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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Nursing, Department of Health Professions
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	18VAC90-19
<b>VAC Chapter title(s)</b>	Regulations Governing the Practice of Nursing
<b>Action title</b>	Prohibition on practice of conversion therapy
<b>Date this document prepared</b>	10/21/20

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.*

The Board has amended section 230 to specify that the standard of practice would prohibit a nurse from engaging in conversion therapy with a person under the age of 18. Regulations define conversion therapy as it is defined in § 54.1-2409.5 of the Code of Virginia as amended by the 2020 General Assembly. The goal is to align regulations of the Board with the stated policies and ethics for the profession and with the prohibition in the Code.

### Acronyms and Definitions

*Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.*

N/A

### Mandate and Impetus

*Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."*

The impetus for the regulatory change was initially legislation that was introduced in the 2018 General Assembly session prohibiting a person licensed by a health regulatory board from engaging in sexual orientation change efforts with a person under 18 years of age. Subsequently a workgroup recommended that affected health regulatory boards consider the promulgation of regulations, and the Board of Nursing issued a Notice of Intended Regulatory action for that purpose.

Subsequently, legislation was introduced and passed by the 2020 General Assembly establishing a definition of conversion therapy and a prohibition on such practice in the Code in Virginia. The impetus of this action is now to include similar language in the grounds for disciplinary action by the Board.

### Legal Basis

*Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.*

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 Nursing 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 specific Code section establishing a prohibition on conversion therapy is found in:

***§ 54.1-2409.5. Conversion therapy prohibited.***

*A. As used in this section, "conversion therapy" means any practice or treatment that seeks to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender. "Conversion therapy" does not include counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change an individual's sexual orientation or gender identity.*

*B. No person licensed pursuant to this subtitle or who performs counseling as part of his training for any profession licensed pursuant to this subtitle shall engage in conversion therapy with a person under 18 years of age. Any conversion therapy efforts with a person under 18 years of age engaged in by a provider licensed in accordance with the provisions of this subtitle or who performs counseling as part of his training for any profession licensed pursuant to this subtitle shall constitute unprofessional conduct and shall be grounds for disciplinary action by the appropriate health regulatory board within the Department of Health Professions.*

**Purpose**

*Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.*

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The purpose of this regulatory action is to specify in regulations the interpretation of the Board that conversion therapy has the potential for significant harm if practiced with persons under the age of 18. The regulations will define the term consistent with accepted usage within the profession and consistent with policy statements by state and national professional organizations.

**Substance**

*Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.*

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**Issues**

*Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.*

1) The primary advantage to the public is protection for minors who might otherwise be subjected to reparative or conversion therapy; the Board does not believe there are disadvantages because practitioners can provide assistance to a person undergoing gender transition or psychological services that offer acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development.

2) There are no advantages or disadvantages to the agency or the Commonwealth.

3) The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. The Board is authorized under § 54.1-2400 to “*promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary to administer effectively the regulatory system.*”

Any restraint on competition as a result of promulgating this regulation is a foreseeable result of the statutory obligation of the Board to protect the safety and health of clients/patients in the Commonwealth.

### Requirements More Restrictive than Federal

*Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.*

There are no applicable federal requirements.

### Agencies, Localities, and Other Entities Particularly Affected

*Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. “Particularly affected” are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

Other State Agencies Particularly Affected - None

Localities Particularly Affected - None

Other Entities Particularly Affected - None

### Economic Impact

*Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact,*

specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

**Impact on State Agencies**

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:                  a) fund source / fund detail;                  b) delineation of one-time versus on-going expenditures; and                  c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>There are no costs to the state for implementation or enforcement; all funding for the Board is derived from fees charged to applicants and licensees.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There are no costs to other agencies</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>There are no benefits to agencies.</p>

**Impact on Localities**

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There are no costs to localities</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>No benefits</p>

