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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Physical Therapy, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC112-20
Regulation title	Regulations Governing the Practice of Physical Therapy
Action title	Direct access certification
Date this document prepared	7/25/06

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an “emergency situation” as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The adoption of an “emergency” regulation by the Board of Physical Therapy is required to comply with amendments to Chapters 9 and 18 of Title 54.1 and the second enactment clause of HB2087 and SB1305 enacted by the 2007 General Assembly, which requires: “*That the Board shall promulgate regulations to implement provisions of this act to be effective within 280 days*”

of its enactment.” Chapters 9 and 18 were enacted on March 13, 2007, the day the bills were signed by the Governor.

The amended regulations will: 1) establish the qualifications and application requirements for certification in direct access; 2) set out the responsibility for the physical therapist to obtain the medical release and patient consent required by the statute; 3) establish a biennial renewal of certification with continuing education hours; and 4) establish the fees for direct access certification.

Legal basis

Other than the emergency authority described above, 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., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

18VAC112-20-10 et seq. Regulations Governing the Practice of Physical Therapy are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board of Physical Therapy the authority to promulgate regulations to 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:

- ...
- 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 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...*

The mandate for promulgation of regulations to establish a certification for direct access authorization for physical therapists is found in:

§ 54.1-3482. (Contingent effective date - see Editor's note) Certain experience and referrals required; unlawful to practice physical therapist assistance except under the direction and control of a licensed physical therapist.

A. It shall be unlawful for a person to engage in the practice of physical therapy except as a licensed physical therapist, upon the referral and direction of a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician, except as provided in this section.

B. A physical therapist who has obtained a certificate of authorization pursuant to § 54.1-3482.1 may evaluate and treat a patient for no more than 14 consecutive business days after evaluation without a referral under the following conditions: (i) the patient at the time of presentation to a physical therapist for physical therapy services is not being currently cared for, as attested to in writing by the patient, by a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician for the symptoms giving rise to the presentation; (ii) the patient

identifies a practitioner from whom the patient intends to seek treatment if the condition for which he is seeking treatment does not improve after evaluation and treatment by the physical therapist during the 14-day period of treatment; (iii) the patient gives written consent for the physical therapist to release all personal health information and treatment records to the identified practitioner; and (iv) the physical therapist notifies the practitioner identified by the patient no later than three days after treatment commences and provides the practitioner with a copy of the initial evaluation along with a copy of the patient history obtained by the physical therapist. Evaluation and treatment may not be initiated by a physical therapist if the patient does not identify a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician to manage the patient's condition. Treatment for more than 14 consecutive business days after evaluation of such patient shall only be upon the referral and direction of a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician. A physical therapist may contact the practitioner identified by the patient at the end of the 14-day period to determine if the practitioner will authorize additional physical therapy services until such time as the patient can be seen by the practitioner. A physical therapist shall not perform an initial evaluation of a patient under this subsection if the physical therapist has performed an initial evaluation of the patient under this subsection within the immediately preceding three months. For the purposes of this subsection, business days means Monday through Friday of each week excluding state holidays.

C. After completing a three-year period of active practice upon the referral and direction of a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician, a physical therapist may conduct a one-time evaluation, that does not include treatment, of a patient who does not meet the conditions established in (i) through (iv) of subsection B without the referral and direction of a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician; if appropriate, the physical therapist shall immediately refer such patient to the appropriate practitioner.

D. Invasive procedures within the scope of practice of physical therapy shall at all times be performed only under the referral and direction of a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician.

E. It shall be unlawful for any licensed physical therapist to fail to immediately refer any patient to a licensed doctor of medicine, osteopathy, chiropractic, podiatry, or dental surgery, or a licensed nurse practitioner as authorized in his practice protocol, whose medical condition is determined, at the time of evaluation or treatment, to be beyond the physical therapist's scope of practice. Upon determining that the patient's medical condition is beyond the scope of practice of a physical therapist, a physical therapist shall immediately refer such patient to an appropriate practitioner.

F. Any person licensed as a physical therapist assistant shall perform his duties only under the direction and control of a licensed physical therapist.

