



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

MEMORANDUM

TO: KARIN CLARK
Virginia Department of Social Services

FROM: Susan P. D. Whyte *SPDW*
Assistant Attorney General

DATE: July 25, 2019

SUBJECT: Final Stage Review of 22 VAC 40-185
Amend Training Requirements to Comply with Code Changes

I have reviewed the attached regulation, which is being amended to comply with Chapter 604 of the 2019 Acts of Assembly, to determine if the State Board of Social Services ("State Board") has the statutory authority to promulgate the specified regulation and whether the specified regulation comports with applicable state law.

Pursuant to Virginia Code § 63.2-217, the State Board is required to promulgate regulations as may be necessary or desirable to carry out the purposes of Title 63.2 of the Virginia Code. Consequently, it is my opinion that the State Board has the authority to promulgate this regulation, which is exempt from the provisions of Article 2 of the Administrative Process Act pursuant to Virginia Code § 2.2-4006(A)(4)(a), and the State Board has not exceeded that authority.

If you have any questions, please feel free to call me at 786-3450.

DEPARTMENT OF SOCIAL SERVICES

Amend Training Requirements to Comply with Code Changes

Part I

Introduction

22VAC40-185-10. Definitions.

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

"Adult" means any individual 18 years of age or older.

"Age and stage appropriate" means the curriculum, environment, equipment, and adult-child interactions are suitable for the ages of the children within a group and the individual needs of any child.

"Age groups":

1. "Infant" means children from birth to 16 months.
2. "Toddler" means children from 16 months up to two years.
3. "Preschool" means children from two years up to the age of eligibility to attend public school, five years by September 30.
4. "School age" means children eligible to attend public school, age five or older by September 30 of that same year. Four- or five-year-old children included in a group of school age children may be considered school age during the summer months if the children will be entering kindergarten that year.

"Attendance" means the actual presence of an enrolled child.

"Balanced mixed-age grouping" means a program using a curriculum designed to meet the needs and interests of children in the group and is planned for children who enter the program at three through five years of age. The enrollment in the balance mixed-age grouping comprises a relatively even allocation of children in each of three ages (three to six years) and is designed for children and staff to remain together with turnover planned only for the replacement of exiting students with children of ages that maintain the class balance.

"Body fluids" means urine, feces, saliva, blood, nasal discharge, eye discharge, and injury or tissue discharge.

"Camp" means a child day camp that is a child day center for school age children that operates during the summer vacation months only. Four-year-old children who will be five by September 30 of the same year may be included in a camp for school age children.

"Center" means a child day center.

"Child" means any individual under 18 years of age.

"Child day center" means a child day program offered to (i) two or more children under the age of 13 in a facility that is not the residence of the provider or of any of the children in care or (ii) 13 or more children at any location.

~~Exemptions (§ 63.2-1715 of the Code of Virginia):~~

~~1. A child day center that has obtained an exemption pursuant to § 63.2-1716 of the Code of Virginia;~~

~~2. A program where, by written policy given to and signed by a parent or guardian, children are free to enter and leave the premises without permission or supervision regardless of (i) such program's location or the number of days per week of its operation; (ii) the provision of transportation services, including drop-off and pick-up times; or (iii) the scheduling of breaks for snacks, homework, or other activities. A program that would~~

~~qualify for this exemption except that it assumes responsibility for the supervision, protection and well-being of several children with disabilities who are mainstreamed shall not be subject to licensure;~~

~~3. A program of instructional experience in a single focus, such as, but not limited to, computer science, archaeology, sport clinics, or music, if children under the age of six do not attend at all and if no child is allowed to attend for more than 25 days in any three-month period commencing with enrollment. This exemption does not apply if children merely change their enrollment to a different focus area at a site offering a variety of activities and such children's attendance exceeds 25 days in a three-month period;~~

~~4. Programs of instructional or recreational activities wherein no child under age six attends for more than six hours weekly with no class or activity period to exceed 1-1/2 hours, and no child six years of age or above attends for more than six hours weekly when school is in session or 12 hours weekly when school is not in session. Competition, performances and exhibitions related to the instructional or recreational activity shall be excluded when determining the hours of program operation;~~

~~5. A program that operates no more than a total of 20 program days in the course of a calendar year provided that programs serving children under age six operate no more than two consecutive weeks without a break of at least a week;~~

~~6. Instructional programs offered by public and private schools that satisfy compulsory attendance laws or the Individuals with Disabilities Education Act, as amended (20 USC § 1400 et seq.), and programs of school-sponsored extracurricular activities that are focused on single interests such as, but not limited to, music, sports, drama, civic service, or foreign language;~~

