

16101572D

HOUSE BILL NO. 740

Offered January 13, 2016

Prefiled January 12, 2016

A BILL to amend and reenact §§ 51.5-41, 51.5-120, 51.5-140, 51.5-141, 51.5-142, 51.5-163, 51.5-164, and 51.5-172 through 51.5-176 of the Code of Virginia and to repeal § 51.5-165 of the Code of Virginia, relating to federal Rehabilitation Act and Older Americans Act.

Patron—Yost

Referred to Committee on Health, Welfare and Institutions

Be it enacted by the General Assembly of Virginia:

1. That §§ 51.5-41, 51.5-120, 51.5-140, 51.5-141, 51.5-142, 51.5-163, 51.5-164, and 51.5-172 through 51.5-176 of the Code of Virginia are amended and reenacted as follows:

§ 51.5-41. Discrimination against otherwise qualified persons with disabilities by employers prohibited.

A. No employer shall discriminate in employment or promotion practices against an otherwise qualified person with a disability solely because of such disability. For the purposes of this section, an "otherwise qualified person with a disability" means a person qualified to perform the duties of a particular job or position and whose disability is unrelated to the person's ability to perform such duties or position or is unrelated to the person's qualifications for employment or promotion.

B. It is the policy of the Commonwealth that persons with disabilities shall be employed in the state service, the service of the political subdivisions of the Commonwealth, in the public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as other persons unless it is shown that the particular disability prevents the performance of the work involved.

C. An employer shall make reasonable accommodation to the known physical and mental impairments of an otherwise qualified person with a disability, if necessary to assist such person in performing a particular job, unless the employer can demonstrate that the accommodation would impose an undue burden on the employer. For the purposes of this section, "mental impairment" does not include active alcoholism or current drug addiction and does not include any mental impairment, disease, or defect that has been successfully asserted by an individual as a defense to any criminal charge.

1. In determining whether an accommodation would constitute an undue burden upon the employer, the following shall be considered:

a. Hardship on the conduct of the employer's business, considering the nature of the employer's operation, including composition and structure of the employer's work force;

b. Size of the facility where employment occurs;

c. The nature and cost of the accommodations needed, taking into account alternate sources of funding or technical assistance included under ~~§§ 51.5-165 and~~ 51.5-173;

d. The possibility that the same accommodations may be used by other prospective employees;

e. Safety and health considerations of the person with a disability, other employees, and the public.

2. Notwithstanding the foregoing, any accommodation that would exceed \$500 in cost shall be rebuttably presumed to impose an undue burden upon any employer with fewer than 50 employees.

3. The employer has the right to choose among equally effective accommodations.

4. Nothing in this section shall require accommodations when the authority to make such accommodations is precluded under the terms of a lease or otherwise prohibited by statute, ordinance, or other regulation.

5. Building modifications made for the purposes of such reasonable accommodation may be made without requiring the remainder of the existing building to comply with the requirements of the Uniform Statewide Building Code.

D. Nothing in this section shall prohibit an employer from refusing to hire or promote, from disciplining, transferring, or discharging or taking any other personnel action pertaining to an applicant or an employee who, because of his disability, is unable to adequately perform his duties, or cannot perform such duties in a manner which would not endanger his health or safety or the health or safety of others. Nothing in this section shall subject an employer to any legal liability resulting from the refusal to employ or promote or from the discharge, transfer, discipline of, or the taking of any other personnel action pertaining to a person with a disability who, because of his disability, is unable to adequately perform his duties, or cannot perform such duties in a manner that would not endanger his health or safety or the health or safety of others.

INTRODUCED

HB740

59 E. Nothing in this section shall be construed as altering the provisions of the Virginia Minimum
60 Wage Act (§ 40.1-28.8 et seq.).

61 F. This section shall not apply to employers covered by the federal Rehabilitation Act of 1973.

62 G. No employer who has hired any person because of the requirements of this section shall be liable
63 for any alleged negligence in such hiring.

