarize all public comment received as the result of the Notice of Periodic Review published in the Virginia Register and provide the agency response. Where applicable, describe critical issues or particular areas of concern in the regulation. Also please indicate if an informal advisory group was or will be formed for purposes of assisting in the periodic review or development of a proposal.

An announcement of the board's review of its regulations governing the licensure of occupational therapists was posted on the Virginia Regulatory Townhall, sent to the Registrar of Regulations, and sent to persons on the Public Participation Guidelines mailing list for the board. Public comment was received until August 2, 2000. During the 30-day comment period, no comments were received from members of the public.

The Advisory Board on Occupational Therapy held a public meeting on August 10, 2000 to conduct a review of regulations and discuss related issues, such as appropriate supervision of unlicensed assistants and criteria for assuring continued competency. Based on the concerns expressed by licensees about their responsibilities in the supervision of unlicensed assistants and the statutory mandate to have some evidence of continued competency, the Advisory Board voted to request that the Board recommend amendments to regulations.

Effectiveness

Please provide a description of the specific and measurable goals of the regulation. Detail the effectiveness of the regulation in achieving such goals and the specific reasons the agency has determined that the regulation is essential to protect the health, safety or welfare of citizens. In addition, please indicate whether the regulation is clearly written and easily understandable by the individuals and entities affected.

The goals for this regulation are as follows:

1) Achieve a high level of satisfaction for application and renewal processes for all licensed practitioners.

The Board reviewed the responses of recent licensees on the Customer Service Satisfaction Surveys and determined that the application process and renewal of licensure was effective in that instructions for making application are clear and easy to understand and complete. Of those that responded, 92.9% agreed or strongly agreed that the instructions were easy to understand; 87.1% agreed or strongly agreed that the application was processed promptly; and 89.4% agreed

or strongly agreed that the forms were easy to complete. Therefore, no changes in regulations are being considered in the application process.

There is a recommendation to clarify the rules on practice by an applicant while waiting for the results of the examination. According to § 54.1-2956.5 of the Code of Virginia, an applicant is permitted to practice occupational therapy with a restriction on the title that may be used. Since the Board staff sometimes receives questions about practice, it is apparent that the public and the regulated entities would be well-served by clarifying the rule.

2) Review regulations to ensure consistency and application to the current practice of occupational therapy.

- Chapter 227 of the 1997 Acts of the Assembly mandated the Board of Medicine to promulgate regulations to assure that licensed practitioners continue to be competent in the current practice of occupational therapy. The Board has already adopted proposed amendments, which are intended to establish requirements for renewal of licensure to include continuing competency as evidenced by 160 hours of active practice each biennium and the completion of at least 20 hours of continuing learning activities. The proposed amendments also establish an inactive license for licensees who are not engaged in practice and do not want to meet the requirements for renewal of an active license. Finally, proposed amendments set forth the conditions which must be met to reactivate an inactive license or reinstate a lapsed license.

The goal of the Advisory Board on Occupational Therapy and the intent of the Board was to develop requirements that would: 1) encourage learner-directed continuing education through which a practitioner can identify a practice question or problem, seek the learning activity which provides needed information or teaches a new skill, and thereby, enhance his expertise or ability to practice; 2) offer a choice of content and form that is flexible enough to meet the needs of occupational therapists in a variety of practice settings in any location in Virginia; and 3) assure the public that occupational therapists are current in their skills and competencies.

The Board is awaiting permission to publish the proposed regulation, after which a public comment period and a public hearing will be held.

- Currently, occupational therapy assistants are not regulated by the Board of Medicine and are only accountable to their supervising occupational therapists. There are no educational or training requirements and no evidence of minimal competency. Regulations clearly state that the occupational therapist is responsible for supervision of occupational therapy personnel who work under his direction, but it is not explicitly stated that the initial assessment and evaluation of a patient and clinical decisions requiring professional judgement should only be performed by a licensed O.T. To ensure the health and safety of the public, the Board is recommending language be added accordingly.