- ~~7. Education and care programs provided by public schools that are not exempt pursuant to subdivision 6 of this definition shall be regulated by the State Board of Education using regulations that incorporate, but may exceed, the regulations for child day centers licensed by the commissioner;~~
- ~~8. Early intervention programs for children eligible under Part C of the Individuals with Disabilities Education Act, as amended (20 USC § 1400 et seq.), wherein no child attends for more than a total of six hours per week;~~
- ~~9. Practice or competition in organized competitive sports leagues;~~
- ~~10. Programs of religious instruction, such as Sunday schools, vacation Bible schools, and Bar Mitzvah or Bat Mitzvah classes, and child-minding services provided to allow parents or guardians who are on site to attend religious worship or instructional services;~~
- ~~11. Child-minding services which are not available for more than three hours per day for any individual child offered on site in commercial or recreational establishments if the parent or guardian (i) is not an on-duty employee, except for part-time employees working less than two hours per day; (ii) can be contacted and can resume responsibility for the child's supervision within 30 minutes; and (iii) is receiving or providing services or participating in activities offered by the establishment;~~
- ~~12. A certified preschool or nursery school program operated by a private school that is accredited by a statewide accrediting organization recognized by the State Board of Education or accredited by the National Association for the Education of Young Children's National Academy of Early Childhood Programs; the Association of Christian Schools International; the American Association of Christian Schools; the National Early Childhood Program Accreditation; the National Accreditation Council for Early Childhood Professional Personnel and Programs; the International Academy for Private Education;~~

~~the American Montessori Society; the International Accreditation and Certification of Childhood Educators, Programs, and Trainers; or the National Accreditation Commission that complies with the provisions of § 63.2-1717 of the Code of Virginia;~~

~~13. A program of recreational activities offered by local governments, staffed by local government employees, and attended by school-age children. Such programs shall be subject to safety and supervisory standards established by local governments; or~~

~~14. By policy, a child day center that is required to be programmatically licensed by another state agency for that service.~~

"Child day program" means a regularly operating service arrangement for children where, during the absence of a parent or guardian, a person or organization has agreed to assume responsibility for the supervision, protection, and well-being of a child under the age of 13 for less than a 24-hour period.

Note: This does not include programs such as drop-in playgrounds or clubs for children when there is no service arrangement with the child's parent.

"Children with special needs" means children with developmental disabilities, mental retardation, emotional disturbance, sensory or motor impairment, or significant chronic illness who require special health surveillance or specialized programs, interventions, technologies, or facilities.

"Cleaned" means treated in such a way to reduce the amount of filth through the use of water with soap or detergent or the use of an abrasive cleaner on inanimate surfaces.

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

"Communicable disease" means a disease caused by a microorganism (bacterium, virus, fungus, or parasite) that can be transmitted from person to person via an infected body fluid or respiratory spray, with or without an intermediary agent (such as a louse, mosquito) or

environmental object (such as a table surface). Some communicable diseases are reportable to the local health authority.

"Department" means the Virginia Department of Social Services.

"Department's representative" means an employee or designee of the Virginia Department of Social Services, acting as the authorized agent of the commissioner.

"Evening care" means care provided after 7 p.m. but not through the night.

"Good character and reputation" means knowledgeable and objective people agree that the individual (i) maintains business, professional, family, and community relationships which are characterized by honesty, fairness, and truthfulness and (ii) demonstrates a concern for the well-being of others to the extent that the individual is considered suitable to be entrusted with the care, guidance, and protection of children. Relatives by blood or marriage and people who are not knowledgeable of the individual, such as recent acquaintances, shall not be considered objective references.

"Group of children" means the children assigned to a staff member or team of staff members.

"High school program completion or the equivalent" means an individual has earned a high school diploma or General Education Development (G.E.D.) certificate, or has completed a program of home instruction equivalent to high school completion.

"Independent contractor" means an entity that enters into an agreement to provide specialized services or staff for a specified period of time.

"Individual service, education or treatment plan" means a plan identifying the child's strengths, needs, general functioning and plan for providing services to the child. The service plan includes specific goals and objectives for services, accommodations and intervention

strategies. The service, education or treatment plan clearly shows documentation and reassessment/evaluation strategies.

"Intervention strategies" means a plan for staff action that outlines methods, techniques, cues, programs, or tasks that enable the child to successfully complete a specific goal.

"Licensee" means any individual, partnership, association, public agency, or corporation to whom the license is issued.

"Minor injury" means a wound or other specific damage to the body such as, but not limited to, abrasions, splinters, bites that do not break the skin, and bruises.

"Overnight care" means care provided after 7 p.m. and through the night.

"Parent" means the biological or adoptive parent or parents or legal guardian or guardians of a child enrolled in or in the process of being admitted to a center.

"Physician" means an individual licensed to practice medicine in any of the 50 states or the District of Columbia.

"Physician's designee" means a physician, licensed nurse practitioner, licensed physician assistant, licensed nurse (R.N. or L.P.N.), or health assistant acting under the supervision of a physician.

"Primitive camp" means a camp where places of abode, water supply system, or permanent toilet and cooking facilities are not usually provided.

