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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Department of Behavioral Health and Developmental Services
Virginia Administrative Code (VAC) Chapter citation(s)	12VAC35-105
VAC Chapter title(s)	Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services
Action title	Amend the Licensing Regulations to align with enhanced behavioral health services
Date this document prepared	~~June 29, 2020~~ August 27, 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 (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 the subject matter, intent, and goals of this 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 or changes. If applicable, generally describe the existing regulation.

Within the 2020 – 2022 biennium budget (HB 30), the General Assembly included the following requirements for the Department of Medical Assistance Services (DMAS) within Item 313:

3. *Effective on or after January 1, 2021, DMAS shall implement programmatic changes and reimbursement rates for the following services: assertive community treatment, multisystemic therapy and family functional therapy.*

4. *Effective on or after July 1, 2021, DMAS shall implement programmatic changes and reimbursement rates for the following services: intensive outpatient services, partial*

hospitalization programs, mobile crisis intervention services, 23 hour temporary observation services, crisis stabilization services and residential crisis stabilization unit services.

In order to assist with the implementation of these programmatic changes, the General Assembly directed the Department of Behavioral Health and Developmental Services (DBHDS), within Item 318 of the Appropriation Act, to promulgate emergency regulations to ensure that the DBHDS licensing regulations support high quality, community-based mental health services and align with the changes being made to the Medicaid behavioral health regulations for the services funded in the budged that support evidence-based, trauma-informed, prevention-focused and cost-effective services for members across the lifespan.

The amendments contained in this emergency action consist of only those changes that are necessary to align DBHDS licensing regulations with anticipated changes to Medicaid behavioral health regulations by removing provisions that would conflict with newly funded behavioral health services and establishing new licensed services for those newly funded behavioral health services that cannot be nested under an existing DBHDS license.

As stated above, most of the anticipated newly funded behavioral health services are consistent with already existing DBHDS licensed services. For these services, including functional family therapy, multisystemic family therapy, intensive outpatient services, partial hospitalization programs, mobile crisis intervention services, 23 hour temporary observation services, crisis stabilization services and residential crisis stabilization unit services; only very minimal changes are included in this action. The existing license requirements for Program for Assertive Community Treatment (PACT) services, however, are inconsistent with the Assertive Community Treatment (ACT) services that will be funded as part of Behavioral Health Enhancement. Substantive changes have been made to the service specific licensing regulations for this service to align licensing requirements with ACT service expectations. These changes are intended to ensure that providers licensed to provide ACT services adhere to a base level of fidelity to the ACT model.

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.

ACT: Assertive Community Treatment
CPRS: Certified Peer Recovery Specialist
CSAC: Certified Substance Abuse Counselor
DBHDS: Department of Behavioral Health and Developmental Services
DMAS: Department of Medical Assistance Services
FFT: Functional Family Therapy
FTE: Full Time Equivalent
ICT: Intensive Community Treatment
LMHP: Licensed Mental Health Professional
LPN: Licensed Professional Nurse
MST: Multi-Systemic Therapy
NP: Nurse Practitioner
QMHP: Qualified Mental Health Professional
RN: Registered Nurse

Mandate and Impetus (Necessity for Emergency)

Explain why this rulemaking is an emergency situation in accordance with § 2.2-4011 A and B of the Code of Virginia. In doing so, either:

a) *Indicate whether the Governor's Office has already approved the use of emergency regulatory authority for this regulatory change.*
b) *Provide specific citations to Virginia statutory law, the appropriation act, federal law, or federal regulation that require that a regulation be effective in 280 days or less from its enactment.*

As required by § 2.2-4011, also describe the nature of the emergency and of the necessity for this regulatory change. In addition, delineate any potential issues that may need to be addressed as part of this regulatory change

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The General Assembly, through the 2020 – 2022 biennium budget (HB 30), directed the Department of Behavioral Health and Developmental Services (DBHDS) to promulgate emergency regulations, to be effective within 280 days or less from the enactment of the 2020 appropriations act, to ensure that licensing regulations support high quality community-based mental health services and align with the changes being made to the Medicaid behavioral health regulations.

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 or Acts and 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.

Section 37.2-203 of the Code of Virginia authorizes the Board of Behavioral Health and Developmental Services to adopt regulations that may be necessary to carry out the provisions of Title 37.2 of the Code and other laws of the Commonwealth administered by the DBHDS Commissioner or the department. On July 15, 2020, the State Board voted to adopt the emergency amendments to regulation 12VAC35-105 and to initiate the standard permanent process.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The purpose of this regulatory action is to align DBHDS licensing regulations with ongoing interagency efforts to enhance Virginia's behavioral health services system. The changes in this regulatory action will ensure that DBHDS's behavioral health provider licensing regulations align with changes to Medicaid funded behavioral health services in the Commonwealth by eliminating licensing provisions that conflict with Medicaid service expectations and creating new licensed services for those newly funded services that cannot be nested under an existing DBHDS licensed service.

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.