Since the profession of occupational therapy has responsibility for providing health care services to some of the most vulnerable and frail members of the public, regulations which set minimal competencies and standards for practice are essential. The Board has determined that the requirements for initial licensure are consistent with national standards, but that evidence of

continuing education and practice is necessary to ensure that an occupational therapist has remained competent to practice.

Alternatives

Please describe the specific alternatives for achieving the purpose of the existing regulation that have been considered as a part of the periodic review process. This description should include an explanation of why such alternatives were rejected and this regulation reflects the least burdensome alternative available for achieving the purpose of the regulation.

The two major issues facing the Board in the regulation of occupational therapists and the alternatives to dealing with those issues are discussed below:

1. Continuing competency hours

The Advisory Board considered the options for continuing competency and recommended that a minimum number of hours of active practice in a biennium combined with a small number of continuing learning activities would provide the assurance that an occupational therapist was maintaining his current knowledge and skills and being exposed to new ideas, techniques and technologies. The proposed requirements will only necessitate that someone actively practice for 160 hours (the equivalent of 4 weeks) within a biennium and have a total of 20 hours of continuing learning, 10 of which may be totally self-directed study or activity. Occupational therapists who recommended these requirements believe that they are minimal and will not present a burden for compliance. In 31 of the 50 states, there are requirements for continuing education or competency; the requirement ranges between 10 to 30 hours per year.

The availability of continuing learning opportunities and hours was discussed and considered in the adoption of these regulations. In many organizations where occupational therapists are employed, such as hospitals or school systems, attendance at in-service courses and presentations are expectations of employment and part of the employee's evaluation. Courses are available without any charge through a hospital or other health care organization which provides continuing education for persons on staff. Entities which employ occupational therapists, such as home health agencies, also routinely make in-service training available and encourage participation by their employees. Since an occupational therapist is only required to obtain 5 hours per year of Type 1 continuing learning (Type 1 must be offered and documented by a recognized entity such as a hospital or other organization), those hours could be obtained during the hours of employment at no cost to the employee.

For those occupational therapists who do not have such in-service training readily available, the Virginia Occupational Therapy Association has state conferences in different parts of Virginia which offer the sufficient number of continuing education hours. The VOTA is also divided into regional districts, each of which offer continuing education at their meetings. Yearly membership in the VOTA is \$40, but it is not necessary to be a member of the VOTA to attend one of the district meetings and obtain the continuing education offered.

The American Occupational Therapy Association offers a number of continuing learning opportunities ranging from its annual convention to courses by teleconferencing. On their website, there is a lengthy list of continuing education offerings, including: a) on-line workshops in which the practitioner can participate and communicate with faculty through e-mail (participation can occur at any time of the day or night); b) courses on disk, which range in costs from \$17 to \$62 and could be shared by a number of O. T.'s; and c) telephone seminars at which the course would be transmitted to a site for an average cost of \$115. Since occupational therapists typically work within organizations, costs for these offerings could be underwritten by the employer or shared by a group of O. T.'s.

The 5 hours per year of Type II continuing learning is self-directed and self-verified. It is the type of learning in which every professional should routinely be engaged, consisting of reading journals, learning from colleagues, or self-study of any type. There should be no cost to the O. T. for acquiring hours of Type II learning.

Requirement for active practice hours

The current regulations require 160 hours of supervised practice for an applicant or a lapsed licensee who has been out of practice for six or more years. In adopting regulations for licensure, the Advisory Board strongly recommended changing the regulation to require supervised practice for anyone who has not actively practiced for two or more years. With the changes occurring in health care, an occupational therapist who has not practiced at least 160 hours over a two-year period has likely not remained current with professional knowledge and skills.

An occupational therapist who is maintaining an active license to practice should be required to work a minimal number of hours during the biennium in order to keep up with a rapidly changing, highly technical field. The requirement of 160 hours of practice (the equivalent of four weeks) with a two-year period is easily obtainable, even for persons who are working only on a part-time basis.

To accommodate persons whose practice as an occupational therapist may now include educational, administrative, supervisory or consultative services rather than direct patient care, the Board added a definition of "active practice" to clarify that those professional activities were acceptable for the purpose of fulfilling the renewal or initial licensure requirements.

