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Proposed Regulation
Agency Background Document

Agency name	Department of Behavioral Health and Developmental Services
Virginia Administrative Code (VAC) Chapter citation(s)	12VAC35-46
VAC Chapter title(s)	Regulations for Children's Residential Facilities
Action title	Amend regulations to align with the requirements of the FFPSA
Date this document prepared	Updated: August 8, 2022

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 Department of Behavioral Health and Developmental Services (DBHDS) was mandated by the 2021 General Assembly within Item 318. D. of the 2021 Special Session 1 Appropriation Act to promulgate emergency regulations to amend the Regulations for Children's Residential Facilities [12VAC35-46] to align with the requirements of the federal Family First Prevention Service Act (FFPSA) for children's residential service providers who accept Title IV-E funding to meet the standards as qualified residential treatment programs (QRTPs). The department received input from the Department of Social Services (DSS) and the Department of Medical Assistance Services (DMAS) in the development of this action. The goal of this action is to make permanent the changes made through emergency regulations promulgated on September 29, 2021, by the State Board of Behavioral Health and Developmental Services that amended the regulations to align with the FFPSA to meet the standards of QRTPs.

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.

Department of Behavioral Health and Developmental Services – DBHDS

Department of Medical Assistance Services – DMAS

Department of Social Services – DSS

Family First Prevention Service Act – FFPSA

Psychiatric Residential Treatment Facility -- PRTF

Qualified Residential Treatment Programs – QRTPs

State Board – State Board of Behavioral Health and Developmental Services

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 2021 General Assembly mandated the State Board of Behavioral Health to promulgate emergency regulations to become effective within 280 days or less from the enactment of Item 318 D of the 2021 Special Session 1 Appropriation Act. This action is intended to make permanent the changes made through emergency regulations promulgated on September 29, 2021 by the State Board of Behavioral Health and Developmental Services which amended the regulations to align with the FFPSA to meet the standards of QRTPs.

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.

The General Assembly mandated the State Board of Behavioral Health to promulgate emergency regulations to become effective within 280 days or less from the enactment of the 2021 Special Session 1 Appropriation Act (Chapter 552) that align with the requirements of the federal Family First Prevention Service Act in accordance with Item 318 D of the Appropriation Act. Section 37.2-203 of the Code of Virginia gives the State Board of Behavioral Health and Developmental Services the authority to adopt regulations that may be necessary to carry out the provisions of Title 37.2 of the Code of Virginia and other laws of the Commonwealth administered by the DBHDS Commissioner. The State Board of Behavioral Health and Developmental Services voted to adopt emergency regulations on September 29,

2021. This action makes permanent those regulations. The State Board of Behavioral Health and Developmental Services voted to adopt this regulatory action on March 30, 2022.

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.

The purpose of this regulatory action is to align DBHDS Regulations for Children's Residential Facilities with the requirements of the federal Family First Prevention Service Act to require providers who accept Title IV-E funding to meet the standards as QRTPs. Providers who do not accept Title IV-E funding shall not be affected by this action.

FFPSA includes reforms to child welfare financing streams by providing prevention services to families of children who are at imminent risk of entering foster care. It seeks to underscore the importance of children growing up in families and seeks to avoid the traumatic experience of children being separated from their families and entering foster care. Specifically, federal reimbursement will be available for trauma-informed mental health services, substance use disorder treatment, and in-home parenting skills training to safely maintain in-home family placement. FFPSA also aims to improve the well-being of children already in foster care by safely reducing placement of children in non-family based settings (e.g. residential treatment programs), and instead increasing placement of children in the least restrictive, most family-based setting appropriate to their individual needs. FFPSA created a specific nonfamily-based placement type called a QRTP, along with a structure around placing children in these types of placements. QRTPs serve children with specific treatment needs who need short term placement out of the home. Federal funding for foster youth with specific treatment needs will only be available for nonfamily-based placements that qualify as a QRTP.

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.

This regulatory action amends Chapter 46 to align with the requirements of the federal FFPSA to require providers who accept Title IV-E funding to meet the standards as QRTPs. Providers who do not accept Title IV-E funding shall not be affected by this action. QRTPs are required to have a trauma-informed treatment model; have registered licensed nursing staff and licensed clinical staff who are available 24 hours a day and seven days a week; facilitate outreach to the family members of the child; facilitate participation of family members in the child's treatment program; provide or arrange discharge planning and family-based aftercare support for at least six months post-discharge; be licensed; and be accredited by an independent, not-for profit, accrediting organization approved by the US Secretary of Health and Human Services.

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.

The primary advantage of the regulatory change is children's residential licensing regulations that incorporate best practices, help to enhance support services for families, increase the number of children who remain at home, and build the capacity of communities to support children and families. This is an advantage to the public, the agency, and the Commonwealth. There are no known disadvantages to the agency or the Commonwealth. The primary disadvantage is that some providers may experience a financial burden in order to comply with the new regulations. However, providers have been aware for at least two years of the eventual changes brought in these regulations and providers that do not accept Title IV-E funding shall not be affected by this regulatory change. Further, as these are federal requirements, the department does not have much discretion in the manner in which they are enacted.