**Impact on Other Entities**

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>Persons affected by this regulation are licensed registered nurses and registered clinical nurse specialists.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:                  a) is independently owned and operated and;                  b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There is no estimate of the number who may be affected but it is likely very small. The vast majority of nurses do not practice in an environment in which they would be counseling on sexual identity issues. The one exception may be registered clinical nurse specialists who practice in the mental health field. Even so, conversion therapy has been considered by the professional to be contrary to its code of ethics, so it is unlikely that any practitioners are engaged in the practice.                  Overall numbers are:                  Registered nurses – 111,710                  Clinical nurse specialists - 406</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:</p>	<p>There are no costs to affected individuals.</p>

<p>a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;                  b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change;                  c) fees;                  d) purchases of equipment or services; and                  e) time required to comply with the requirements.</p>	
<p>Benefits the regulatory change is designed to produce.</p>	<p>There are no economic benefits to this regulatory change.</p>

**Alternatives to Regulation**

*Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.*

For the purpose of public protection, the Board also adopted a guidance document (90-5) on January 22, 2019 stating that conversion therapy may be interpreted as being harmful to a patient. However, specific language in its regulation will more clearly state the professionally accepted standard for ethical practice and the prohibition stated in the Code of Virginia. Inclusion of the prohibition in regulation will facilitate a statement of allegations should a complaint be filed with the Board.

**Regulatory Flexibility Analysis**

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.*

The Board adopted guidance for its practitioners on the practice of conversion therapy, but health, safety and welfare of minor children receiving counseling services require a regulatory standard for which practitioners can be held accountable.

**Periodic Review and Small Business Impact Review Report of Findings**

*If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.*

This form is not being used to report the result of a periodic review.

**Public Comment**

*Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.*

There was a 30-day comment period on the Notice of Intended Regulatory Action from 8/31/20 to 9/30/20. Two comments were received.

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
Ted Lewis, Side by Side VA	Supported the protection of youth under the age of 18.	The Board appreciated the support of the prohibition.
W. Kevin Watterson, MD	Expressed concern that children who are questioning not only sexuality, but basic identity, be able to have a conversation where they can voice being uncomfortable with same sex attraction or transgender feelings without a practitioner feeling as if their sole recourse is to affirm the discomfort as inevitable.	The Board concurs with the comment and believes that the statutory definition allows for such discourse and exploration without engaging in conversion therapy.

**Public Participation**

*Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.*

The Board of Nursing is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Elaine Yeatts, 9960 Mayland Drive, Henrico, VA 23233; phone: (804) 367-4688; Fax: (804)



527-4434; email: [Elaine.yeatts@dhp.virginia.gov](mailto:Elaine.yeatts@dhp.virginia.gov). In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

### Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

Current chapter-section number	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
10	Sets out definitions for words and phrases used in the Chapter	<p>There is a new definition for “conversion therapy” as any practice or treatment as defined in § 54.1-2409.5 (A) of the Code of Virginia.</p> <p><i>In the guidance document (90-5) previously adopted by the Board, there was a definition for conversion therapy as identical to the statutory definition adopted in 2020. In the adoption of proposed regulation, the Board chose to adopt the statutory definition so there is no distinction between Code and regulation.</i></p>
230	Sets out the disciplinary provisions under which the Board operates	<p>For the purpose of establishing allegations to be included in the notice of hearing, the board has added to Subsection A the following: “<u>engaging in conversion therapy with a person under 18 years of age</u>”.</p> <p><i>The amendment is consistent with a 2015 position statement from the American Academy of Nursing, in which the Academy stated its support for the numerous professional bodies that have stated opposition to conversion therapy or sexual orientation change interventions. As stated in its guidance document, the Board noted “conversion therapy” or “sexual orientation change efforts” to be services that have the potential to harm patients. Additionally, the amendment is consistent with the prohibition as stated in § 54.1-2409.5, as enacted by the 2020 General Assembly.</i></p>