

MARYLAND REGISTER

Proposed Action on Regulations

Transmittal Sheet PROPOSED OR REPROPOSED Actions on Regulations	Date Filed with AELR Committee	TO BE COMPLETED BY DSD
	05/14/2015	Date Filed with Division of State Documents
		Document Number
		Date of Publication in MD Register

1. Desired date of publication in Maryland Register: 6/26/2015

2. COMAR Codification

Title Subtitle Chapter Regulation

10 58 04 10

3. Name of Promulgating Authority

Department of Health and Mental Hygiene

4. Name of Regulations Coordinator

Michele Phinney

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5. Name of Person to Call About this Document

Kristen Neville

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6. Check applicable items:

New Regulations

Amendments to Existing Regulations

 Date when existing text was downloaded from COMAR online: .

Repeal of Existing Regulations

Recodification

Incorporation by Reference of Documents Requiring DSD Approval

Reproposal of Substantively Different Text:

: Md. R
(vol.) (issue) (page nos) (date)

Under Maryland Register docket no.: --P.

7. Is there emergency text which is identical to this proposal:

Yes No

8. Incorporation by Reference

Check if applicable: Incorporation by Reference (IBR) approval form(s) attached and 18 copies of documents proposed for incorporation submitted to DSD. (Submit 18 paper copies of IBR document to DSD and one copy to AELR.)

9. Public Body - Open Meeting

OPTIONAL - If promulgating authority is a public body, check to include a sentence in the Notice of Proposed Action that proposed action was considered at an open meeting held pursuant to State Government Article, §10-506(c), Annotated Code of Maryland.

OPTIONAL - If promulgating authority is a public body, check to include a paragraph that final action will be considered at an open meeting.

10. Children's Environmental Health and Protection

Check if the system should send a copy of the proposal to the Children's Environmental Health and Protection Advisory Council.

11. Certificate of Authorized Officer

I certify that the attached document is in compliance with the Administrative Procedure Act. I also certify that the attached text has been approved for legality by Ari Elbaum, Assistant Attorney General, (telephone #410-767-1871) on March 4, 2015. A written copy of the approval is on file at this agency.

Name of Authorized Officer

Van T. Mitchell

Title

Secretary

Telephone No.

410-767-6500

Date

May 14, 2015

Title 10
DEPARTMENT OF HEALTH AND MENTAL HYGIENE
Subtitle 58 BOARD OF PROFESSIONAL COUNSELORS AND THERAPISTS

10.58.04 Hearing Procedures

Authority: Health Occupations Article, §§17-205, [17-314] 17-509, and 17-511; State Government Article, §§10-205, 10-206; 10-216, and 10-226(c)(2), Annotated Code of Maryland

Notice of Proposed Action

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The Secretary of Health and Mental Hygiene proposes to adopt new Regulation .10 under COMAR 10.58.04 Hearing Procedures.

This action was considered at a public meeting on November 21, 2014, notice of which was given on the Board's website at <http://dhmh.maryland.gov/bopc/SitePages/Home.aspx>, pursuant to State Government Article, §10-506(c)(1), Annotated Code of Maryland.

Statement of Purpose

The purpose of this action is to :

- 1) Authorize the Board to order the summary suspension of a license or certificate if the Board determines that there is a substantial likelihood that a licensee or certificate holder poses a risk of harm to the public health, safety, or welfare;
- 2) Require the Board to give the respondent proper notice of the Board's intent to summarily suspend the respondent's license or certificate and require that the notice include certain information;
- 3) Establish a process by which the Board shall serve a respondent with the notice of intent to summarily suspend;
- 4) Authorize the respondent to request a pre-deprivation hearing before the Board if the respondent is notified of the Board's intent to summarily suspend the respondent's license or certificate;
- 5) Establish procedures for the pre-deprivation hearing before the Board;
- 6) Authorize the Board to summarily suspend a license or certificate without prior notice to the licensee or certificate holder under certain circumstances;
- 7) Establish timelines for serving the order of summary suspension without prior notice and for the respondent to request a post-deprivation hearing before the Board;
- 8) Establish procedures for the post-deprivation hearing, including the burdens of production and proof;
- 9) Provide that after a pre-deprivation hearing or after a post-deprivation hearing, the Board may take certain actions;
- 9) Provide that, if the Board orders a summary suspension without prior notice to the licensee or certificate holder, the licensee or certificate holder is entitled to an evidentiary hearing before the Board or an administrative law judge within a certain

period of time;

10) Require an administrative law judge to issue a recommended decision to the Board including certain information;

11) Authorize both parties to a decision to file exceptions to the recommended decision in accordance with State law; and

12) Provide that a summary suspension or final order of the Board issued after a pre-deprivation hearing or a post-deprivation hearing is a final order of the Board and a public record under State law.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

I. Summary of Economic Impact.

To the extent that a licensee or certificate holder hires a lawyer to defend against Board charges, there would be a financial impact to the licensee or certificate holder. Also, to the extent that the Board refers a case to the Office of Administrative hearings or to an administrative prosecutor, there would be a cost to the Board.