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.

The proposed regulatory action aligns Chapter 46 with the requirements of the federal FFPSA. None of the requirements of the regulatory action are more restrictive than 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

DSS and DMAS will be affected by this regulatory action. As a result, the department received significant input from the DSS and the DMAS in the development of this action.

Localities Particularly Affected

None identified at this time.

Other Entities Particularly Affected

Families of children who are at imminent risk of entering foster care.

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

For your agency: 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	Limited costs shall be incurred in the form of employee time and effort. Staff shall be required to create the new QRTP license type and onboard providers.
For other state agencies: projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	As noted earlier in the document, DSS and DMAS may have costs; however, as these regulations are mandated by the General Assembly to align federal requirements, the department does not have discretion in the implementation of these regulations or their associated costs.
For all agencies: Benefits the regulatory change is designed to produce.	The regulatory action is intended to enhance support services for families, increase the number of children who remain at home, and build the capacity of communities to support children and families.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	None known.
Benefits the regulatory change is designed to produce.	The regulatory action is intended to enhance support services for families, increase the number of children who remain at home, and build the capacity of communities to support children and families.

Impact on Other Entities

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.	Residential treatment programs that accept Title IV-E funding shall be affected by this regulatory change.
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.	DSS currently has approved 51 QRTPs that are licensed through DBHDS and 9 pending applications. DBHDS assumption of authority over the QRTP designation might increase the likelihood of providers applying because it will be a similar licensing process with which these providers are already familiar. An increase in congregate care providers that become certified as QRTP will benefit children in foster care by increasing the quality of care they receive, as well as benefiting local DSS by increasing the number of options for placement that accept Title IV-E funding. .

	While there are a number of costs for DSS associated with FFPSA, none are directly related to or impacted by this regulation.
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: 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.	Some providers may experience a financial burden in order to comply with the new regulations as the regulations. However, as these regulations are mandated by the General Assembly to align with federal requirements, the department does not have discretion in the implementation of these regulations or their associated costs.
Benefits the regulatory change is designed to produce.	The regulatory action shall enhance support services for families, increase the number of children who remain at home, and build the capacity of communities to support children and families.

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.

There are no viable alternatives to the regulatory action. The action is mandated by the General Assembly to bring the regulations into alignment with federal law.

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.

These regulations are mandated by the General Assembly to align with federal requirements, the department does not have discretion in the implementation of these regulations.

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.

Commenter	Comment	Agency response
Tara P	1. I am not clear on the expectations for nursing or licensed staff. The document referred to subsection A. "*have registered licensed nursing staff and licensed clinical staff who are available 24 hours a day and seven days a week"* Will on call suffice? Do they need to be on campus? A clearer statement of what this means for providers would be helpful. 2. Section D-E are difficult for providers to do especially in foster care cases. What is the actual expectation of this? Just try to make contact? Show something else? It seems like more paperwork to do rather than anything else. 3. Section F – what does ensure mean? This makes it sound like a residential needs to follow these cases, check in and provide some level of case management. Where will funding come for this? It seems manifestly unfair to ask residential providers to do this when there are community based services such as ICC that are better equipped to handle this aspect of care. It increases liability for the provider as well if the family is still considered a "case" that is being followed.	1. Thank you for your comments. Nursing and clinical staff must provide care onsite according to the treatment model. The nursing and clinical staff must be available 24/7, after hour cares can be supplied either in person, via tele health or via telephone as needed. The department plans on issuing guidance regarding this provision when the permanent regulations take effect. 2. The expectation is documentation of attempts at outreach, such as documentation of phone calls, emails, etc., are expected as noted within the regulatory language. This is a federal requirement being placed into state regulations. 3. The purpose of this provision is that these programs shall be required to ensure discharge planning includes family-based aftercare support for at least six months post discharge. Providers will be required to follow the individual served for up to six months. The department is not a payor of services, however, services for children who are discharged from a QRTP may be funded through the local Children Services Act (CSA) program or through Medicaid (for Medicaid covered services). A program may also explore adding the cost of aftercare support to the cost of the actual residential treatment. A program may subcontract with another entity to provide aftercare supports for the six-month period; however, Virginia does not allow a QRTP

	4. Please add clarity so providers know exactly what to expect within the regulations as we will be held to this and the required documentation status.	to assign liability or responsibility to a subcontractor. 4. Please provide clarification for this comment. The regulations are federal requirements being placed into state regulations. The department has attempted to succinctly lay out the requirements in order to add clarity. As always, if the department finds across providers that additional clarification is necessary, the department shall issue formal guidance to explain intent.
Michael Triggs	In the notice, it states that these regulations would apply to providers "who accept Title IV-E funding to meet the standards as QRTP's. Providers who do not accept Title IV-E funding shall not be affected by this action." Understanding this, the regulations should only apply to group homes, as no PRTF providers are able to accept IV-E funding regardless of the facilities status as a QRTP. I would recommend clarifying language be added to the regulations to show that PRTF's who are QRTP's do not fall under this language if, indeed "providers who do not accept Title IV-E funding (are not) affected by this action.	Thank you for the feedback. Providers who do not accept Title IV-E funds are not affected by this action. The language that the commenter suggests is more appropriate for training or guidance, which the department will consider in the future. These regulations create a new license type and these regulations shall only apply to QRTP license holders.

