



COMMONWEALTH of VIRGINIA
Office of the Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

Mark R. Herring
Attorney General

TO: **KARIN CLARK**
Virginia Department of Social Services

FROM: **MICHELLE A. L'HOMMEDIEU**
Assistant Attorney General 

DATE: **July 28, 2017**

SUBJECT: **Exempt Final Regulation – Amend General Procedures to Conform with Code, 22 VAC 40-80-10 et seq. (4824/7940)**

I am in receipt of the attached regulation to amend the General Procedures licensing regulations 22 VAC 40-80-10 *et seq.* You have asked the Office of the Attorney General to review and determine if the State Board of Social Services (“State Board”) has the statutory authority to promulgate this regulation and if it comports with applicable state law.

Virginia Code § 63.2-217 mandates that the State Board promulgate regulations that are necessary to carry out the provisions of Title 63.2 and Virginia Code § 63.2-1700 *et seq.* charges the DSS Commissioner with responsibility for licensure of certain types of facilities. The proposed amendment to the regulation is necessary to reflect the changes to § 63.2-1701 and § 63.2-1709.2 by the adoption of Chapters 196, 138, and 283 of the 2017 Acts of Assembly.

Based on my review, it is my view that the State Board has the authority to promulgate the final regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and Executive Order 17 (2014), and has not exceeded that authority. To date, the Board has not yet acted on this regulation; and the Agency Background Document available on Town Hall reflects the anticipated future date of Board action. Based on the foregoing, it is my view that the amendments to these regulations are exempt from the procedures of Article 2 of the APA under Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about this regulation, please contact me at 786-6005.

cc: Kim F. Piner, Esq.
Attachment

DEPARTMENT OF SOCIAL SERVICES

Amend General Procedures to Conform with Code

Part I

Introduction

22VAC40-80-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Administrative hearing" means a hearing that is conducted pursuant to § 2.2-4020 of the Administrative Process Act.

"Adult care facility" means a licensed assisted living facility or adult day care center.

"Adverse action" means any case where the department either gives notice of revocation or refuses to issue a license for an assisted living facility, adult day care center or child welfare agency or imposes another administrative sanction pursuant to § 63.2-1709 of the Code of Virginia.

"Aggrieved party" means an applicant or licensee who has requested an appeal in accordance with instructions provided after the department has given written notice of the imposition of an administrative sanction or adverse action for an assisted living facility, adult day care center, or child welfare agency.

"Allowable variance" means permission is granted by the department to a licensee or applicant for licensure to meet the intent of a standard by some means other than as specified by the standard when the applicant or licensee has demonstrated that (i) the implementation of

a standard would impose a substantial financial or programmatic hardship and (ii) the variance would not adversely affect the safety and well-being of persons in care.

"Applicant" means the person, corporation, partnership, association, limited liability company or public agency that has applied for a license to operate or maintain an assisted living facility, adult day care center, or child welfare agency. For a child welfare agency, the "person who operates or maintains a child welfare agency" means any individual; corporation; partnership; association; limited liability company; local government; state agency, including any department, institution, authority, instrumentality, board, or other administrative agency of the Commonwealth; or other legal or commercial entity that operates or maintains a child welfare agency.

"Board" means the State Board of Social Services.

"Child welfare agency" means a child day center, child-placing agency, child-caring institution, family day home, family day system, or independent foster home.

"Commissioner" means the Commissioner of the Department of Social Services.

"Complaint" means an accusation that a facility that is subject to licensure is operating without a license or that a licensed facility is not in compliance with licensing standards or law.

"Conditional license" means a license that may be issued to a new facility to operate in order to permit the applicant to demonstrate compliance with specified standards.

"Consent agreement" means an agreement between the licensee and the department that the licensee will perform specific actions for the purpose of correcting violations to come into compliance with standards or statutes.

"Council" means the Child Day-Care Council.

"Day" means a calendar day unless otherwise specified.

"Denial" means the act of refusing to grant a license after receipt of an initial or renewal application.

"Department" means the Department of Social Services.

"Early compliance" means that the licensee has demonstrated full compliance with requirements, allowing the department to replace a provisional or conditional license with a regular license.

"Functional design" means the design features of building and grounds not regulated by the Building Code, necessary for particular activities and operations of a facility subject to licensure by the Department of Social Services.

"Good character and reputation" means findings have been established and knowledgeable, reasonable, and objective people agree that the individual (i) maintains business or professional, family, and community relationships that are characterized by honesty, fairness, truthfulness, and dependability; and (ii) has a history or pattern of behavior that demonstrates the individual is suitable and able to administer a program for the care, supervision, and protection of children or adults. Relatives by blood or marriage and persons who are not knowledgeable of the individual, such as recent acquaintances, may not be considered objective references.

"Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ 2.2-4007 and 2.2-4019 of the Code of Virginia and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 2.2-4009 of the Code of Virginia in connection with the making of regulations or (ii) a similar right of private parties of public agencies as provided in § 2.2-4020 of the Code of Virginia in connection with case decisions.

"Hearing coordinator" means the person designated by the Department of Social Services to perform certain administrative functions involved in setting up and carrying out the hearings concerning adverse action on a license for an assisted living facility, adult day care center or child welfare agency, as set out herein.

"Hearing officer" means an attorney selected from a list maintained by the Executive Secretary of the Supreme Court in accordance with § 2.2-4024 of the Code of Virginia to preside at hearings concerning adverse action on a license for an assisted living facility, adult day care center or child welfare agency.

