



Final Regulation Agency Background Document

Agency name	Board of Medicine, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC85-20-10 et seq.
Regulation title	Regulations Governing the Licensure of Occupational Therapists
Action title	Regulation and licensure of occupational therapy assistants
Date this document prepared	10/29/09

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*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

Chapters 64 and 89 (HB383 and SB134) of the 2008 Acts of the Assembly require the Board of Medicine to establish requirements for the licensure of occupational therapy assistants. The key provisions of the regulations are the national credential specified for licensure, the requirements for continuing competency and renewal, the provisions for supervision of occupational therapy assistants (OTA), and the perimeters for practice. In order to be licensed, an applicant must pass the certification examination for an occupational therapy assistant from the National Board for Certification in Occupational Therapy (NBCOT). Practice by an OTA must be supervised by an occupational therapist (OT) and includes services that do not require the clinical decision or specific knowledge, skills and judgment of a licensed OT nor the discretionary aspects of the initial assessment, evaluation or development of a treatment plan.

Revisions to the proposed regulations in section 110 are as follows: 1) changing occupational therapy “personnel” to occupational therapy “assistants”; and 2) changing the requirement for countersigning by an OT of documentation in a patient record entered by an OTA from “within

10 days of such information being recorded” to countersigning at the time of review and evaluation required in subsection B (at least once every 10th treatment or 30 calendar days, whichever comes first).

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On October 29, 2009, the Board of Medicine adopted final amendments to 18VAC85-80-10 et seq., Regulations for the Licensure of Occupational Therapists.

Legal basis

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 numbers, 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.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Medicine 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. ...

In the Medical Practice Act (§ [54.1-2900 et seq.](#)), the Board of Medicine is mandated to set in regulation the requirements for licensure as an occupational therapy assistant.

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

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

§ 54.1-2956.5. Unlawful to practice occupational therapy without license; restriction of titles for occupational therapy assistants.

A. It shall be unlawful for any person not holding a current and valid license from the Board to practice occupational therapy or 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 use the designations "O.T." or "O.T.L." or any variation thereof. 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 six months from the date of graduation, whichever occurs sooner.

B. It shall be unlawful for any person to practice as an occupational therapy assistant as defined in § 54.1-2900 or to hold himself out to be or advertise that he is an occupational therapy assistant or use the designation "O.T.A." or any variation thereof unless such person holds a current and valid license from the Board to practice as an occupational therapy assistant. However, a person who has graduated from a duly accredited occupational therapy assistant education program may practice with the title "Occupational Therapy Assistant-License Applicant" or "O.T.A.-Applicant" until he has taken and received the results of any examination required by the Board or until six months from the date of graduation, whichever occurs sooner.

Purpose

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

The board has reviewed the role delineations for occupational therapy and adopted regulations that specify the extent of responsibilities within the education and experience of the two levels of licensees. While the OTA can be an active participant in patient care from the initial assessment through discharge decisions and planning, the OT is ultimately responsible and accountable for patient care and outcomes under clinical supervision. The role of an OTA is to perform those tasks assigned, document in the patient record, consult with the OT on patient responses and functionality and provide for resources necessary upon discharge. The OTA renders services under the supervision of an OT that do not require the clinical decision or specific knowledge, skills and judgment of a licensed OT and do not include the discretionary aspects of the initial assessment, evaluation or development of a treatment plan for a patient. By clearly specifying the scope of practice for an OTA and the requirements of the OT for supervision, co-signing patient records and re-evaluating patients, there is some assurance that the health and safety of citizens receiving occupational therapy services are protected.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The intent of the regulatory action is compliance with the statute that requires the board to establish licensure for OTA’s and to promulgate regulations for that purpose. The substance of the regulation is to set the minimum criteria necessary for initial licensure and continued licensure and to establish an appropriate scope of practice for an OTA who practices in coordination with and under the supervision of an OT.

Issues

Please identify the issues associated with the proposed regulatory action, including:
 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
 3) other pertinent matters of interest to the regulated community, government officials, and the public.
 If there are no disadvantages to the public or the Commonwealth, please indicate.

