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Final Regulation Agency Background Document

Agency name	State Mental Health, Mental Retardation and Substance Abuse Services Board
Virginia Administrative Code (VAC) citation	12 VAC 35-45
Regulation title	Regulations for Providers of Mental Health, Mental Retardation and Substance Abuse, <u>and Brain Injury</u> Services for Children
Action title	Addition of provisions for licensing providers of brain injury services
Date this document prepared	11/12/06

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

This action will amend the existing Regulations for Providers of Mental Health, Mental Retardation, and Substance Abuse Residential Services for Children to include provisions for licensing providers of brain injury services. The existing regulations provide standards for licensing providers of residential treatment services for children with mental illness, mental retardation or substance use disorders and are an addendum to 22VAC42-10-10 et seq., which are generic (core) standards governing a wide variety of residential facilities licensed by the Departments of Mental Health, Mental Retardation and Substance Abuse Services (Department), Social Services, Education, and Juvenile Justice. The standards in this addendum or "Mental Health Module" as it is operationally called, cover a wide range of residential services from small group homes to large residential treatment facilities. The proposed regulatory action adds a definition of "brain injury" and incorporates brain injury service into the definition "services" that are governed by these regulations. Several other definitions have been added or revised to encompass brain injury services. The regulations have been revised to require providers of brain injury services to maintain policies and structured programs to reduce or ameliorate the effects of brain injury. They add "neurobehavioral service" to the scope of services that may be part of a structured program. The

amended regulations also include requirements for the staff and supervision of residential facilities for children with brain injury.

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 December 8, 2006 the State Mental Health, Mental Retardation and Substance Abuse Service Board adopted the amendment to the Regulations for Providers of Mental Health, Mental Retardation ~~and Substance Abuse~~, and Brain Injury Services for Children to comply with Chapter 725 of the 2005 Virginia Acts of Assembly.

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.

The State Mental Health, Mental Retardation and Substance Abuse Services Board (Board) has the statutory authority to adopt the regulations under Va. Code § 37.2-203 and Chapter 725 of the 2005 Virginia Acts of Assembly. The authority is mandatory.

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.

This regulatory action will add provisions to the existing Mental Health Module to enable the Department to license providers of residential services for individuals with brain injuries. Virginia does not currently have a Brain Injury Waiver.

In December 2005, the Board adopted emergency regulations to implement the provisions of the new legislation. Prior to that, there was no designated licensing authority for residential services serving individuals with brain injuries and some applicants had been denied licensing as a result. This action will allow these services to continue to operate in Virginia. Before this specific licensing authority was implemented, some residential brain injury services were licensed as assisted living facilities by the Department of Social Services. This licensing authority has been or will be transferred to the Department.

The agency has developed the regulations in collaboration with the Department of Rehabilitative Services and representatives of various stakeholder groups. The regulation is intended to establish a framework for licensing providers of brain injury services to ensure there is appropriate and consistent oversight, support, and resources to provide an acceptable standard of care for persons who receive services. Prior to this, there has been no single authority responsible for oversight of this residential service. Therefore, this regulatory action is essential to protect the welfare of residents of Virginia with brain injuries and to ensure fair and consistent monitoring of providers of this service.

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.

Existing definitions have been modified and new definitions have been added to identify providers of brain injury services to be subject to licensing requirements. New definitions include “ brain injury” and “neurobehavioral services” to clarify and facilitate the implementation of the new licensing provisions. Provisions have been added to require providers to have policies for children with a diagnosis of brain injury in a residential service. Neurobehavioral services are added to list of services that are provided in a residential setting and providers are required to assess the needs of residents with brain injury. The provider staffing requirements are changed to require brain injury service providers to employ or contract with staff with the appropriate credentials to provide brain injury services.

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. In the past, the development and availability of brain injury services were limited in Virginia because no agency had been given licensing authority. This action is likely to increase the availability of these services in the Commonwealth. Additional brain injury services have become licensed following the promulgation of the emergency regulations.
2. The advantage of this regulatory action to the Commonwealth is that it provides for licensing of brain injury residential services using the same regulations as those used for other children’s residential services. This simplifies and standardizes the process for providers of service.