II. Types of Economic Impact.	Revenue (R+/R-)	Magnitude
	Expenditure (E+/E-)	
A. On issuing agency:	(E+)	Indeterminate
B. On other State agencies:	NONE	
C. On local governments:	NONE	
	Benefit (+)	Magnitude
	Cost (-)	
D. On regulated industries or trade groups:	(-)	Indeterminate
E. On other industries or trade groups:	NONE	
F. Direct and indirect effects on public:	NONE	

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A. The Board cannot estimate either of these amounts as it does not know how many cases may be referred to the OAH or how many licensees or certificate holders will hire an attorney.

D. See A.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Michele Phinney, Director, Office of Regulation and Policy Coordination, Department of Health and Mental Hygiene, 201 West Preston Street, Room 512, Baltimore, MD 21201, or call 410-767-6499; TTY:800-735-2258, or email to dhmh.regs@maryland.gov, or fax to 410-767-6483. Comments will be accepted through July 27, 2015. A public hearing has not been scheduled.

Economic Impact Statement Part C

- A. Fiscal Year in which regulations will become effective: FY 2016
- B. Does the budget for the fiscal year in which regulations become effective contain funds to implement the regulations?
- C. If 'yes', state whether general, special (exact name), or federal funds will be used:
- D. If 'no', identify the source(s) of funds necessary for implementation of these regulations:
- E. If these regulations have no economic impact under Part A, indicate reason briefly:
- F. If these regulations have minimal or no economic impact on small businesses under Part B, indicate the reason and attach small business worksheet.
It is incumbent upon licensees or certificate holders to follow Board statutes and regulations and to make the decision to hire an attorney to defend against Board disciplinary action, not upon a small business.
- G. Small Business Worksheet:

Attached Document:

Title 10
DEPARTMENT OF HEALTH AND MENTAL
HYGIENE
Subtitle 58 BOARD OF PROFESSIONAL COUNSELORS AND
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10.58.04 Hearing Procedures

Authority: Health Occupations Article, §§17-205, [17-314] 17-509, and 17-511; State Government Article, §§10-205, 10-206; 10-216, and 10-226(c)(2), Annotated Code of Maryland

.10 Summary Suspension of a License or Certificate

A. Pursuant to State Government Article, §10 – 226 (c)(2), Annotated Code of Maryland, the Board shall order the summary suspension of a licensee or certificate holder if the Board determines that there is substantial likelihood that a licensee or certificate holder poses a risk of harm to the public health, safety, or welfare.

B. Notice of Intent to Summarily Suspend.

(1) Based on information gathered in an investigation or otherwise provided to the Board, the Board may vote to issue:

- (a) A notice of intent to summarily suspend a license or certificate; or
- (b) An order of summary suspension.

(2) If the Board votes to issue a notice of intent to summarily suspend a license or certificate or an order of summary suspension, the Board shall refer the matter to an administrative prosecutor for prosecution.

(3) A notice of intent to summarily suspend a license or certificate shall include:

(a) A proposed order of summary suspension which is unexecuted by the Board and includes:

- (i) The statutory authority on which the action has been taken;
- (ii) Allegations of fact that the Board believes demonstrate a substantial likelihood that the licensee or certificate holder poses a risk of harm to the public health, safety, or welfare; and
- (iii) Notice to the respondent of the right to request a full hearing on the merits of the summary suspension if the Board executes the proposed order of summary suspension; and

(b) An order or summons to appear before the Board to show cause why the Board should not execute the order of summary suspension and which notifies the respondent of the consequences of failing to appear.

(4) Service.

(a) The Board shall serve a respondent with a notice of intent to summarily suspend a license or certificate not later than 5 days before a predeprivation show cause hearing is scheduled before the Board.

(b) Service of the notice of intent to summarily suspend shall be made:

- (i) Personally upon the respondent;
- (ii) By certified mail to the address the respondent is required to maintain with the Board; or
- (iii) By other reasonable means to effect service.

(c) If the Board is unable to serve the notice of intent to summarily suspend a license or certificate upon the respondent as described in §B(4)(b) of this regulation, the Board may nevertheless proceed to prosecute the case.

C. Predeprivation Opportunity to Be Heard.

(1) If the Board issues a notice of intent to summarily suspend a license or certificate, the respondent may request an opportunity to appear before the Board to show cause why the respondent's license or certificate should not be suspended before the Board executes the order of summary suspension.

(2) Predeprivation Show Cause Hearing Before Board.

(a) The hearing shall be a nonevidentiary hearing to provide the parties with an opportunity for oral argument on the proposed summary suspension.

(b) The Board member presiding at the hearing shall determine all procedural issues and may impose reasonable time limits on each party's oral argument.