- 1) The primary advantage of this proposal to the public is more accountability for occupational therapist assistants by becoming a licensed profession. As such, their scope of practice is more defined and more inclusive, so their ability to provide services to populations of patients is enhanced. The availability of additional licensed practitioners has the potential to improve accessibility and the quality of occupational therapy services. There are no disadvantages.
- 2) There are no disadvantages of these provisions to the agency or the Commonwealth; licensure is required by law and already in effect under emergency regulations. More specificity about the scope of practice and supervision of OTA’s allows board staff to direct persons with questions about those issues to the regulations.
- 3) There are no other pertinent matters.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
110	Subsection B requires the OT to meet with the occupational therapy “personnel” on a schedule for review and evaluation.	The term occupational therapy “personnel” is changed to occupational therapy “assistants”	The terminology in the regulation was generic because OTA’s were not a regulated profession. With licensure, the term should have been changed.
110	Subsection D requires countersigning by an OT of documentation in a patient record entered by an OTA from “within 10 days of	The rule is changed to require countersigning at the time of review and evaluation required in subsection B (at least once every 10 th treatment or 30 calendar days,	The proposed requirement for countersigning was too burdensome. If notes were entered in a patient record on a daily basis, it

	such information being recorded”	whichever comes first).	could require daily review and countersigning by the OT. Commenters requested a more reasonable rule.
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Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Proposed regulations were published in the Virginia Register of Regulations on June 8, 2009. Public comment was requested for a 60-day period ending August 7, 2009. A Public Hearing before the Advisory Board on Occupational Therapy was held on July 22, 2009 at which the following comments were given by representatives of the Virginia Occupational Therapy Association (VOTA):

The VOTA supported the proposed regulations but suggested that the word “personnel” be changed to occupational therapy assistant in 18 VAC 85-80-110 B and that section D be stricken completely or the requirement for an occupational therapist to “countersign” in the last sentence of section D be deleted.

Board response:

At the recommendation of the Advisory Board, the Board of Medicine revised the terminology in subsection B and the requirement for countersigning in subsection D. It did not eliminate the requirement for countersigning completely, as it is the only documentation that the supervising OT has reviewed the patient record and the treatment and progress of a patient receiving care from an OTA.

There were 23 comments posted on the Virginia Regulatory Townhall on the proposed regulations:

Commenters expressed concern about the requirement to countersign notes on patient care entered by an occupational therapy assistant within 10 days. Since treatment notes are sometimes entered on a daily basis, such a provision may require daily review and countersigning by the OT within 10 days of every entry. Counter-signing of patient notes and other records should be consistent with the requirement for supervisory review once every 10th visit or every 30 days, whichever occurs first.

Board response:

The board revised the requirement in subsection D consistent with requests from commenters.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

In addition to those listed below, sections of the regulation that are applicable to occupational therapy assistants as well as occupational therapists have been amended accordingly.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10	n/a	Sets out definitions for words and terms used in the regulation	Adds a subsection A to reference words and terms already defined in the Code and adds OTA to definitions, where appropriate.
26	n/a	Sets fees for licensure and renewal	Cost for the initial license is \$70; biennial renewal is \$70. Other fees are set proportionally. <i>Fees for OTA are generally set at one/half the amount for an OT, which is consistent with other professions licensed under Medicine in which there is a subordinate license (Radiologic technologist and radiologic technologist, limited)</i>
45	n/a	Provides for practice by a graduate awaiting results of the licensure examination	Subsection B is added to specify that OTA-applicants can practice for six months or until they have received the results of the examination, whichever comes first. <i>The regulatory provision is identical to the statutory.</i>
50	n/a	Sets out the requirements for an examination to qualify for licensure	Subsection B is added to specify that the NBCOT certification examination is required for initial licensure. <i>Currently, there is title protection in the Code which restricts the use of OTA or Occupational Therapist Assistant to someone who holds the credential established in regulation. Section 61 of this chapter provides that the NBCOT certification is required for use of the protected titles. Therefore, anyone who is currently practicing as an OTA has passed the NBCOT certification examination and will qualify for licensure.</i>
61	n/a	Sets the credential required for a person to use the title of OTA	This section is repealed since certification is being replaced by licensure.
90	n/a	Sets out the general responsibilities of an OT	Adds subsection B to specify that an OTA renders services under the supervision of an OT that do not require the clinical decision or specific knowledge, skills and judgment of a licensed OT and do not include the discretionary aspects of the initial assessment, evaluation or development of a treatment plan for a patient.

			<i>The general duties and responsibilities set out in this section are similar to those proposed by the VOTA and found in regulations of neighboring states.</i>
100	n/a	Sets out the individual responsibilities of an OT	<p>Adds subsection D to specify the responsibilities of an OTA to include:</p> <ol style="list-style-type: none"> 1. Participation in the evaluation or assessment of a patient by gathering data, administering tests and reporting observations and client capacities to the occupational therapist; 2. Participation in intervention planning, implementation and review; 3. Implementation of interventions as determined and assigned by the occupational therapist; 4. Documentation of patient responses to interventions and consultation with the occupational therapist about patient functionality; 5. Assistance in the formulation of the discharge summary and follow-up plans; and 6. Implementation of outcome measurements and provision of needed patient discharge resources under the direction of the occupational therapist. <p><i>The Board derived the description of OTA responsibilities from a compilation of listings in other states' regulation and recommended from the VOTA. The OTA may be a participant in patient care from the initial assessment through discharge decisions and planning. The role of an OTA is to perform those tasks assigned, document in the patient record, consult with the OT on patient responses and functionality and provide for resources necessary upon discharge.</i></p>
110	n/a	Sets out the supervisory responsibilities of the OT for unlicensed occupational therapy personnel	<p>Subsection A now specifies the delegation by an OT to a licensed occupational therapy assistant. #1 provides that the OT is ultimately responsible and accountable for patient care and outcomes under his clinical supervision. <i>The OTA is responsible for safe performance of the tasks and responsibilities to which he is assigned, but the OT is accountable for the overall well-being of the patient and for the clinical outcome of treatment.</i></p> <p>#2 is amended to delete the reference to "unlicensed occupational therapy personnel" which was inclusive of OTA's and continues to include OTA's who are now "licensed" personnel. It currently provides that an</p>