64 **§ 51.5-120. Cooperation of Department with other state departments.**

65 A. The Department shall collaborate with the Department of Behavioral Health and Developmental
66 Services in activities related to licensing providers of (i) services under the Individual and Families
67 Developmental Disabilities Support Waiver, (ii) services under the Brain Injury Waiver, and (iii)
68 residential services for individuals with brain injuries as defined in § 37.2-403. These activities include
69 involving advocacy and consumer groups who represent persons with developmental disabilities or brain
70 injuries in the regulatory process; training the Department of Behavioral Health and Developmental
71 Services, local human rights committees, and the State Human Rights Committee on the unique needs
72 and preferences of individuals with developmental disabilities or brain injuries; assisting in the
73 development of regulatory requirements for such providers; and providing technical assistance in the
74 regulatory process and in performing annual inspections and complaint investigations.

75 B. The Department shall collaborate with the Department of Social Services in activities related to
76 the planning and provision of adult services pursuant to Article 4 (§ 51.5-144 et seq.), adult protective
77 services pursuant to Article 5 (§ 51.5-148), and auxiliary grants pursuant to Article 9 (§ 51.5-159 et
78 seq.).

79 C. *The Department shall enter into cooperative agreements with the Department of Behavioral*
80 *Health and Developmental Services, the Department of Medical Assistance Services, the Virginia*
81 *Community College System, public institutions of higher education, and the Department of Education to*
82 *identify the responsibilities of each public entity relating to the provision of vocational rehabilitation*
83 *services as required by the federal Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), as amended.*

84 **§ 51.5-140. Access to clients, patients, individuals, facilities, and records by Office of State**
85 **Long-Term Care Ombudsman; interference, retaliation, or reprisals against complainants.**

86 A. The entity designated by the Department to operate the programs of the Office of the State
87 Long-Term Care Ombudsman pursuant to the Older Americans Act (42 U.S.C. § 3001 et seq.) shall, in
88 the investigation of complaints referred to the program performance of its functions, responsibilities, and
89 duties, have access to the facilities providing services; the clients, patients, and individuals receiving
90 services; and the records of such clients, patients, and individuals in (i) licensed assisted living facilities
91 and adult day care centers as those terms are defined in § 63.2-100; (ii) home care organizations as
92 defined in § 32.1-162.7; (iii) hospice facilities as defined in § 32.1-162.1; (iv) certified nursing facilities
93 and nursing homes as those terms are defined in § 32.1-123; (v) providers as defined in § 37.2-403; (vi)
94 state hospitals operated by the Department of Behavioral Health and Developmental Services; and (vii)
95 providers of services by an area agency on aging or any private nonprofit or proprietary agency
96 whenever the ~~entity~~ Office of the State Long-Term Care Ombudsman has the consent of the client,
97 patient, or individual receiving services or his legal representative. However, if a client, patient, or
98 individual receiving services is unable to consent to the review of his medical and social records and has
99 no legal representative and access to the records is necessary to investigate a complaint, access shall be
100 granted to the extent necessary to conduct the investigation. Further, access shall be granted to the ~~entity~~
101 Office of the State Long-Term Care Ombudsman if a legal representative of the client, patient, or
102 individual receiving services refuses to give consent and the ~~entity~~ Office of the State Long-Term Care
103 Ombudsman has reasonable cause to believe that the legal representative is not acting in the best
104 interests of the client, patient, or individual receiving services. Notwithstanding the provisions of
105 § 32.1-125.1, the ~~entity~~ designated by the Department to operate the programs of the Office of the State
106 Long-Term Care Ombudsman shall have access to state hospitals in accordance with this section. Access
107 to patients, residents, and individuals receiving services and their records and to facilities and state
108 hospitals shall be available ~~during normal working hours except in emergency situations at any time~~
109 ~~during a facility's regular business or visiting hours and at any other time when access may be required~~
110 ~~by the circumstances to be investigated~~. Records that are confidential under federal or state law shall be
111 maintained as confidential by the ~~entity~~ Office of the State Long-Term Care Ombudsman and shall not
112 be further disclosed, except as permitted by law. However, notwithstanding the provisions of this
113 section, there shall be no right of access to privileged communications pursuant to § 8.01-581.17.