For those practitioners who have not engaged in practice for more than six years, the Board considered whether it should be necessary to require retesting as a measure of minimal competency. It decided to adopt a less restrictive requirement of practice under supervision for 320 hours before relicensure or initial licensure. Therefore, for those persons who have been out of practice for two or more years, the proposed regulations would require supervised practice before a license could be issued, reactivated or reinstated. Such persons would be able to have employment in occupational therapy, but they would not be able to call themselves occupational therapists or function as licensees until the board-approved practice under supervision was completed - either 160 hours in two months (2 to 6 years) or 320 hours in four months (six or more years).

2. Supervision of unlicensed persons to ensure compliance with law and regulation and provide for public protection:

Members of the profession are often faced with issues related to the appropriate use of unlicensed assistants in practice. The Code of Virginia permits practice by unlicensed assistants but also restricts the practice of occupational therapy as defined in § 54.1-2900 to persons who hold a license from the Board. Licensees often have a dilemma about what tasks constitute practice and what tasks may be appropriately delegated.

To address issues related to the competency and use of unlicensed persons in practice, the Board has considered a variety of possible actions. It has considered the possibility of legislative actions to regulate assistants, so there would be some measure of their competency and recourse for their actions. A study by the Board of Health Professions is currently being conducted, and there would appear to be insufficient evidence of risk of harm to warrant licensure of these persons, provided they are appropriately supervised in the performance of delegated tasks which are commensurate with their training. Therefore, the Board is not recommending regulation of assistants but rather clarification of its regulation on supervision.

To provide greater regulatory clarity, the Board has reviewed the regulations of the Board of Nursing for delegation of certain tasks to unlicensed persons. While the nursing regulations are more extensive than is required for this Board, there are several provisions that could be applicable in assuring the appropriate delegation of a task to an unlicensed person. Those regulations specify that tasks and level of supervision must be appropriate to the level of competency of the licensed person and consistent with other related factors. Likewise, the Board has considered incorporation of language similar to that governing the use of unlicensed persons by licensees in the medical profession in § 54.1-2901 of the Code of Virginia. Under exceptions to the practice of medicine, the Code permits delegation of activities or functions that are non-discretionary and do not require the exercise of professional judgment and are normally and customarily delegated by practitioners of the healing arts. Such a standard may serve to provide clarity to the issue of delegation and practice of unlicensed persons in the practice of occupational therapy.

Recommendation

Please state whether the agency is recommending the regulation be amended or terminated and the reasons such a recommendation is being made.

The board is recommending amendments to its regulations for the licensure of occupational therapists in order to address concerns about the adequacy of supervision for unlicensed assistants and the competency of practitioners who are renewing their licenses. **Proposed regulations establishing requirements for continuing competency have already been submitted for review by the executive branch and will not be included in the Notice of Intended Regulatory Action resulting from this review.** Other amendments are recommended for greater clarity for the regulated entities.

Substance

Please detail any changes that would be implemented.

18 VAC 85-80-36. New section on practice while awaiting examination results.

Based on a recommendation from staff who often receive inquiries from applicants, the Board suggests that a new section be added to clarify the conditions by which an applicant can practice occupational therapy while waiting the examination results, consistent with § 54.1-2956.5 of the Code of Virginia.

18 VAC 85-80-70. Biennial renewal of licensure.

An editorial change is recommended to eliminate duplication in language.

18 VAC 85-80-110. Supervisory responsibilities.

Amendments to regulations are recommended to clarify the supervisory responsibilities in response to concerns about the appropriate functions for unlicensed assistive personnel. As discussed in the "Alternatives" section, the board intends to consider regulatory provisions which will ensure that the licensed occupational therapist is responsible for the initial assessment and evaluation and for development of a treatment plan. Clinical decision and tasks that require professional knowledge and judgment should not be delegated to unlicensed assistants and that the licensee remains fully responsible for patient safety and outcomes.

Family Impact Statement

Please provide a preliminary analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which 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.

In its preliminary analysis of the proposed regulatory action, the agency has determined that there is no potential impact on the institution of the family and family stability and no effect on family income.