The substantive provisions of this regulatory action include:

1) The creation of a service definition and license for Mental Health Intensive Outpatient Service;
2) Revised definition of Substance Abuse Intensive Outpatient Service; and
3) The creation of Assertive Community Treatment (ACT) as a newly licensed service in place of the previously licensed Program of Assertive Community Treatment (PACT) service. This includes modification of the licensing requirements to align with the ACT service model and ensure that providers licensed to provide ACT services meet a basic level of fidelity to the ACT model.

The new services defined in this action will ensure that Virginia's licensing regulations align with and support the Commonwealth's initiatives to enhance behavioral healthcare in Virginia and support high quality community-based mental health 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.

Virginia's behavioral health system is undergoing a multi-phased, interagency process of enhancing the behavioral health services available in the Commonwealth. This process requires coordination between agencies with responsibilities for licensing, funding, and overseeing the delivery of behavioral health services in the Commonwealth. This regulatory action will benefit the public by 1) ensuring that Virginians have access to a continuum of high quality behavioral health services, 2) ensuring that a base level of model fidelity is adhered to by providers of Assertive Community Treatment (ACT), and 3) aligning DBHDS licensing regulations with Medicaid service expectations to ensure that the licensing and funding of behavioral health services are in alignment.

There are no known disadvantages to the public or the Commonwealth to these regulatory changes.

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 alternatives to the regulatory changes contained herein that could achieve the essential purpose of this regulatory action. The regulatory changes contained herein are limited to only those that are necessary to ensure consistency between DBHDS licensing regulations and DMAS behavioral health regulations. Misalignment between the two would be problematic for providers of behavioral health services, including small business providers, as well as those who receive behavioral health services in the commonwealth.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this Emergency/NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and Executive Order 14 (as amended, July 16, 2018)), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify as necessary for your agency.

This NOIRA is not being used to announce a periodic review or a small business impact review.

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. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Department of Behavioral Health and Developmental Services 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, and (iii) the potential impacts of the regulation.

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:

John Cimino
1220 Bank Street
Richmond, VA 23219
Phone: (804)298-3279
FAX: (804) 692-0066
John.cimino@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 prior to the implementation of the emergency 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 emergency 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
20		Defines terms used within the Licensing Regulations, including: "Program of assertive community treatment" or "PACT"; Substance Abuse Intensive Outpatient Service	 Removes definition of Program of assertive community treatment or "PACT". Updates definition of Substance Abuse Intensive Outpatient Service Adds new definitions for: • Assertive community treatment or "ACT" • Mental Health Intensive Outpatient Service, and
30		Lists services for which providers may be licensed by DBHDS, including: Program of Assertive Community Treatment (PACT)	Adds "Mental health intensive outpatient service" as a DBHDS licensed service. Removes "Program of Assertive Community Treatment (PACT)" from list of licensed services, and replaces with "Assertive Community Treatment (ACT)"
1360		Defines admission and discharge criteria for Intensive Community Treatment (ICT) and Program of Assertive Community Treatment (PACT) providers	Changes Program of Assertive Community Treatment (PACT) to Assertive Community Treatment (ACT) Adds personality disorder and brain injury to the list of sole diagnoses that render an individual ineligible for ICT and ACT services. Makes the following non-substantive language changes: replaces "substance addition or abuse" with "substance use disorder".
1370		Defines the minimum treatment team and staffing requirements for ICT and PACT teams Requires • Requires ICT and PACT team leader to	Removes references to PACT Creates separate treatment team and staffing requirements for ACT teams. Makes substantive changes to ACT team staffing requirements to align with ACT service requirements, including

		be a QMHP-A with at least three years experience in the provision of mental health services to adults with serious mental illness. • Requires ICT teams to be staffed with at least one full time nurse, and PACT teams to be staffed with at least two full time nurses, at least one of whom shall be a Registered Nurse (RN). • Requires ICT and PACT teams to have one full-time vocational specialist and one full-time substance abuse specialist	• Requires ACT team leader to be a Licensed Mental Health Professional (LMHP), or a Registered Qualified Mental Health Professional-Adult (QMHP-A) if already employed by the employer as a team leader prior to July 1, 2020. • Differentiates nurse staffing requirements based on the size of the ACT Team. o Small ACT teams shall have at least one full-time nurse, who shall be either an RN or an LPN. o Medium ACT teams shall have at least one full time RN, and at least one additional full-time nurse, who shall be LPN's or RNs. o Large ACT teams shall have at least one full-time RN, and at least two additional full-time nurses who shall e LPNs or RNs.
		• Requires a peer specialist who is a QPPMH or QMHP-A who is or has been a recipient of mental health services for severe and persistent mental illness. • Requires a psychiatrist who is a physician who is board certified in psychiatry or who is board eligible in psychiatry and is licensed to practice medicine in Virginia	• Requires Vocational Specialist to be a registered QMHP with demonstrated expertise in vocational services through experience or education • Requires ACT Co-occurring disorder specialist to be a LMHP, registered QMHP, or Certified Substance Abuse Specialist (CSAC) with training or experience working with adults with co-occurring serious mental illness and substance use disorder • Requires a peer recovery specialist to be a Certified Peer Recovery Specialist (CPRS) or certify as a CPRS within the first year of employment