The Department’s existing Office of Licensing will be responsible for licensing children’s residential treatment providers of brain injury services in accordance with the new regulations. This is a cost-efficient and effective means to implement the regulations because this Office has the administrative support and experience to perform the required functions. Therefore, these regulations should be advantageous to the Department, providers of brain injury services, and the public.

There are no disadvantages.

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.

There have been no changes to the text of the regulation since the publication at the proposed stage.

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.

Commenter	Comment	Agency response
<p>Jane Peay, Central Virginia Community Services Board</p>	<p>The definition of “brain injury” does not include brain injury sustained as a result of birth trauma</p> <p>The regulations should include provisions for need screening and in-depth assessment of the nature and severity of brain injury. Need detailed description of injury and course of recovery.</p>	<p>The definition in the regulations is exactly the same as the statutory definition (Chapter 725 of the 2005 Virginia Acts of Assembly). The statute provides a definition of acquired brain injury which does not usually encompass brain injury from birth trauma.</p> <p>The regulations require that the brain injury provider contract or employ a neuropsychologist or licensed clinical psychologist to provide neurobehavioral services. These individuals will assist with initial assessments, development of service plans, staff training, crises, and service design.</p> <p>No changes have been made in response to these comments.</p>
<p>Virginia Office for Protection and Advocacy</p>	<p>The agency should carefully consider the use of behavior management techniques and strategies. Restraints may be counter-indicated. Providers should be encouraged not to rely on seclusion and restraints.</p> <p>Increase qualifications required regarding staffing to include experience with brain injuries and children.</p>	<p>Use of the least restrictive behavioral interventions are now required in the regulations. Residential services for individuals with brain injury will not use seclusion.</p> <p>The regulations do require staff to have two years working with children. Program directors must have direct experience in working with individuals with brain injury.</p> <p>No changes have been made in response to these comments.</p>

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.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10		This section provides definitions of terms that are relevant to the current regulations. Terms that are specifically applicable to brain injury services and providers are not used in the current regulations and not defined in this section.	Changes have been made to the definitions of “care;” “residential treatment program;” and “service.” Each definition has been expanded to encompass brain injury services or facilities, as appropriate. The definition of “service” is expanded to include “planned individualized interventions intended to reduce or ameliorate the effects of brain injury. This will allow the Department to license residential programs that provide brain injury services under these regulations. Definitions are added for “brain injury;” and “neurobehavioral service.” These terms are used in new provisions for brain injury services. The definitions are intended to clarify and facilitate the implementation of the new regulatory requirements.
80C		The current provision requires service providers to have and implement written policies for structured programs for the care and treatment of facility residents with mental illness, mental retardation, and substance abuse. This section also lists the types of services or interventions that may be provided to residents of facilities.	The requirement has been expanded to require policies for persons with brain injury in a residential service. “Neurobehavioral services” is added to the list of services that are provided to the residents of facilities.
80D		The current section requires providers to have formal arrangements for evaluation, assessment, and treatment of the mental health needs of residents.	This provision has been expanded to require providers to assess the brain injury needs of residents.

210			This new section has been added to the regulations requiring that providers of services to persons with brain injury employ or contract with staff with the credentials that are considered appropriate for the type of services provided.

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.

The existing “mental health module” regulations apply largely to small residential businesses licensed by the Department that provide mental health, mental retardation, and substance abuse services. The intent of this regulatory action is to add provisions to the existing regulation to enable the Department to license certain residential providers of services to children with brain injury. The regulations are generally designed to accomplish the regulatory objectives taking into consideration the conditions of these small business providers. Most of the regulations concern health and safety.

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.

This regulatory action will implement requirements for licensing providers of services for persons with brain injury. The licensing standards will provide a means regulatory oversight and accountability of service providers. This should have a positive impact on the stability the families of persons with brain injury by promoting the quality of service and an acceptable standard of care. The regulations should not have any significant impact on the authority or rights of parents, self-sufficiency or individual responsibility, marital commitment, or family income.