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Proposed Regulation
Agency Background Document

Agency name	State Board of Behavioral Health and Developmental Services
Virginia Administrative Code (VAC) citation	12 VAC 35-115-10 et seq.
Regulation title	Rules and Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded or Operated by the Department of Behavioral Health and Development Services
Action title	Streamline administrative process; improve program efficiencies; and eliminate redundancies.
Date this document prepared	4/17/14

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

The changes improve the ability of the Human Rights Office to perform its mandated responsibilities and maximize resources, in a manner that promotes the vision of recovery, self-determination, empowerment, and community integration for individuals receiving services.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

Local Human Rights Committee (LHRC)
State Human Rights Committee (SHRC)
State Office of Human Rights (SOHR or OHR)
Virginia Organization of Consumers Asserting Leadership (VOCAL)

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

The State Behavioral Health and Developmental Services Board has the authority to promulgate these regulations under Va. Code §§37.2-203 and 37.2-400. Based on the significant public input provided during the NOIRA review period and subsequently , the Board, at its April 9, 2014 meeting, voted to revise 12 VAC35 115.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

The proposed regulatory changes are intended to:

- Increase the availability and flexibility of human rights advocates for direct involvement with individuals receiving services and other critical functions by:
  - Clarifying the administrative responsibilities of Department of Behavioral Health and Developmental Services with regards to the operation of the Human Rights system
  - Clarifying the role of the Human Rights Advocate
  - Clarifying the role of the Local Human Rights Committee (LHRC)
  - Clarifying the role of the State Human Rights Committee (SHRC)
- Simplify the administrative processes:
  - Dispute resolution process
  - Behavior Treatment Plan review
  - Substitute Decision Making
  - Eliminate redundant or duplicative activities
- Enhance the user friendliness of the regulations:
  - Shorten and reorganize
  - Simplify language

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)

The major changes include:

- Operational functions of the system have been removed from LHRCs, providers and the SHRC and placed with the department.
- The department has an increased responsibility for the overall functioning of the human rights system by supporting LHRCs with resources, training, and consultation.

- The department in consultation with the SHRC, will set the number of local human rights committees.
- LHRC duties will now focus on individual rights (complaints, behavior plans, and variances). The LHRC duties will not include monitoring providers (review of policies, reporting requirements, attendance requirements etc).
- Expanded LHRC review of all restrictions lasting longer than seven days and any plans that proposed to restrict an individual's rights. (DOJ).
- Human Rights Advocates will have increased responsibilities to train all stakeholders on regulatory protections.
- Providers will no longer affiliate with a LHRC rather will access the committee in their area if there is an issue which requires review. Providers will no longer be required to attend LHRC meetings.
- Complaint processes are now consolidated in one section.
- Prohibit the use of prone restraints.

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 the regulatory action poses no disadvantages to the public or the Commonwealth, please indicate.

There are more than 70 local human rights committees (LHRCs). The regulatory changes will reduce the number of LHRCs and fundamentally modify their role and function by shifting from a focus on provider administrative and support activities to review and approval of planned restrictions to the rights of individuals receiving services.

The regulatory changes reorganize the information regarding the complaint process to clarify expectations and responsibilities.

Requirements more restrictive than federal

Please identify and describe any requirements of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The human rights regulations are not more restrictive than applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities that will be particularly affected by the proposed regulatory changes.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

To assure that constituents, providers, and the public had ample opportunity to provide input, a thirty day extension to original NOIRA time period was granted. Due to the Department's extensive effects to secure constituents, providers, and the public input for these proposed regulatory changes and the Board's approved meeting schedule, the submission of these proposed regulatory changes is after the suggested submission deadline for regulatory changes resulting from a NOIRA review and will require an approval of an extension to that deadline.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is 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 via the Regulatory Town Hall website (**http://www.townhall.virginia.gov**), or by mail, email or fax to State Human Rights Director**.** Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last date of the public comment period.

A public hearing will be held during this regulatory stage is published in the *Virginia Register of Regulations* and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (**http://www.townhall.virginia.gov**) and on the Commonwealth Calendar website (**http://www.virginia.gov/cmsportal3/cgi-bin/calendar.cgi**). Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that we are looking at the impact of the proposed changes to the status quo.

Description of the individuals, businesses or other entities likely to be affected (positively or negatively) by this regulatory proposal. Think broadly, e.g., these entities may or may not be regulated by this board	Individuals receiving services, provider organizations licensed or funded by DBHDS, and DBHDS employees,

Agency's best estimate of the number of (1) entities that will be affected, including (2) small businesses affected. Small business means a business, including affiliates, that is independently owned and operated, employs fewer than 500 full-time employees, or has gross annual sales of less than $6 million.	900 small businesses
Benefits expected as a result of this regulatory proposal.	Increase user understanding of the complaint process Increase availability of human rights advocates Increase protections of individuals receiving services Increase attention to due process rights of individuals Clarify role of local human rights committee, advocate and DBHDS in the human rights system Increase resources available for support of local human rights committees Increase training of local human rights committees Reduce number of local human rights committees Reduce staff, volunteer and provider organizations time in attending meetings Increase training opportunities Reduce redundancies in oversight
Projected cost to the state to implement and enforce this regulatory proposal.	A slight increase in the state costs to offset the administrative cost of LHRC operations
Projected cost to localities to implement and enforce this regulatory proposal.	No costs to localities
All projected costs of this regulatory proposal for affected individuals, businesses, or other entities. Please be specific and include all costs, including projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses, and costs related to real estate development.	Decrease in local service providers' administrative costs, since providers will no longer be responsible for LHRC operations.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

The Board considered all viable alternatives for updating these regulations, consistent with legal requirements. This regulatory action is essential to ensure that regulatory requirements are clearly written and understandable, are consistent with all current legal requirements, reflect current standards of practice, and can be easily implemented by all users and stakeholders, including individuals receiving services and their families, community services boards, private providers, and state facilities.