		• Requires each team to have a psychiatrist on staff, who must be a physician who is board certified in psychiatry or who is board eligible in psychiatry. • N/A • Defines minimum staffing capacity for ICT and PACT teams. PACT teams shall have at least 10 full-time equivalent clinical employees or contractors. And PACT and ICT teams must maintain a minimum staff to individual ratio of 1:10. • N/A	• Allows a Psychiatric Nurse Practitioner practicing within the scope of practice of a Psychiatric Nurse Practitioner to fill the psychiatrist position on an ACT team • Requires generalist clinical staff as follows: o Small ACT teams shall have at least one generalist clinical staff; o Medium ACT teams shall have at least two generalist clinical staff; o Large ACT teams shall have at least three generalist clinical staff. • Defines minimum staff to individual ratios that ACT teams must maintain based on the size of the team and the team's caseload. • Requires ACT teams to have 24-hour responsibility for directly responding to psychiatric crises, including meeting the following criteria: o The team shall be available to individuals in crisis 245 hours per day, seven days per week, including in person when needed as determined by the team; o The team shall be the first-line crisis evaluator and responder for individuals serviced by the team; and o The team shall have access to the practical, individualized crisis plans developed to help them address crises for

			each individual receiving services.
1380		Defines minimum number of contacts that ICT and PACT teams must make with individuals receiving services, and requires face-to-face contact, or attempts to make face-to-face contact with individuals in accordance with the individual's individualized services plan	• Removes references to PACT and replaces with ACT. • Language changes for clarity • Requires documentation of attempts to make contact with individuals
1390		Requires daily organizational meetings and progress notes be maintained by ICT and PACT teams	Removes references to PACT and replaces with ACT
1410		Defines minimum service requirements for ICT and PACT teams Providers shall document that the following services are provided consistent with the individual's assessment and ISP. 1. Ongoing assessment to ascertain the needs, strengths, and preferences of the individual; 2. Case management; 3. Nursing; 4. Support for wellness self-management, including the development and implementation of individual recovery plans, symptom assessment, and recovery education; 5. Psychopharmacological treatment, administration, and monitoring; 6. Substance abuse assessment and treatment for individuals with a co-occurring diagnosis of mental illness and substance abuse ; 7. Individual supportive therapy; 8. Skills training in activities of daily living, social skills, interpersonal relationships, and leisure time;	Amends service requirements to align with ACT service expectations and philosophy. Providers shall document that the following services are provided consistent with the individual's assessment and ISP. 1. Ongoing assessment to ascertain the needs, strengths, and preferences of the individual; 2. Case management; 3. Nursing; 4. Support for wellness self-management, including the development and implementation of individual recovery plans, symptom assessment, and recovery education; 5. Psychopharmacological treatment, administration, and monitoring; 6. Co-occurring diagnosis substance use disorder services that are non-confrontational, trauma informed, person-centered, consider interactions of mental illness and substance use, and have goals determined by the individual; 7. Empirically supported interventions and psychotherapy; 8. Psychiatric rehabilitation to include skill-building, coaching, and access to necessary resources to help individuals with personal care, safety skills, money management skills, grocery shopping, cooking, food safety and storage, purchasing and caring for clothing, household maintenance and cleaning skills,

		9. Supportive in-home services; 10. Work-related services to help find and maintain employment; 11 . Support for resuming education; 12. Support, psychoeducation, consultation, and skill-teaching to family members, and significant others; 13. Collaboration with families and assistance to individuals with children; 14. Direct support to help individuals secure and maintain decent, affordable housing that is integrated into the broader community and to obtain legal and advocacy services, financial support, money-management services, medical and dental services, transportation, and natural supports in the community; and 15. Mobile crisis assessment, interventions to prevent or resolve potential crises, and admission to and discharge from psychiatric hospitals.	social skills, and use of transportation and other community resources; 9. Work-related services to help find and maintain employment; 10. Support for resuming education; 11. Support, psychoeducation, consultation, and skill-teaching to family members, and significant others, and broader natural support systems, which shall be directed exclusively to the well-being and benefit of the individual; 12. Collaboration with families and assistance to individuals with children; 13. Assistance in obtaining and maintaining safe, decent, and affordable housing that follows the individual's preferences in level of independence and location, consistent with an evidence based Supportive Housing Model. 14. Direct support to help individuals obtain legal and advocacy services, financial support, money-management services, medical and dental services, transportation, and natural supports in the community; and 15. Mobile crisis assessment, interventions to prevent or resolve potential crises, and admission to and discharge from psychiatric hospitals. 16. Assistance in developing and maintaining natural supports and social relationships; 17. Medication education, assistance, and support; 18. Peer support services, such as coaching, mentoring, assistance with self-advocacy and self-direction, and modeling recovery practices.