"Informal conference" means the informal fact-finding procedures available pursuant to §§ 2.2-4019 and 2.2-3021 of the Code of Virginia.

"Licensee" means the person, corporation, partnership, association, limited liability company, or public agency to whom a license is issued and who is legally responsible for compliance with the regulations and statutory requirements related to the facility operation or maintenance of the assisted living facility, adult day care center, or child welfare agency. For a child welfare agency, the "person who operates or maintains a child welfare agency" means any individual; corporation; partnership; association; limited liability company; local government; state agency, including any department, institution, authority, instrumentality, board, or other administrative agency of the Commonwealth; or other legal or commercial entity that operates or maintains a child welfare agency.

"Probationary status" means placing a licensee on notice that the facility or agency is substantially out of compliance with the terms of its license and the health, safety, and well-being of persons in care are at risk. Probationary status is a precursor to more serious action such as revocation, denial, or injunctive action unless immediate corrective action occurs.

"Provisional license" means a license that may be issued upon expiration of a regular license when the licensee is temporarily unable to substantially comply with the requirements of the law and regulations.

"Recommended findings of fact and recommended decision" means the report prepared by the hearing officer upon evidence presented in the administrative hearing based on the applicable laws and regulations under which the department operates.

"Regular license" means a license that is issued for 12 months or more as provided in Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia to a facility determined to be in substantial compliance with applicable standards and regulations. The actual duration of the licensure period is stated on the license.

"Revocation" means the act of terminating a license during its effective dates because of findings of serious noncompliance.

"Special order" means an order imposing an administrative sanction issued to any party licensed pursuant to Title 63.2 of the Code of Virginia by the commissioner that has a stated duration of not more than 12 months. A special order shall be considered a case decision as defined in § 2.2-4001 of the Code of Virginia. The 12-month period begins 30 days after notification of the issuance of a special order or at the conclusion of all appeal steps.

"Substantial compliance" means that while there may be noncompliance with one or more standards that represents minimal risk, compliance clearly and obviously exists with most of the standards as a whole.

22VAC40-80-340. Administrative sanctions.

The commissioner may impose administrative sanctions or initiate court proceedings, severally or jointly, when appropriate in order to ensure prompt correction of violations involving noncompliance with state law or regulation in assisted living facilities, adult day care centers

and child welfare agencies as discovered through any inspection or investigation conducted by the Department of Social Services, the Virginia Department of Health, the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services, or by state and local building or fire prevention officials. These administrative sanctions include:

1. Petitioning the court to appoint a receiver for any assisted living facility or adult day care center;
2. Revoking or denying renewal of a license for any assisted living facility or adult day care center that fails to comply with the limitations and standards set forth in its license for violation that adversely affects, or is an imminent and substantial threat to, the health, safety or welfare of residents, or for permitting, aiding or abetting the commission of any illegal act in an adult care facility;
3. Revoking or denying renewal of a license for any child welfare agency that fails to comply with the limitations and standards set forth in its license;
4. Requiring an assisted living facility to contract with an individual licensed by the Board of Long-Term Care Administrators to administer, manage or operate the facility on an interim basis if the commissioner receives information from any source indicating imminent and substantial risk of harm to residents. This action shall be an attempt to bring the facility into compliance with all relevant requirements of law, regulation or any plan of correction approved by the commissioner. The contract shall be negotiated in accordance with the provisions of § 63.2-1709 of the Code of Virginia;
5. Issuing a summary order of suspension of the license to operate an assisted living facility pursuant to proceedings set forth in § 63.2-1709 C of the Code of Virginia in conjunction with any proceedings for revocation, denial, or other action when conditions

or practices exist that pose an imminent and substantial threat to the health, safety and welfare of residents; and

6. Imposing administrative sanctions through the issuance of a special order as provided in § 63.2-1709.2 of the Code of Virginia. These include:

a. Placing a licensee on probation upon finding that the licensee is substantially out of compliance with the terms of the license and that the health and safety of residents, participants or children are at risk;

b. Reducing the licensed capacity or prohibiting new admissions when the commissioner has determined that the licensee cannot make necessary corrections to achieve compliance with the regulations except by a temporary restriction of its scope of service;

c. Mandating training for the licensee or licensee's employees, with any costs to be borne by the licensee, when the commissioner has determined that the lack of such training has led directly to violations of regulations;

d. Assessing civil penalties of not more than \$500 per inspection upon finding that the licensee of an adult day care center or child welfare agency is substantially out of compliance with the terms of its license and the health and safety of residents, participants or children are at risk;

e. Assessing a civil penalty for each day an assisted living facility is or was out of compliance with the terms of its license and the health, safety, and welfare of residents are at risk. The aggregate amount of such civil penalties shall not exceed \$10,000 in any ~~24-month~~ 12-month period. Criteria for imposition of civil penalties and amounts, expressed in ranges, are developed by the board and are based upon the severity, pervasiveness, duration and degree of risk to the health, safety, or

welfare of residents. Such civil penalties shall be applied by the commissioner in a consistent manner;

f. Requiring licensees to contact parents, guardians or other responsible persons in writing regarding health and safety violations; and

g. Preventing licensees who are substantially out of compliance with the licensure terms or in violation of the regulations from receiving public funds.