G. However, a licensed physical therapist may provide, without referral or supervision, physical therapy services to (i) a student athlete participating in a school-sponsored athletic activity while such student is at such activity in a public, private, or religious elementary, middle or high school, or public or private institution of higher education when such services are rendered by a licensed physical therapist who is certified as an athletic trainer by the National Athletic Trainers' Association Board of Certification or as

a sports certified specialist by the American Board of Physical Therapy Specialties; (ii) employees solely for the purpose of evaluation and consultation related to workplace ergonomics; (iii) special education students who, by virtue of their individualized education plans (IEPs), need physical therapy services to fulfill the provisions of their IEPs; (iv) the public for the purpose of wellness, fitness, and health screenings; (v) the public for the purpose of health promotion and education; and (vi) the public for the purpose of prevention of impairments, functional limitations, and disabilities.

(2000, c. 688; 2001, c. 858; 2002, cc. 434, 471; 2003, c. 496; 2005, c. 928; 2007, cc. 9, 18.)

§ 54.1-3482.1. (For contingent effective date - see Editor's note) Certain certification required.

A. The Board shall promulgate regulations establishing criteria for certification of physical therapists to provide certain physical therapy services pursuant to subsection B of § 54.1-3482, without referral from a licensed doctor of medicine, osteopathy, chiropractic, podiatry, dental surgery, licensed nurse practitioner as authorized in his practice protocol, or a licensed physician assistant acting under the supervision of a licensed physician. The regulations shall include but not be limited to provisions for (i) the promotion of patient safety; (ii) an application process for certification to perform such procedures; (iii) minimum education, training, and experience requirements for certification to perform such procedures; and (iv) continuing education requirements relating to carrying out direct access duties under § 54.1-3482.

B. The minimum education, training, and experience requirements for certification shall include evidence that the applicant has successfully completed (i) a doctor of physical therapy program approved by the American Physical Therapy Association; (ii) a transitional program in physical therapy as recognized by the Board; or (iii) at least three years of active practice with evidence of continuing education relating to carrying out direct access duties under § 54.1-3482.

C. In promulgating minimum education, training, and experience criteria, the Board shall consult with an advisory committee comprised of three members selected by the Medical Society of Virginia and three members selected by the Virginia Physical Therapy Association. All members of the advisory committee shall be licensed by the Board of Physical Therapy or the Board of Medicine and shall engage in clinical practice. The committee shall have a duty to act collaboratively and in good faith to recommend the education, training, and experience necessary to promote patient safety. The advisory committee shall prepare a written report of its recommendations and shall submit this report to the Board of Physical Therapy and shall also submit its recommendations to the Board of Medicine for such comments as may be deemed appropriate, prior to the promulgation of draft regulations. The advisory committee may meet periodically to advise the Board on the regulation of such procedures.

D. In promulgating the regulations required by this section, the Board shall take due consideration of the education, training, and experience requirements adopted by the American Physical Therapy Association and the American Medical Association.

(2007, cc. 9, 18.)

The third enactment provides that the amendments to § 54.1-3482 become effective 180 days after the effective date of regulations promulgated under § 54.1-3482.1.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of the regulatory action is compliance with the statute that requires the Board to establish criteria for certification to provide certain physical therapy services without referral. Regulations must provide for promotion of patient safety and for continuing education to carry out direct access duties. Therefore the qualifications for certification are a doctoral or transitional program that includes education in screening for medical disorders or differential diagnosis or specific continuing education in those areas coupled with at least three years of experience in active practice. In addition, a physical therapist who intends to maintain certification will have to direct at least four of the required 30 hours of continuing education each biennium to topics related to practice in a direct access environment.

