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Fast Track Proposed Regulation Agency Background Document

Agency name	Department (Board) of Juvenile Justice
Virginia Administrative Code (VAC) citation	6VAC35-20-37
Regulation title	REGULATIONS GOVERNING THE MONITORING, APPROVAL, AND CERTIFICATION OF JUVENILE JUSTICE PROGRAMS (6VAC35-20-37)
Action title	Addition of provisions for issuing an order of summary suspension of the license or certification to operate a group home or residential facility for children.
Date this document prepared	May 21, 2008

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.

The proposed regulation adds procedures to the existing certification process that will enable the Director to issue an order of summary suspension consistent with the statutory authority. Section 37 of the regulation is to provide the process for suspending the license to operate a group home or residential facility for children in cases of immediate and substantial threat to the health, safety, and welfare of the residents. The proposed amendments add provisions to the existing certification process that will enable the Director to issue an order of summary suspension consistent with the statutory authority. The section details the circumstances under which an order of suspension of the license or certificate of a facility regulated by the Department may be issued by the Director, notification requirements after an order is issued, the process through which the licensee or certificate holder may appeal any such order, and the Director's and licensee's alternatives after the appeal hearing.

Thus, the section will provide the basis for the Department to act, in accordance with legal protocols, and ensure protections for the legal rights of all parties that may be affected by an action to summarily suspend a license to operate a group home or other residential facility for children.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

This action is necessary due to legislation enacted during the 2006 General Assembly session. Chapter 168 of the 2006 Virginia Acts of Assembly (SB 190) amends §66-24 of the Code of Virginia relating to summary suspension of licenses or certificates for group homes and residential facilities under certain circumstances. A second enactment clause in Chapter 168 requires the Board of Juvenile Justice to promulgate regulations to implement the provisions of the legislation within 280 days of enactment.

The State Board approved the Emergency Regulations Governing the Monitoring, Approval, and Certification of Juvenile Justice Programs for publication in the Virginia Register at the September 13, 2006, meeting. The emergency regulations were published by the Virginia Register of Regulations on August 20, 2007. The public comment period ended on September 19, 2007. No public comments were received. The emergency regulations became effective on September 19, 2007, and expire on July 31, 2008.

A Notice of Intended Regulatory Action (NOIRA) was submitted with the Emergency Regulation, which began the regulatory process for the addition of the provision, for issuance of an order of summary suspension of a license or the certification to operate a group home or residential facility for children, to the Board's certification regulation. At its April 9, 2008, meeting, the State Board of Juvenile Justice approved the draft proposed regulation for publication as a proposed regulation.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.

Virginia Code §66-10 establishes the general authority of the Board of Juvenile Justice to promulgate regulations. This action is necessary due to legislation enacted during the 2006 General Assembly session. Chapter 168 of the 2006 Virginia Acts of Assembly (SB 190) amends §66-24 of the Code of Virginia relating to summary suspension of licenses or certificates for group homes and residential facilities under certain circumstances.

In 2005 the General Assembly gave the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services Board authority to issue a summary suspension order for children's group homes and residential facilities in cases of immediate and substantial threat to the health, safety, and welfare of residents. (See 12VAC35-45.)

In 2006 the Joint Subcommittee Studying Private Youth and Single Family Group Homes pursuant to HJR 685 (2005) recommended providing the same summary suspension order authority to the Superintendent of Public Instruction, the Director of the Department of Juvenile Justice, and the Commissioner of Social Services.

In 2006, the General Assembly acted upon the Joint Subcommittee’s recommendation and passed Senate Bill 190. (See Chapter 168 of the 2006 Virginia Acts of Assembly.) Chapter 168 of the 2006 Virginia Acts of Assembly (SB 190) amended §66-24 of the Code of Virginia relating to summary suspension of licenses for group homes and residential facilities under certain circumstances. The Code now authorizes the Director of the Department of Juvenile Justice to issue orders of summary suspension of a license to operate a group home or other residential facility for children in cases of immediate and substantial threat to the health, safety, and welfare of residents.

