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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	Department of Behavioral Health and Developmental Services
<b>Virginia Administrative Code (VAC) citation(s)</b>	12 VAC35-105
<b>Regulation title(s)</b>	Rules and Regulations For Licensing Providers by the Department of Behavioral Health and Developmental Services
<b>Action title</b>	Provision of provider statement to any other provider.
<b>Date this document prepared</b>	<del>June 28, 2019</del> August 5, 2019 August 25, 2020

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

### Brief Summary

*Please 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.*

This regulatory action is in compliance with Chapter 776 (HB2652) of the 2019 General Assembly, which requires every licensed provider of all services (excluding children's residential) to provide a statement regarding the character, ability, and fitness for employment of a current or past employee or other individual currently or previously associated with the provider in a capacity that requires a criminal history background check to any other licensed provider with which the current or past employee has applied for employment or to fill a role that requires a criminal history background check upon receipt of a request for such information from the other licensed provider and written consent to the disclosure of such information executed by the current or past employee or other individual currently or previously associated with the provider in a capacity that requires a criminal history background check.

The proposal places the new language in its own new section 12VAC35-105-435, which would follow immediately after 12VAC35-105-430, a section regarding employee or contractor personnel records.

### 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.*

“DBHDS” means the Virginia Department of Behavioral Health and Developmental Services.

“State Board” means State Board of Behavioral Health and Developmental Services.

### 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.*

The new section, 12VAC35-105-435. Provision of provider statement to any other provider, was approved at the July 17, 2019, meeting of the State Board as a fast track action.

### Mandate and Impetus

*Please 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, board decision, etc.). 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.”*

*As required by Virginia Code § 2.2-4012.1, please also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.*

This regulatory action is in compliance with Chapter 776 (HB2652) of the 2019 General Assembly.

### Legal Basis

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

Section 37.2-203 of the Code of Virginia authorizes the Board to adopt regulations that may be necessary to carry out the provisions of Title 37.2 and other laws of the Commonwealth administered by the Commissioner and the Department.

### Purpose

*Please 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.*

The intent of the legislative mandate is to protect individuals receiving services from unfit direct care staff as there currently is not a state registry for those with founded cases of abuse and neglect against adults.

## Substance

*Please 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.*

The intent of [Chapter 776](#) (HB2652) is to protect individuals receiving services from unfit direct care staff as there currently is not a state registry for those with founded cases of abuse and neglect against adults. Technical considerations: Because this is a mandate from the General Assembly, with specific language, staff initially investigated the possibility of recommending an exempt action pursuant to Va. Code § 2.2-4006(A), which exempts, "4. Regulations that are: a. Necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved." The language staff propose closely tracks the language of the bill, except that it would require the statement to be "in writing," which is an act of discretion by DBHDS that takes it out of the exempt category. The proposal places the new language in its own new section 12VAC35-105-435, which would follow immediately after 12VAC35-105-430, a section regarding employee or contractor personnel records.

12VAC35-105-435. Provision of provider statement to any other provider.

Providers shall give a statement in writing regarding a current or past employee or other individual currently or previously associated with the provider in a capacity that requires a criminal history background check pursuant to § 37.2-416 or 37.2-506 of the Code of Virginia to any other licensed provider with which the current or past employee has applied for employment or to fill a role that requires a criminal history background check pursuant to § 37.2-416 or 37.2-506 of the Code of Virginia. The statement shall address the character, ability, and fitness for employment in or to otherwise fill the role for which the person has applied and shall be provided upon:

1. Receipt of a request for such information from the other licensed provider; and
2. Written consent to the disclosure of such information executed by the current or past employee or other individual currently or previously associated with the provider in a capacity that requires a criminal history background check pursuant to § 37.2-416 or 37.2-506 of the Code of Virginia.

Nothing in this provision shall require disclosure of information subject to privilege or confidentiality pursuant to § 8.01-581.16, 8.01-581.17, or 32.1-127.1:03 of the Code of Virginia or federal law.

## Issues

*Please 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, specifically individuals receiving services, is better protection of those individuals from unfit direct care as there currently is not a state registry for those with founded cases of abuse and neglect against adults. This regulatory requirement creates an opportunity for providers to learn of employee work history, which may include founded cases of abuse or neglect

that may render a prospective employee unfit for employment and thereby reduce risk to individuals receiving services. There are no disadvantages to the public.