114 B. *The Department shall put in place mechanisms to prohibit and investigate allegations of*
115 *interference, retaliation, and reprisals by a long-term care facility, other entity, or individual with*
116 *respect to any resident, employee, or other person for filing a complaint with, providing information to,*
117 *or otherwise cooperating with any representative of the Office of the State Long-Term Care Ombudsman*
118 *or its designees and shall provide for appropriate sanctions with respect to such interference,*
119 *retaliation, or reprisals.*

120 **§ 51.5-141. Confidentiality of records of Office of the State Long-Term Care Ombudsman.**

All documentary and other evidence received or maintained by *the Office of the State Long-Term Care Ombudsman*, the Department, or *its* ~~their~~ agents in connection with specific complaints or investigations under any program of the Office of the State Long-Term Care Ombudsman ~~conducted by~~ ~~or under the Commissioner~~ shall be confidential and not subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except that such information may be released on a confidential basis in compliance with regulations adopted by the Department and consistent with provisions of subdivision 4 of § 2.2-601 and with the requirements of the Older Americans Act (42 U.S.C. § 3001 et seq.).

The ~~Commissioner~~ *Office of the State Long-Term Care Ombudsman* shall release information concerning completed investigations of complaints made under the programs of the Office of the State Long-Term Care Ombudsman but shall in no event release the identity of any complainant or resident of a long-term care facility unless (i) the complainant or resident or his legal representative consents ~~in~~ ~~writing~~ to disclosure or (ii) disclosure is required by court order. The ~~Commissioner~~ *Office of the State Long-Term Care Ombudsman* shall establish procedures to notify long-term care ~~facilities~~ *providers* of the nature of complaints and their findings.

§ 51.5-142. Protection for representatives of the Office of the State Long-Term Care Ombudsman; interference, retaliation, and reprisals.

A. Any designated representative of the Office of the State Long-Term Care Ombudsman who in good faith with reasonable cause and without malice performs the official duties of ombudsman, including acting to report, investigate, or cause any investigation to be made regarding a long-term care provider, shall be immune from any civil liability that might otherwise be incurred or imposed as the result of making the report or investigation.

B. *The Department shall put in place mechanisms to prohibit, investigate, and sanction interference, retaliation, and reprisals by a long-term care facility, other entity, or individual against the Office of the State Long-Term Care Ombudsman or its representatives for fulfillment of its functions, responsibilities, or duties.*

C. *The Department shall put in place mechanisms to ensure that the Office of the State Long-Term Care Ombudsman (i) may analyze, comment on, and monitor the development and implementation of federal, state, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of individuals receiving long-term care services, and recommend any changes to such laws, regulations, and policies as the Office of the State Long-Term Care Ombudsman determines to be appropriate and (ii) may provide such information as the Office of the State Long-Term Care Ombudsman determines necessary to public and private agencies, legislators, media, and other persons regarding the problems and concerns of individuals receiving long-term care services and provide recommendations related to such problems and concerns. The Office of the State Long-Term Care Ombudsman shall make clear that the determinations and positions are those of the Office and shall not necessarily represent the determinations or positions of the Department or other agency in which the Office is organizationally located.*

§ 51.5-163. Centers for independent living.

A. Services provided through grants or contracts with centers for independent living pursuant to this article shall include:

1. Advocacy;
2. Peer counseling;
3. Independent living skills training; ~~and~~
4. Information and referral; ~~and~~

5. *Services that (i) facilitate the transition of individuals with significant disabilities from nursing homes and other institutions to home and community-based residences with the requisite supports and services, (ii) provide assistance to individuals with significant disabilities who are at risk of entering institutions so that the individuals may remain in the community, and (iii) facilitate the transition of youth with significant disabilities, who were eligible for individualized education programs under § 614(d) of the Individuals with Disabilities Education Act or who have completed their secondary education, to post-secondary life.*

Services may include other services deemed necessary by the local consumer base.

B. Centers for independent living funded in whole or in part by the Department shall be staffed by persons with disabilities who are trained in the philosophy of independent living. The majority of management staff shall include persons with disabilities.

§ 51.5-164. Statewide Independent Living Council created.

The Statewide Independent Living Council is hereby created to ~~plan, together with the Department,~~ ~~activities carried out under~~ *develop and sign the Statewide Plan for Independent Living in accordance with Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. § 796 et seq.) and to provide advice to the Department regarding such* perform other activities as provided in such Act. Membership and

182 duties shall be constructed according to federal provisions. The Department shall provide staff support
183 for the Council.