A second enactment clause in Chapter 168 requires the Board of Juvenile Justice to promulgate regulations to implement the provisions of the legislation within 280 days of enactment. Pursuant to this clause, the emergency regulation became effective September 19, 2007; and, as provided in the Administrative Process Act, will be effective for one year from the date of filing with the Registrar of Regulations. (See §2.2-4011 of the Code of Virginia.)

A Notice of Intended Regulatory Action (NOIRA) was submitted with the Emergency Regulation, which began the regulatory process for the addition of the provision, for issuance of an order of summary suspension of a license or the certification to operate a group home or residential facility for children, to the Board’s certification regulation.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The existing regulation prescribes how, in accordance with Code of Virginia §§16.1-234, 16.1-309.1, 16.1-309.9 B, 16.1-309.10, 16.1-349, and 66-10, the Board and Department of Juvenile Justice will monitor and approve residential and non-residential programs that are part of the Commonwealth’s juvenile justice system. The proposed regulation adds procedures to the existing certification process that will enable the Director to issue an order of summary suspension consistent with the statutory authority. The regulation is intended to provide the process for suspending the license or certificate to operate a group home or residential facility for children in cases of immediate and substantial threat to the health, safety, and welfare of the residents. The regulation will provide the basis for the Department to act in accordance with legal protocols and ensure protections for the legal rights of all parties that may be affected by an action to suspend a license or certificate.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

Please note: If an objection to the use of the fast-track process is received within the 60-day public comment period from 10 or more persons, any member of the applicable standing committee of either

house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

There are two reasons for using the fast track process for promulgating this regulation. First, this regulation is not a substantive change to the powers of the Director and the State Board of Juvenile Justice. The actual authority of the Director to take action against a licensee or a certificate holder dates back to 1992. As promulgated in 1992, former regulations 6VAC35-20-120 and 6VAC35-20-130 allowed the Director to withdraw funding or prohibit placement of children in certified child residential facilities.

The current regulation was amended in 2003 (6VAC35-20-37). Current regulatory law provides the Director with the authority to take immediate administrative action when there is evidence of any life, health, or safety violation or a program is not in substantial compliance with Board-approved standards, policies, or the local plan for Virginia Juvenile Community Crime Control Act programs. The administrative action may include withholding funds; removing juveniles from the program; or placing the program on administrative probation for up to six months pending certification action by the Board. (See 6VAC35-20-37.) Therefore, the proposed regulation is not a substantive change to the Director's authority. The proposed regulation clarifies the duties of the Director and enhances the due process rights of the licensee or certificate holder. The proposed regulation adds language to clarify the circumstances in which the Director may issue a summary suspension order and the due process rights for the certificate or license holder for whom the summary order was issued against.

Second, this regulatory action is mandated by Chapter 168 of the 2006 Virginia Acts of Assembly (SB 190) and the proposed changes are consistent with the Virginia Code amendments made by Chapter 168 of the 2006 Virginia Acts of Assembly. (See Virginia Code §66-24.) Moreover, the proposed regulation addresses a fundamental due process notice issue by fixing a critical timing flaw in the law as passed by the General Assembly. As amended, Virginia Code §66-24 states that the summary order of suspension becomes effective at the time of issuance by the Director. By law, the licensee then has three business days to appeal the decision from the date of issuance. However, Virginia Code §66-24 requires that summary order of suspension be served on the licensee or its designee as soon as practicable thereafter by personal service and certified mail, return receipt requested, to the address of record of the licensee. The issue is that the timeframe for requesting an appeal could elapse before the licensee receives notice that the summary order of suspension has been issued and his right to appeal. The proposed regulation requires the Director to provide notice of the issuance of the summary suspension immediately upon its issuance verbally and by facsimile.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

The current regulation allows the director to take immediate administrative action whenever evidence is found of any life, health, or safety violation or a program is not in substantial compliance with Board-approved standards, policies, or local plan for Virginia Juvenile Community Crime Control Act programs. Such administrative action may include withholding funds; removing juveniles from the program; or

placing the program on administrative probation for up to six months pending certification action by the board.