In compliance with the law, a physical therapist treating a patient without referral will be required to obtain an attestation from a patient that he is not currently being treated for the same condition by another practitioner and written consent to provide a copy of the patient record to another practitioner identified by the patient, if the condition for which he is seeking treatment does not improve after the 14-day period in which the physical therapist is allowed to treat.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

The qualifications required for certification in direct access assure that the physical therapist has education and training in the recognition of and screening for medical disorders to protect patient health and safety while in the care of the physical therapist. The requirement for written consent to provide patient records to another health care practitioner will assure that the physical therapist is able to work collaboratively with other practitioners to provide safe and effective treatment.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

Current section number	Proposed new section number	Current requirement	Proposed change and rationale
n/a	81	n/a	A. An applicant for certification to provide services to patients without a referral as specified in § 54.1-3482.1 shall hold an active, unrestricted license as a physical therapist in Virginia and shall submit evidence satisfactory to the board, that he has one of the following qualifications: 1. Completion of a doctor of physical therapy program

			<p>approved by the American Physical Therapy Association; or</p> <p>2. Completion of a transitional program in physical therapy as recognized by the board; or</p> <p>3. At least three years of post-licensure, active practice with evidence of 15 contact hours of continuing education in medical screening or differential diagnosis, including passage of a post-course examination. The required continuing education shall be offered by a provider or sponsor listed as approved by the board in 18VAC112-20-131 and may be face-to-face or on-line education courses.</p> <p><i>The minimum qualifications for certification were set in § 54.1-3482 in the legislation. The Board did not include additional requirements for training, education or experience. The law allows a PT with 3 years of active practice to qualify with evidence of continuing education, which the Board determined should be 15 contact hours in specific subjects, including a post-course test. The 15 hours could include on-line education and is readily available to PT's throughout Virginia.</i></p> <p>B. In addition to the evidence of qualification for certification required in subsection A, an applicant seeking direct access certification shall submit to the board:</p> <p>1. A completed application as provided by the board;</p> <p>2. Any additional documentation as may be required by the board to determine eligibility of the applicant; and</p> <p>3. The application fee as specified in 18VAC112-20-150.</p> <p><i>The application requirements are necessary to ensure that the Board has sufficient information to determine eligibility and that the application fee has been paid.</i></p>
90	n/a	Sets out the general responsibilities of a physical therapist in his practice	<p>Adds subsection E: A physical therapist providing services with a direct access certification as specified in §54.1-3482 shall utilize the Direct Access Patient Attestation and Medical Release Form prescribed by the board or otherwise include in the patient record the information, attestation and written consent required by subsection B of §54.1-3482.</p> <p><i>The law specifies a 14-day period of treatment under direct access and requires the PT to obtain certain attestations and written consent from the patient before treatment without referral can be initiated. The additional language in section 90 is necessary to assure that the PT's responsibility is carried out in accordance with the law.</i></p>
130	n/a	Sets out the requirements for biennial renewal including	<p>Adds subsection D: In order to renew a direct access certification, a licensee shall be required to:</p> <p>1. Hold an active, unrestricted license as a physical therapist; and</p>

		evidence of continuing competency	<p>2. Comply with continuing education requirements set forth in 18VAC112-20-131 I.</p> <p><i>The Board has established a biennial renewal of certification concurrent with the renewal of a PT's license.</i></p>
131	n/a	Establishes the hours of continuing competency required for renewal and the listing of approved providers	<p>Adds subsection I: Physical therapists holding certification to provide direct access without a referral shall include four contact hours related to carrying out direct access duties as part of the required 30 contact hours of continuing education. Courses for direct access continuing education shall relate to clinical practice in a direct access setting.</p> <p><i>The law requires continuing education requirements related to carrying out direct access without referral. The Board determined that four hours every two years (as a part of the 30 hours required for renewal of a PT license) relating to clinical practice in direct access was minimal.</i></p>
150	n/a	Establishes the fees for application and renewal of certification	<p>Adds subsection F for direct access certification fees: 1) The application fee shall be \$100 for a physical therapist to obtain certification to provide services without a referral; 2) The fee for renewal on a direct access certification shall be \$35 and shall be due by December 31st in each even-numbered year; and 3) A fee of \$15 for processing a late renewal of certification within one renewal cycle shall be paid in addition to the renewal fee.</p> <p><i>The application fee includes a biennial renewal of certification (\$35) or at least 24 months of certification before renewal is required. It also includes the cost of review of an application and issuance of a new license with direct access certification noted. The renewal fee is based on the need to cover expenses related to audits for continuing education, investigation of complaints for direct access care, and any disciplinary proceedings that may result for such care. The late fee is consistent with Department policy for late fees to be approximately 1/3 of the renewal fee.</i></p>