184 **§ 51.5-172. Individualized plan for employment.**

185 A written individualized plan for employment for each recipient of vocational rehabilitation services
186 provided or funded by the Department, in whole or in part, shall be developed ~~within a reasonable time~~
187 ~~and as soon as possible, but not later than 90 days after the due date of the determination of eligibility,~~
188 ~~unless an extension is agreed to by the client, his parents or guardian, if appropriate, and the~~
189 ~~Department. The plan shall be agreed to and signed by the client, his parents or guardian, if appropriate,~~
190 ~~and a qualified vocational rehabilitation counselor employed by the Department. When the Department is~~
191 ~~operating under an order of selection, the plan shall be developed and implemented for individuals~~
192 ~~meeting the Department's order of selection criteria.~~ The plan shall be reviewed at least annually by the
193 client, his parents or guardian, if appropriate, and the qualified vocational rehabilitation counselor.

194 **§ 51.5-173. Services for individuals.**

195 A. Vocational rehabilitation services provided by the Department shall address comprehensively the
196 individual needs of each client to the maximum extent possible with resources available to the
197 Department, through the following:

198 1. An assessment for determining eligibility and vocational needs by qualified personnel, including, if
199 appropriate, an assessment by personnel skilled in rehabilitation technology;

200 2. Counseling and guidance, including information and support services to assist an individual in
201 exercising informed choice, and referral necessary to help applicants or clients to secure needed services
202 from other agencies;

203 3. Diagnosis and treatment of physical or mental impairments, including:

204 a. Corrective surgery or therapeutic treatment necessary to correct or substantially modify a physical
205 or mental condition that constitutes a substantial impediment to employment, but that is of such a nature
206 that correction or modification may reasonably be expected to eliminate or reduce such impediment to
207 employment within a reasonable length of time;

208 b. Necessary hospitalization in connection with surgery or treatment;

209 c. Prosthetic and orthotic devices;

210 d. Eyeglasses and visual services as prescribed by qualified personnel who meet state licensure laws
211 and who are selected by the client;

212 e. Special services including transplantation and dialysis, artificial kidneys, and supplies necessary for
213 the treatment of clients with end-stage renal disease; and

214 f. Diagnosis and treatment for mental and emotional disorders by qualified personnel who meet state
215 licensure laws;

216 4. Vocational and other training services, including the provision of personal and
217 vocational-adjustment services, books, tools, and other training materials, except that no training services
218 provided at institutions of higher education shall be paid for with funds under this article unless
219 maximum efforts have been made to secure grant assistance in whole or part from other funding
220 sources;

221 5. Maintenance for additional costs incurred while participating in an assessment for determining
222 eligibility and vocational rehabilitation needs or while receiving services under an individualized plan for
223 employment;

224 6. Transportation, including adequate training in the use of public transportation vehicles and systems
225 that is provided in connection with the provision of any other services described in this section and
226 needed by the client to achieve an employment outcome;

227 7. Services to members of a client's family when such services are necessary to assist the client to
228 achieve an employment outcome;

229 8. Interpreter services provided by qualified personnel for clients who are deaf or hard of hearing and
230 reader services for clients determined to be blind, after an examination by qualified personnel who meet
231 state licensure laws;

232 9. Rehabilitation technology, including telecommunications and sensory and other technological aids
233 and devices;

234 10. Job-related services, including job search and assistance, job retention services, follow-up
235 services, and follow-along services;

236 11. Specific post-employment services necessary to assist the client to retain, regain, or advance in
237 employment;

238 12. Occupational licenses, tools, equipment, and initial stocks and supplies;

239 13. On-the-job or other related personal assistance services provided while a client is receiving other
240 services described in this section;

241 14. Supported employment services which include providing a rehabilitation or other human services
242 agency staff person to assist in job placement, job site training, and job follow-through for the disabled
243 employee;

15. Technical assistance and other consultation services to conduct market analyses, develop business plans, and otherwise provide resources, to the extent such resources are authorized to be provided through the statewide workforce investment system, to eligible clients pursuing self-employment or telecommuting or establishing a small business operation as an employment outcome; and

16. Transition services for students with disabilities that facilitate the *transition from school to post-secondary life, such as the achievement of the an employment outcome identified in the individualized plan for employment in competitive integrated employment or pre-employment transition services*;

17. *Customized employment for an individual with a significant disability in a competitive integrated setting that is based on the strengths, needs, interests, and abilities of the individual and the business needs of the employer; and*

18. *Encouragement of qualified individuals who are eligible to receive services to pursue advanced training in the fields of science, technology, engineering, mathematics (including computer science fields), medicine, law, or business.*

B. Written standards shall be established by the Commissioner detailing the scope and nature of each vocational rehabilitation service authorized herein, the conditions, criteria and procedures under which each service may be provided, and the use of entitlements and other benefits to access these services, when appropriate.