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.

DBHDS is providing an opportunity for comments on this regulatory proposal, including (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 Susan Puglisi, 1220 Bank Street, Richmond, Virginia 23129 Phone Number: 804-371-2709, email: susan.puglisi@dbhds.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 not be held following the publication of this stage of this regulatory action.

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.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
N/A	12VAC35-46—1260. Qualified Residential Treatment Programs.	None	Intent: Adding the requirements of a Qualified Residential Treatment Program (QRTP). A qualified residential treatment program shall: • Have a trauma-informed treatment model. • Have registered or licensed nursing staff and other clinical staff who are available 24 hours a day and 7 days a week. • Facilitate outreach to family members as appropriate. • Facilitate participation of family members in the child's treatment program. • Provide or arrange discharge planning and family-based aftercare support for at least six months post discharge. • Be licensed. • Be accredited by an independent, not-for profit accrediting organization approved by the US Secretary of Health and Human Services. Impact: Compliance with the General Assembly mandate, alignment with federal law, enhancement of support services for families, providing assistance to allow children to remain at home, and build the capacity of communities to support children and families.

N/A	12VAC35-46-1270. Additional requirements for QRTP placements for children within the custody of local social service boards.	None	Intent: Adding the requirements of documentation of the need for placement in a QRTP. *The QRTP shall coordinate with the VDSS, family, and others. Documentation shall be placed within the child's record at the QRTP. This section does not apply to direct parental placements of children into the QRTP that are made outside of the social services system.* Impact: Compliance with the General Assembly mandate, alignment with federal law, enhancement of support services for families, providing assistance to allow children to remain at home, and build the capacity of communities to support children and families.

Table 3: Changes to the Emergency Regulation

Emergency chapter-section number	New chapter-section number, if applicable	Current emergency requirement	Change, intent, rationale, and likely impact of new or changed requirements since emergency stage
12VAC35-46-1260		A. A qualified residential treatment program ("QRTP") shall have a trauma-informed treatment model that is designed to address the needs, including clinical needs as appropriate, of children with serious emotional or behavioral disorders or disturbances and, with respect to a child, is able to implement the treatment identified for the child. B. In addition to the staffing requirements within Parts II - VI of this chapter, a QRTP shall have registered or licensed nursing staff and other licensed clinical staff who: 1. Provide care within the scope of their practice as defined by state law;	Clarification which inserts the Virginia Administrative Code sections to note which regulatory sections Parts II-VI entail.

		2. Are on-site according to the treatment model referred to in subsection A; and 3. Are available 24 hours a day and seven days a week. The QRTP is not required to acquire nursing or other clinical staff solely through means of a direct employer to employee relationship. C. To the extent appropriate and in accordance with the child's best interests, the QRTP shall facilitate participation of family members in the child's treatment program. D. The QRTP shall facilitate outreach to the family members of the child, including siblings, document how the outreach is made including contact information, and maintain contact information for any known biological family and fictive kin of the child. Documentation of outreach to family members and contact information of family members shall be placed within the child's record at the QRTP. E. The QRTP shall document how family members are integrated into the treatment process for the child including post-discharge, and how sibling connections are maintained. Documentation of family member integration shall be placed within the child's record at the QRTP. F. The QRTP shall provide or ensure discharge planning and family-based aftercare support for at	Clarifying edit, "post discharge" was changed to "after discharge" Clarifying edit, "post discharge" was changed to "following discharge"

		least six months post-discharge. G. The QRTP shall be licensed in accordance with 42 U.S.C. § 471 (a)(10) and accredited by any of the following independent nonprofit organizations: 1. The Commission on Accreditation of Rehabilitation Facilities (CARF); 2. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO); 3. The Council on Accreditation (COA); or 4. Any other independent, nonprofit accrediting organization approved by the US Secretary of Health and Human Services.	
12VAC35-46-1270. Additional requirements for QRTP placements for children within the custody of Social Services.	Additional requirements for QRTP placements for children within the custody of local social service boards.	A. The qualified residential treatment program shall coordinate with the Virginia Department of Social Services, the child's biological family members, relative and fictive kin of the child, and, as appropriate, professionals who are a resource to the family of the child, such as teachers, clergy, or medical or mental health providers who have treated the child. B. All documents related to a child's need for placement shall be placed within the child's record at the qualified residential treatment program, including the assessment determination of the qualified individual, as defined within 42 U.S.C. § 675a (c)(1)(D)(i), and the written documentation of the approval or disapproval of the placement in a	Clarifying edit that QRTPs shall coordinate with 'the local departments of social services.'

		qualified residential treatment program by a court or administrative body. C. This section shall not apply to direct parental placements of children into the QRTP that are made outside of the social services system.	