The proposed LHRC changes will be less costly for small business by reducing their administrative responsibilities and mandatory participation.

Regulatory flexibility analysis

Pursuant to §2.2-4007.1B of the Code of Virginia, 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 is no alternative to regulations to assure the health, safety, environmental and economic welfare of the individuals receiving services is protected.

Small business impact review report of findings

In order to minimize the economic impact of regulations on small businesses, please include, pursuant to Code of Virginia § 2.2-4007.1 E and F, a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to the which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, include a discussion of the agency's determination of whether the regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.

There is a continued need for regulation. Considerable comments were provided regarding the complexity of the complaint process as currently written and the administrative burden of the current LHRC system. The proposed changes are intended to simply the regulations regarding the complaint process, remove some of the administrative burdens of the LHRC system; and recognize the technology enhancement that have occurred in the reporting process.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

- While there were no formal comments received during the periodic review of these regulations, the continued proliferation of LHRCs and a concern that DBHDS Human Rights Advocates needed to spend more time directly supporting the individuals receiving services, the Board determined that regulatory action was needed.
- A NOIRA was published at the end of December 2012 with a comment period that closed at the end of February 2013. At the request of a Northern Virginia advocate, the comment period was

extended until the March 18, 2013. Written comments were received from less than 10 individuals.

- Given the limited number of comments received, the Department decided to hire an outside consultant to conduct stakeholder feedback and provided the consultant with the comments received to date.
- Contracted with the ODU Social Science Research Center
  - 5 distinct stakeholder groups were surveyed -- Nearly 850 surveys were completed by individuals receiving services, their family members, advocates, public and private providers, and LHRC members about the current administrative review and complaint processes.
  - 3 stakeholder Focus Groups
- A final report was issued in June 2013, which analyzed all the comments received during and after the NOIRA comment period is available at http://www.dbhds.virginia.gov/library/document-library/human%20rights%20complaint%20process%20stakeholder%20survey.pdf . One of the report's recommendations was to seek additional feedback from individuals, family members and LHRC members. Subsequently, the Department:
  - Held 5 Town Hall meetings across the state where OHR, in partnership with VOCAL, talked with individuals.
  - Convened one Town Hall meeting attended by LHRC members and providers as well.
  - Contacted other individuals and family members for feedback.

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 should have a positive impact on families and family stability because it will ultimately enhance the community resources available to assure the human rights of individuals receiving services is protected. This action is not expected to impact family income.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the **pre**-emergency regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s) or regulations that are being repealed and replaced, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10 et al			Changed text regarding services and disabilities to reflect updated Code language.
20		Definitions	Added definitions for "independent review committee" and “SCC, specially constituted committee"
50		Dignity	Sections on investigations of abuse and neglect and complaint are deleted and relocate to Section 175
60		Services	Policies and procedures related to the complaint process are deleted and relocated to Section 175
90		Access to and amendment of services records.	Reference to statutory prohibition added
100		Restrictions on freedoms of everyday life	Added a requirement for LHRC approval of a restriction of a human right that lasts longer than seven days. Providing written notice is required when a right is being restricted
	105	Behavioral Treatment Plans	Requires LHRC approval of any planned restriction of a human right.
110		Use of seclusion, restraint, and time out	Prohibits the use of prone restraints; removes the LHRC responsibility to review provider policies; and clarifies that a licensed professional must complete the assessment for a behavioral treatment plan
130		Research	Re-formatted Code reference
140		Complaint and fair hearing	Repealed and majority of provisions relocated to Section 175
145		Determination of capacity to give consent or authorization	Establishes how a licensed professional must be involved in a capacity evaluation
150		General provisions	Clarifies that actions of the judicial system and administrative hearings are not subject to 12VAC35 115 complaint process
170		Complaint resolution process	Repealed and majority of provisions relocated to Section 175
	175	Human Rights Complaint Process	Combines the deleted sections
180		Local Human Rights Committee hearing and review procedures	Clarifies that any decision regarding a complaint is appealable Establishes LHRC hearing practices
190		Special procedures for emergency hearings by the LHRC	Grammatical changes are being made
200		Special procedures for LHRC reviews involving consent and authorization	Grammatical changes are being made
210		State Human Rights Committee appeals procedures	Grammatical changes are being made
230		Provider requirements for	Recognizes the web based reporting

		reporting to the department	requirement and eliminated the Department's authority to grant extensions.
250		Offices, composition and duties	Repealed and majority of provisions relocated to new Sections 260 and 270
	260	Provider and department responsibilities	Removes providers' duty to provide clerical support to LHRCs
	270	State and Local Human Rights Committee responsibilities	Reflects LHRC's revised review responsibilities