C. In providing the foregoing services, the Department shall determine whether comparable services and benefits are available under any other program unless such a determination would interrupt or delay the progress of the client toward achieving the employment outcome identified in the individualized plan for employment, an immediate job placement, or the provision of such service to any client at extreme medical risk.

§ 51.5-174. Services for groups.

Vocational rehabilitation services provided by the Department for the benefit of groups shall include, to the maximum extent possible with the resources available to the Department:

1. The establishment, development, or improvement of community rehabilitation programs, *which shall be used to provide services under this section that promote integration into the community and prepare individuals with disabilities for competitive integrated employment, including supported employment and customized employment*;

2. *The provision of other services that promise to contribute significantly to rehabilitation of a group of clients but that are not directly related to the individualized plan for employment of any one client* Transition services to youth with disabilities and students with disabilities, for which a vocational rehabilitation counselor works in concert with educational agencies, providers of job training programs, providers of services under the Medicaid program pursuant to Title XIX of the federal Social Security Act (42 U.S.C. § 1396 et seq.), entities designated by the Department to provide services for individuals with developmental disabilities, centers for independent living, housing and transportation authorities, workforce development systems, businesses, and employers;

3. The use of telecommunications systems, including telephone, television, satellite, radio, and other similar systems that have the potential for substantially improving delivery methods of activities described in this section and developing appropriate programming to meet the particular needs of individuals with disabilities;

4. Technical assistance ~~and support services~~ to businesses that are ~~not subject to Title I of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) seeking to employ individuals with disabilities; and~~

5. ~~Consultative~~ Consultation and technical assistance services to assist *state and local* educational agencies in planning for the transition of students with disabilities from school to ~~post-school~~ activities *post-secondary life*, including employment;

6. *The establishment, development, or improvement of assistive technology demonstration, loan, reutilization, or financing programs in coordination with activities authorized by the Assistive Technology Act of 1968 (29 U.S.C. § 3001 et seq.) to promote access to assistive technology for individuals with disabilities and employers; and*

7. *Support, including tuition where appropriate, for advanced training in the fields of science, technology, engineering, mathematics (including computer science fields), medicine, law, or business, consistent with the requirements in § 103 of the federal Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.).*

§ 51.5-175. Case closure in extended employment.

When any part of the written individualized plan for employment of a client of the Department includes services in a community rehabilitation program (CRP), that portion of the plan shall be developed jointly with the rehabilitation counselor, a qualified staff member of the CRP, and the client, and, when appropriate, his parents or guardian. Factors to be considered shall include, but not be limited

305 to, proposed activities, activity schedule, and the impact of the activity on the welfare of the client, the
306 client's family, and his community.

307 When a case is closed upon a client's placement in extended employment in a ~~CRP~~ community
308 rehabilitation program or any other employment under § 14(c) of the Fair Labor Standards Act (29
309 U.S.C. § 214(c)), the case shall be reviewed by the Department, ~~with the cooperation of the CRP, within~~
310 ~~12 months of case closure~~ semiannually for two years after the start of employment, and annually
311 thereafter, to determine the interests, priorities, and needs of the individual with respect to competitive
312 integrated employment or training for competitive employment.

313 **§ 51.5-176. Participation by clients in cost of services.**

314 The Commissioner shall adopt written standards for determining the extent to which clients shall be
315 responsible for the cost of vocational rehabilitation services provided or funded by the Department.
316 However, the provision of the following services by the Department shall not be conditioned on the
317 client's or applicant's ability to pay for the cost of those services: (i) evaluation of rehabilitation
318 potential, except for vocational services other than those of a diagnostic nature which are provided under
319 an ~~extended~~ evaluation of rehabilitation potential; (ii) counseling, guidance, and referral services; and
320 (iii) placement and follow-up. The Department shall maximize financial participation of persons
321 receiving services and shall maximize reimbursement from responsible ~~third party~~ third-party payors.

322 **2. That § 51.5-165 of the Code of Virginia is repealed.**