2. This language could potentially increase service quality based on the fact that providers are receiving references related to character, ability, and fitness of potential employees providing direct care services. However, there is no specific advantage or disadvantage to the agency or the Commonwealth.
3. Matter of interest: The Code of Virginia § 8.01-46.1 provides immunity from civil liability for employers who furnish information about a person’s professional conduct, reasons for separation, or job performance to the person’s prospective or current employer, provided the employer furnishing the information is not acting in bad faith. Enforcement will focus on whether or not a provider has provided a statement as required by and in accordance with the regulation. Nothing in the amended licensing regulations shall require disclosure of information subject to privilege or confidentiality pursuant to § 8.01-581.16, 8.01-581.17, or 32.1-127.1:03 of the Code of Virginia or federal law.

**Requirements More Restrictive than Federal**

*Please 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**

*Please 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

There are no state agencies particularly affected.

Localities Particularly Affected

There is no locality particularly affected.

Other Entities Particularly Affected

There is no other entity particularly affected.

**Economic Impact**

*Pursuant to § 2.2-4007.04 of the Code of Virginia, please 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. Please 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 is no additional cost to implement and enforce the amendment.</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 is no additional cost to any other state agency due to this amendment.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>This regulatory requirement creates an opportunity for providers licensed by DBHDS to learn of employee work history, which may include founded cases of abuse or neglect, that may render a prospective employee unfit for employment and thereby reduce risk to individuals receiving services.</p>

**Impact on Localities**

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There is no additional cost to any other locality due to this amendment.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>This change will help to ensure local citizens receiving services are better protected from abuse and neglect.</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>Individuals receiving services and their families; providers licensed by DBHDS; law enforcement officials; courts; community services boards through the reduction of occurrences of abuse and neglect and related criminal charges.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Please 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>It is not possible to estimate the exact number of individuals receiving services that will be affected by this regulation. Please see <a href="#">Table 2 in Report Document 552</a> (2017). However, at least 100,000 would be affected. Currently, DBHDS licenses approximately 1,100 service providers. There is no way to estimate the number of small businesses within the pool of all providers.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to:</p>	<p>There is no additional administrative cost for individuals, businesses, or other entities.</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>	

### Alternatives

*Please 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.*

There is no alternative to this regulatory change. It is less burdensome than a mandatory registry of staff with founded complaints of abuse and neglect.

### 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) 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.*

- 1) This requirement is a less stringent reporting requirement than if there were a mandatory registry.
- 2) There is no set schedule or deadline for provision of a statement. It is ‘upon receipt of the request.’
- 3) There are no specific compliance or reporting requirements.
- 4) This does not establish performance standards for small businesses to replace design or operational standards.
- 5) There is no exemption of small businesses from all or any part of the requirements contained in the regulatory change. This is a legislative mandate.

### Public Participation

*If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed*

with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

### Detail of Changes

Please 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.

If the regulatory change will be 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 change. Delete inapplicable tables.

If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.

For changes to existing regulation(s), please use the following chart:

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
	12VAC35-105-435. Provision of provider statement to any other provider.		<p>The intent of this legislatively mandated amendment to the Licensing Regulations is to protect individuals receiving services from unfit direct care staff as there currently is not a state registry for those with founded cases of abuse and neglect against adults. The new subsection language states:</p> <p><u>Providers shall give a statement in writing regarding a current or past employee or other individual currently or previously associated with the provider in a capacity that requires a criminal history background check pursuant to § 37.2-416 or 37.2-506 of the Code of Virginia to any other licensed provider with which the current or past employee has applied for employment or to fill a role that requires a criminal history background check pursuant to § 37.2-416 or 37.2-506 of the Code of Virginia. The statement shall address the character, ability, and fitness for employment in or to otherwise fill the role for which the person has applied and shall be provided upon:</u></p> <ol style="list-style-type: none"> <li><u>1. Receipt of a request for such information from the other licensed provider; and</u></li> <li><u>2. Written consent to the disclosure of such information executed by the current</u></li> </ol>

			<p><u>or past employee or other individual currently or previously associated with the provider in a capacity that requires a criminal history background check pursuant to § 37.2-416 or 37.2-506 of the Code of Virginia.</u></p> <p><u>Nothing in this provision shall require disclosure of information subject to privilege or confidentiality pursuant to § 8.01-581.16, 8.01-581.17, or 32.1-127.1:03 of the Code of Virginia or federal law.</u></p>
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