		<p>occupational therapist shall not delegate the discretionary aspects of the initial assessment, evaluation or development of a treatment plan for a patient nor shall he delegate any task requiring a clinical decision or the knowledge, skills, and judgment of a licensed occupational therapist.</p> <p>#3 is also amended to reference OTA's, who were previously considered "unlicensed occupational therapy personnel." Delegation shall only be made if, in the judgment of the occupational therapist, the task or procedures do not require the exercise of professional judgment, can be properly and safely performed by an appropriately trained OTA, and the delegation does not jeopardize the health or safety of the patient.</p> <p>#4 provides that delegated tasks or procedures shall be communicated <i>to an occupational therapy assistant</i> on a patient-specific basis with clear, specific instructions for performance of activities, potential complications, and expected results.</p> <p>Subsection B specifies that the frequency, methods, and content of supervision are dependent on the complexity of patient needs, number and diversity of patients, demonstrated competency and experience of the assistant, and the type and requirements of the practice setting.</p> <p><i>The Advisory Board reviewed regulations in other states in which the various levels of supervision were prescribed depending on the experience and years in practice of the OTA. While those are factors to be considered, there are other factors of equal importance. Therefore, the regulations do not equate a level of supervision to years of experience but require the supervision to be based on consideration of all pertinent factors and allow for flexibility dependent on patient needs and practitioner abilities.</i></p> <p>The occupational therapist providing clinical supervision shall meet with the occupational therapy personnel <u>assistant</u> to review and evaluate treatment and progress of the individual patients at least once every fifth <u>tenth</u> treatment session or 21 <u>30</u> calendar days, whichever occurs first. <u>For the purposes of this subsection,</u></p>
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			<p><u>group treatment sessions shall be counted the same as individual treatment sessions.</u></p> <p><i>Current regulations are generally written for supervision of all types of unlicensed occupational therapy personnel. The need for frequent review and evaluation of treatment and patient progress is mitigated by the competency and accountability of an OTA. The amended requirement for OT review is standard practice, consistent with Medicare specifications.</i></p> <p>Subsection C is amended to specify that no more than three occupational therapy assistants can be counted among the six occupational therapy personnel who can be supervised at any one time. <i>This provision allows a facility to employ any number of OTA's who work part-time, but the OT would not supervise more three OTA at any one time.</i></p> <p>Subsection D provides that the OTA must document in the patient record any aspects of the initial evaluation, treatment plan, discharge summary or other notes on patient care performed by the assistant [, and the supervising occupational therapist shall review and countersign within 10 days of such information being recorded. <u>The supervising occupational therapist shall countersign such documentation in the patient record at the time of the review and evaluation required in subsection B of this section.</u>]</p> <p><i>The requirement for countersigning ensures oversight of services provided by the OTA within a reasonable period of time, allowing for intervention or redirection by the OT if planned interventions and treatment are not resulting in adequate patient progress. The timing of countersigning has been changed to be consistent with the review and evaluation required in subsection B.</i></p>
n/a	111	n/a	<p>Section 111 specifies the requirements for supervision of unlicensed occupational therapy personnel.</p> <p>Subsection A states that unlicensed occupational therapy personnel may be supervised by an occupational therapist or an occupational therapy assistant.</p> <p>Subsection B specifies the tasks that unlicensed</p>

		<p>occupational therapy personnel may be utilized to perform to include:</p> <ol style="list-style-type: none"> 1. Non-client-related tasks, including but not limited to, clerical and maintenance activities and the preparation of the work area and equipment; and 2. Certain routine patient-related tasks that, in the opinion of and under the supervision of an occupational therapist, have no potential to adversely impact the patient or the patient's treatment plan. <p><i>Since both OT's and OTA's may supervise unlicensed occupational therapy personnel (aides or other such designations), this section is added to specify the supervisory role and the tasks that may be so delegated.</i></p>
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Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

There were no alternative methods considered; adoption of regulations was required by statute.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

There is no impact on the institution of the family and family stability.