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

In order to determine the minimum education, training, and experience required for certification, the Board was required to consult with an advisory committee, as set forth in subsection C of

§ [54.1-3482.1](#). The law requires that the advisory committee be comprised of three members selected by the Medical Society of Virginia and three members selected by the Virginia Physical Therapy Association. All members of the advisory committee must be licensed by the Board of Physical Therapy or the Board of Medicine and must engage in clinical practice.

The Committee met on Friday, May 11, 2007, from 4:00pm - 6:00pm at the Department of Health Professions in Richmond, Virginia. All members were in attendance.

The Committee began its discussions with consideration of the minimum criteria set out in subsection B of [54.1-3482.1](#), as follows: *The minimum education, training, and experience requirements for certification shall include evidence that the applicant has successfully completed (i) a doctor of physical therapy program approved by the American Physical Therapy Association; (ii) a transitional program in physical therapy as recognized by the Board; or (iii) at least three years of active practice with evidence of continuing education relating to carrying out direct access duties under § [54.1-3482](#).*

The physical therapists on the Committee described the scope of the doctoral program and the transitional program in physical therapy, including the preparation for practice in a direct access environment. Students graduating from accredited physical therapy programs currently receive the DPT or Doctor of Physical Therapy degree. Physical therapists who graduated before schools adopted doctoral programs may enter a transitional program that leads to a doctoral degree. Virginia physical therapy schools have been graduating doctoral students for at least three years. The physical therapists also provided information about courses available for continuing education in medical screening and differential diagnosis.

There was discussion about the educational and practice preparation in medical screening and differential diagnosis in the DPT and transitional programs and about the need for some period of time in independent practice of physical therapy to ensure experience with patient presentation, treatment options and indicators for referral. Based on the information provided and its responsibility to recommend the education, training and experience criteria necessary to promote patient safety, the Committee recommends the following qualifications for certification:

- 1) Evidence of completion of a doctor of physical therapy program approved by the American Physical Therapy Association and completion of at least one year of post-licensure, full-time, clinical practice;
- 2) Evidence of completion of a transitional program in physical therapy as recognized by the Board of Physical Therapy and completion of at least one year of post-licensure, full-time, clinical practice; or
- 3) Evidence of completion of at least 15 contact hours of continuing education (to include face-to-face or on-line courses with a post-course examination) in patient assessment or differential diagnosis, offered by a provider approved by the Board and at least three years of post-licensure, full-time, clinical practice.

The 2007 legislation required the advisory committee to provide a written report of its recommendations and submit it to the Board of Physical Therapy. Prior to the Board's adoption of regulations, the recommendations were also be submitted to the Board of Medicine for such comments as may be deemed appropriate. Therefore, the advisory committee submitted its report

to the Board of Medicine for its review and comment at its meeting on June 21, 2007. The Board of Medicine accepted the report without further recommendation. The Board of Physical Therapy is required to promulgate regulations, including continuing education requirements relating to carrying out direct access duties, to be effective within 280 days of its enactment or by November 26, 2007. The provisions of the act amending § [54.1-3482](#) do not become effective for 180 days after the effective date of the regulations. Finally, the law provides that the Committee may meet periodically to advise the Board on the regulation of such procedures.

The Board of Physical Therapy accepted the report of the Advisory Committee but did not follow its recommendation for one year of post-licensure, full-time clinical practice as qualification for certification in direct access.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

The Board is seeking comments on the Notice of Intended Regulatory Action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The Board is also 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 or email to Lisa Hahn, Executive Director of the Board of Physical Therapy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or lisa.hahn@dhp.virginia.gov or may submit comment on the Virginia Regulatory Townhall at www.townhall.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 day of the public comment period noted on the Townhall.

A public meeting will be held on the proposed regulations pursuant to the Notice of Intended Regulatory Action.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability.

There is no impact on the family.