The proposed regulation significantly improves the due process rights for licensees and certificate holders upon whom a summary order of suspension has been issued by expediting notice and ensuring that the licensee or certificate holder receives a summary of the information used as the basis for the summary order of suspension. The propose regulation inserts language into the existing regulation that allows the Director to issue a summary order of suspension of the license or certificate of any group home or residential facility when conditions or practices exist in the home or facility that pose an immediate and substantial threat to the health, safety, and welfare of the juveniles who are residents. As required by the Virginia Code, the new language in the proposed regulation establishes that the summary order of suspension will take effect upon its issuance. The new language provides the process for serving notice and the timeframes for requesting and conducting an appeal.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.*

These provisions are advantageous to the public because they provide additional protections for the health, safety, and welfare of individuals receiving services in licensed group homes and their families. The regulation implements legislative changes that allow the Director to act promptly to suspend the operation of a licensed group home or residential facility when there is evidence of immediate and substantial risk to the residents.

The proposed regulations significantly improve the due process rights for licensees and certificate holders upon whom a summary order of suspension has been issued by expediting notice and ensuring that the licensee or certificate holder receives a summary of the information used as the basis for the summary order of suspension.

There are no known disadvantages to this regulation.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include 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 statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There is no locality in the Commonwealth that is particularly affected by the proposed regulation or would have to bear a disproportionate material impact.

Regulatory flexibility analysis

Please 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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

This regulation is largely a restatement of legislation that is fairly prescriptive and requires specific action steps to summarily suspend a provider’s license. The regulation establishes the shortest possible timeframes for taking the required action steps so that a situation can be resolved as soon as possible with minimal impact on service providers and individuals receiving services.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

<p>Projected cost to the state to implement and enforce the proposed regulation, including: (a) fund source/fund detail and (b) a delineation of one-time versus on-going expenditures.</p>	<p>The cost to the state to implement and enforce the proposed regulation is negligible.</p>
<p>Projected cost of the regulation on localities.</p>	<p>Localities may have some minimal staff costs for relocating residents from facilities that are required to cease operation.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the regulation.</p>	<p>The regulation affects child residential facilities that are licensed or certified by the State Board of Juvenile Justice.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>The Board of Juvenile Justice certifies 26 community and family-oriented group homes.</p>

<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>This regulation provides for the immediate closure of the facility resulting in the termination of all sources of income for that facility.</p> <p>The actual fiscal impact would appear to be minimal, if any. Please note: The actual power of the Director to take action against a licensee or a certificate holder dates back to 1992. The current regulation was amended in 2003. There is no evidence that the Director has taken immediate action under this regulation and immediately withdrawn funding or children from a certified juvenile residential facility.</p> <p>The proposed regulation is not a substantive change to the Director’s authority. However, the proposed regulation clarifies the duties of the Director and the due process rights of the licensee or certificate holder.</p>
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Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

There are no appropriate alternatives to this regulatory action. The Department was required to adopt regulations to implement the provisions of Chapter 168 of the 2006 Virginia Acts of Assembly (SB 190) relating to summary suspension of licenses or certificates for group homes and residential facilities under certain circumstances.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This regulatory action will establish procedures for issuing an order of summary suspension of a license or certificate to operate a group home or residential facility for children when there is an immediate and substantial threat to the health, safety, and welfare of the residents. The regulation provides a vehicle for protecting the children who are admitted to licensed or certified facilities and promoting the accountability of service providers.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

