



AND



Virginia Society for Clinical Social Work
 5537 Solaris Drive
 Chesterfield Virginia 23832

October 21, 2019

**PUBLIC COMMENT
 TO THE VIRGINIA BOARD OF COUNSELING
 Regarding**

**REGULATIONS GOVERNING THE REGISTRATION OF QUALIFIED MENTAL HEALTH PROFESSIONALS
 18VAC115-80-10**

The Virginia Society for Clinical Social Work and the Northern Virginia members of the Greater Washington Society for Clinical Social Work appreciate the opportunity to make public comment concerning the final text of the *Regulations governing the registration of qualified mental health professionals, 18vac115-80-10.*

We are concerned that the process of the development of these regulations appears to have created an anti-competitive impact on social workers and also raise antitrust and constitutional concerns. Outlined below is the rationale for our concerns.

In the Agency Background Document of the Final Stage in the “Purpose” section (Amended 9/24/2019) it identifies several issues:

Agency Background Document of the Final Stage (Amended 9/24/2019)	VSCSW Comments
<p>1 “...<i>This regulation is the result of collaborative efforts by DHP, DBHDS, DMAS, private providers, and other licensing boards to address concerns about the use of unlicensed and unregistered persons in the provision of services to clients and the lack of accountability for those services...</i>”</p>	<p>1</p> <ul style="list-style-type: none"> • This documents that three departments of the Executive Branch collaborated to create these regulations. • None of the names of the “private providers” are provided in this document. • A review of the Agendas of the Virginia Board of Social Work between January 2017 and October 2019 reveals that the QMHP regulations were never on the agenda as an item for Board discussion. Thus, the VBSW was not one of the licensing Boards involved with this collaborative effort (See copies of agendas attached).
<p>2 “...<i>The intent of the emergency regulation is to establish a registry of QMHPs, so there is some accountability for their practice and a listing of qualified persons for the purpose of reimbursement by DMAS....</i>”</p>	<p>2</p> <ul style="list-style-type: none"> • Clearly the intent of the regulations involved the “...purpose of reimbursement by DMAS...” • The determination of which providers are reimbursed by DMAS directly impacts anticompetition and antitrust concerns.

This collaborative effort that failed to include the VBSW resulted in regulations that establish the necessity for Licensed Bachelors Social Workers (LBSW) and Licensed Masters Social Workers (LMSW) to acquire registration as a Qualified Mental Health Provider from the Board of Counseling in order to be paid by DMAS for providing services that are within the scope of practice of their license. The Competitive Impact Analysis failed to take this impact on LBSW's and LMSW's into consideration.

The Department of Health Professions, Board of Health Professions in "*Policies and Procedures for the Evaluation of the Need to Regulate Health Occupations and Professions*" defined three levels of government regulation of a profession as:

Registration. *Registration requires only that an individual file his name, location, and possibly background information with the State. No entry standard is typically established for a registration program.*

Statutory Certification. *Certification by the state is also known as "title protection." No scope of practice is reserved to a particular group, but only those individuals who meet certification standards (defined in terms of education and minimum competencies which can be measured) may title or call themselves by the protected title.*

Licensure. *Licensure confers a monopoly upon a specific profession whose practice is well defined. It is the most restrictive level of occupational regulation. It generally involves the delineation in statute of a scope of practice which is reserved to a select group based upon their possession of unique, identifiable, minimal competencies for safe practice. In this sense, state licensure typically endows a particular occupation or profession with a monopoly in a specified scope of practice.*

It seems contrary to public policy to require a person meeting the highest level of regulation- "Licensure" to acquire the lowest level of regulation- "Registration" in order to be paid by DMAS for providing services that are within the scope of practice of their license.

In Rebecca Haw Allensworth's 2016 article "*The New Antitrust Federalism*," in the Virginia Law Review, she notes:

"...Because the special risk of self-regulation, or inherent capture, is that "interstitial policies" will suppress competition to the advantage of industry, it follows that supervision should directly address the competitive effects of the reviewed regulation...."

Allensworth points out that when reviewing agency regulation, it should include an appraisal of the regulation's impact on competition. The Board of Counseling, the majority of whose members are counselors, created regulations that are anti-competitive to social workers. It appears that multiple Departments of the Commonwealth collaborated in efforts that created anti-competitive impacts on social workers.

Both the Constitution of the United States and the Constitution of the Commonwealth of Virginia clearly protect the right of every person to engage in any lawful profession, trade, or occupation of his choice. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when

- (i) it is clearly found that such abridgment is necessary for the protection or preservation of the health, safety, and welfare of the public and

(ii) any such abridgment is no greater than necessary to protect or preserve the public health, safety, and welfare.

(See *Code of Virginia, Title 54.1. Professions and Occupations Chapter 1. General Provisions § 54.1-100. Regulations of professions and occupations*)

The requirement on LBSW's and LMSW's licensees to acquire registration as a Qualified Mental Health Provider from the Board of Counseling in order to be paid by DMAS for providing services that are within the scope of practice of their license appears to be an abridgement of their constitutional rights that is not for the protection or preservation of the health, safety, and welfare of the public. Also, this requirement appears to be an abridgement that is greater than necessary to protect or preserve the public health safety, and welfare. These social workers are already licensed by the Board of Social Work which has as it's mission "*To ensure the delivery of safe and competent patient care by licensing health professionals, enforcing standards of practice, and providing information to healthcare practitioners and the public.*" The public is already protected by the licensure process of the Board of Social Work.

The process involved in the development of the QMHP regulations raises, anti-competitive, antitrust, and constitutional concerns. For the above enumerated reasons, we request that these regulations be revised so as to not create negative impacts on social workers and allow LBSW's and LMSW's to provide services within their scope of practice and be reimbursed by DMAS for providing those services.

Submitted by,

Joseph G. Lynch LCSW
Legislative Vice President VSCSW