(c) The presiding Board member shall make rulings reasonably necessary to facilitate the effective and efficient operation of the hearing.

(d) The respondent and the administrative prosecutor may not exceed 30 minutes each to present oral argument.

(e) The respondent shall proceed first and may reserve part of the allotted time for rebuttal.

(3) The Board member who presides over the hearing:

(a) May allow either the respondent or the administrative prosecutor to present documents or exhibits which are relevant and material to the proceedings and which are not duly repetitious, if the presiding Board member believes that such documents or exhibits are necessary for a fair hearing; and

(b) May not allow testimony by any witness unless agreed to by the parties and approved by the Board in advance of the hearing.

(4) A Board member may be recognized by the presiding member to ask questions of either party appearing before the Board.

D. Summary Suspension Without Prior Notice or Hearing Opportunity.

(1) *Extraordinary Circumstances.* The Board may, after consultation with Board counsel, order the summary suspension of a license or certificate without first issuing a notice of intent to summarily suspend a license or certificate or providing a respondent with an opportunity for a predeprivation hearing if the Board determines that:

(a) The public health, safety, and welfare require the immediate suspension of the license; and

(b) Prior notice and an opportunity to be heard are not feasible.

(2) *Time – Service and Hearing.*

(a) An order of summary suspension under section §D(1) of this regulation shall be served upon the respondent within 48 hours after its execution.

(b) The respondent may request a show cause hearing before the Board within 30 days after the effective date of the summary suspension. The request shall be made within 10 days of the date of the notice of summary suspension.

(3) If the respondent requests a hearing under §B(3)(a)(iii) of this regulation, that hearing shall:

(a) Be conducted before the Board as provided in §D(2)(b) of this regulation; and

(b) Provide the respondent with an opportunity to show cause why the Board should lift the summary suspension and reinstate the license or certificate.

E. Burdens of Production and Persuasion.

(1) In a show cause proceeding under §C of this regulation, the respondent may present argument in opposition to the allegations presented in the order for summary suspension or which otherwise demonstrate that the public health, safety, or welfare is not at risk.

(2) The administrative prosecutor bears the burden of demonstrating by a preponderance of the evidence that the health, safety, or welfare of the public imperatively requires the Board to summarily suspend the respondent's license or certificate.

F. Disposition.

(1) If the Board issues a notice of intent to summarily suspend a license or certificate before summarily suspending a license or certificate, the Board may, after the show cause hearing, vote to:

(a) Order a summary suspension;

(b) Deny the summary suspension;

(c) Issue an order agreed upon by the parties; or

(d) Issue an interim order warranted by the circumstances of the case, including one providing for a stay of the summary suspension subject to certain conditions.

(2) If the Board orders a summary suspension before a show cause hearing, the Board may, at the conclusion of the hearing, vote to:

(a) Affirm its order of summary suspension;

(b) Rescind its order of summary suspension;

(c) Issue an order agreed upon by other parties; or

(d) Issue an interim order warranted by the circumstances of the case, including one providing for a stay of the summary suspension subject to certain conditions.

(3) An order for summary suspension or other order issued by the Board after the initiation of summary suspension proceedings are final orders of the Board and public records under State Government Article, §10–611, Annotated Code of Maryland.

G. Postdeprivation Opportunity for Evidentiary Hearing.

(1) If the Board orders the summary suspension of a license or certificate under §C or D of this regulation, the respondent may request an evidentiary hearing before the Board, or if the Board delegates the matter to the Office of Administrative Hearings, before an administrative law judge.

(2) The respondent may request an evidentiary hearing within 10 days after the Board issues the order of summary suspension.

(3) Unless otherwise agreed by the parties, a hearing shall be provided within 45 days after the respondent's request.

(4) An evidentiary hearing may be consolidated with a hearing on charges issued by the Board that include the facts that form the basis for the summary suspension.

(5) An evidentiary hearing shall be conducted under the contested case provisions of State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland.

(6) If the Board delegates the matter to the Office of Administrative Hearings, the administrative law judge shall issue a recommended decision to the Board with:

(a) Proposed or final findings of fact;

(b) Proposed or final conclusions of law;

(c) A proposed disposition; or

(d) Any combination of §G(6)(a), (b), or (c) of this regulation, pursuant to the Board's delegation of the matter to the Office of Administrative Hearings.

(7) If the hearing is one combined with charges, the administrative law judge's determination of the merits of the summary suspension shall be based only on the parts of the record available to the Board when the Board voted for summary suspension.

(8) The parties may file exemptions to the recommended decision, as provided in State Government Article, §10–216, Annotated Code of Maryland.

(9) An order issued by the Board after a post-deprivation evidentiary hearing is a final order of the Board and is a public record under State Government Article, §10–611, Annotated Code of Maryland.

Van T. Mitchell

Secretary of Health and Mental Hygiene