The proposed regulation significantly improves the due process rights for licensees and certificate holders upon whom a summary order of suspension has been issued by expediting notice and ensuring that the licensee or certificate holder receives a summary of the information used as the basis for the summary order of suspension. The proposed regulation addresses a fundamental due process notice issue by fixing a critical timing flaw in the law as passed by the General Assembly. As amended, Virginia Code §66-24 states that the summary order of suspension becomes effective at the time of issuance by the Director. The licensee then has three business days to appeal the decision from the date of issuance. However, Virginia Code §66-24 requires that summary order of suspension be served on the licensee or its designee as soon as practicable thereafter by personal service and certified mail, return receipt requested, to the address of record of the licensee. Consistent with the provision of the Virginia Code, the emergency regulation only required service as soon as practicable by personal service and certified mail, return receipt requested, to the address of record of the licensee or certificate holder. The issue is that the timeframe for requesting an appeal could elapse before the licensee receives notice that the summary order of suspension has been issued and notice of his right to appeal. The proposed regulation requires the Director to provide notice of the issuance of the summary suspension immediately upon its issuance verbally and by facsimile. Also, the proposed regulation allows the licensee or certificate holder to request a summary of the information used in issuing the preliminary summary order of suspension.

For changes to existing regulations, use this chart:

Current section number
37
New Section
37
Current requirement
The current regulation allows the director to take immediate administrative action whenever evidence is found of any life, health, or safety violation or a program is not in substantial compliance with Board-approved standards, policies, or local plan for Virginia Juvenile Community Crime Control Act programs. Such administrative action may include withholding funds; removing juveniles from the program; or placing the program on administrative probation for up to six months pending certification action by the Board.

Summary of Changes to the Existing Regulations*Changes Made by the Emergency Regulations that Remain in the Proposed Regulations:*

- Pursuant to the provisions set forth in §66-24 of the Virginia Code, the emergency regulation and the proposed regulation allow the Director to issue a summary order of suspension of the license or certificate of any group home or residential facility so regulated by the Department when the conditions or practices exist in the home or facility that pose an immediate and substantial threat to the health, safety, and welfare of the juveniles who are residents.
- The emergency regulation and the proposed regulation state that the summary order of suspension shall take effect upon its issuance.
- The emergency regulation and the proposed regulation require that the licensee or certificate holder be afforded the opportunity for a hearing before the director or his designee within three business days of the issuance of the summary order of suspension.
- The emergency regulation and the proposed regulation require that a final order of summary suspension must be in writing. The emergency regulation and the proposed regulation state that the notice of the final order of summary suspension must include that the licensee or certificate holder may appeal the Director's decision to the appropriate circuit court no later than 10 days following issuance of the order.

Changes Made by the Proposed Regulations that were not Included in the Emergency Regulations:

- The proposed regulation provides parameters concerning the conditions or practices existing in the home or facility posing an immediate and substantial threat to the health, safety, and welfare of the residents. Such conditions and parameters may include, but are not limited to, violations of law or illegal acts that place residents at risk for imminent harm; conduct or practices related to abuse or neglect of children; significant deviations from the program or services without obtaining prior written approval; or a willful action or gross negligence that jeopardizes the care or protection of residents.
- The proposed regulation requires the Director to provide notice of the issuance of the summary suspension immediately upon its issuance verbally and by facsimile. The emergency regulation only required service as soon as practicable by personal service and certified mail, return receipt requested, to the address of record of the licensee or certificate holder.
- The proposed regulation allows the appeal to be conducted in person, by video conference, or by telephone. The emergency regulation was silent on this issue.
- The proposed regulation allows the licensee or certificate holder to request a summary of the information used in issuing the preliminary summary order of suspension. The emergency regulation was silent on this issue.
- With the exception of the Director, the proposed regulation prohibits a person whose regular duties include substantial involvement with the certification or licensing of the facilities to preside over the hearing. The proposed regulation allows the licensee or certificate holder to be represented by counsel.
- The proposed regulation allows the Director or his designee to sustain, amend, or reverse the preliminary summary suspension order. The proposed regulation requires the Director or his designee

to send the licensee or certificate holder written notification of the results of the hearing within 24 hours of the conclusion of the hearing.

- The proposed regulation requires that the Chair of the Board be immediately notified when the Director issues a final order of summary suspension. In accordance with 6VAC35-20-65, the Director must report to the Board no later than its next regularly scheduled meeting the action taken. If the licensee or certificate holder is not satisfied, then the licensee or certificate holder may appeal the final order in accordance with 6VAC35-20-67.