"Programmatic experience" means time spent working directly with children in a group that is located away from the child's home. Work time shall be computed on the basis of full-time work experience during the period prescribed or equivalent work time over a longer period. Experience settings may include but not be limited to a child day program, family day home,

child day center, boys and girls club, field placement, elementary school, or a faith-based organization.

"Resilient surfacing" means:

1. For indoor and outdoor use underneath and surrounding equipment, impact absorbing surfacing materials that comply with minimum safety standards when tested in accordance with the procedures described in the American Society for Testing and Materials' standard F1292-99 as shown in Figures 2 (Compressed Loose Fill Synthetic Materials Depth Chart) and 3 (Use Zones for Equipment) on pages 6-7 of the National Program for Playground Safety's "Selecting Playground Surface Materials: Selecting the Best Surface Material for Your Playground," February 2004.

2. Hard surfaces such as asphalt, concrete, dirt, grass or flooring covered by carpet or gym mats do not qualify as resilient surfacing.

"Sanitized" means treated in such a way to remove bacteria and viruses from inanimate surfaces through using a disinfectant solution (i.e., bleach solution or commercial chemical disinfectant) or physical agent (e.g., heat). The surface of item is sprayed or dipped into the disinfectant solution and allowed to air dry after use of the disinfectant solution.

"Serious injury" means a wound or other specific damage to the body such as, but not limited to, unconsciousness; broken bones; dislocation; deep cut requiring stitches; concussion; foreign object lodged in eye, nose, ear, or other body orifice.

"Shelter-in-place" means the facility or building in which a child day center is located.

"Short-term program" means a child day center that operates less than 12 weeks a year.

"Special needs child day program" means a program exclusively serving children with special needs.

"Specialty camps" means those centers that have an educational or recreational focus on one subject such as dance, drama, music, or sports.

"Sponsor" means an individual, partnership, association, public agency, corporation or other legal entity in whom the ultimate authority and legal responsibility is vested for the administration and operation of a center subject to licensure.

"Staff" means administrative, activity, and service personnel including the licensee when the licensee is an individual who works in the center, and any persons counted in the staff-to-children ratios or any persons working with a child without sight and sound supervision of a staff member.

"Staff positions" are defined as follows:

1. "Aide" means the individual designated to be responsible for helping the program leader in supervising children and in implementing the activities and services for children. Aides may also be referred to as assistant teachers or child care assistants.
2. "Program leader" means the individual designated to be responsible for the direct supervision of children and for implementation of the activities and services for a group of children. Program leaders may also be referred to as child care supervisors or teachers.
3. "Program director" means the primary, on-site director or coordinator designated to be responsible for developing and implementing the activities and services offered to children, including the supervision, orientation, training, and scheduling of staff who work directly with children, whether or not personally performing these functions.
4. "Administrator" means a manager or coordinator designated to be in charge of the total operation and management of one or more centers. The administrator may be responsible for supervising the program director or, if appropriately qualified, may

concurrently serve as the program director. The administrator may perform staff orientation or training or program development functions if the administrator meets the qualifications of 22VAC40-185-190 and a written delegation of responsibility specifies the duties of the program director.

"Therapeutic child day program" means a specialized program, including but not limited to therapeutic recreation programs, exclusively serving children with special needs when an individual service, education or treatment plan is developed and implemented with the goal of improving the functional abilities of the children in care.

"Universal precautions" means an approach to infection control. According to the concept of universal precautions, all human blood and certain human body fluids are treated as if known to be infectious for human immunodeficiency virus (HIV), hepatitis B virus (HBV), and other bloodborne pathogens.

"Volunteer" means a person who works at the center and:

1. Is not paid;
2. Is not counted in the staff-to-children ratios; and
3. Is in sight and sound supervision of a staff member when working with a child.

Any unpaid person not meeting this definition shall be considered "staff" and shall meet staff requirements.

22VAC40-185-240. Staff training and development.

A. Staff shall receive the following training by the end of their first day of assuming job responsibilities:

1. Job responsibilities and to whom they report;

2. The policies and procedures listed in subsection B of this section and 22VAC40-185-420 A that relate to the staff member's responsibilities;
3. The center's playground safety procedures unless the staff member will have no responsibility for playground activities or equipment;
4. Recognizing child abuse and neglect and the legal requirements for reporting suspected child abuse as required by § 63.2-1509 of the Code of Virginia;
5. Confidential treatment of personal information about children in care and their families; and
6. The standards in this chapter that relate to the staff member's responsibilities.

B. By the end of the first day of supervising children, staff shall be provided in writing with the information listed in 22VAC40-185-420 A and the following:

1. Procedures for supervising a child who may arrive after scheduled classes or activities including field trips have begun;
2. Procedures to confirm absence of a child when the child is scheduled to arrive from another program or from an agency responsible for transporting the child to the center;
3. Procedures for identifying where attending children are at all times, including procedures to ensure that all children are accounted for before leaving a field trip site and upon return to the center;
4. Procedures for action in case of lost or missing children, ill or injured children, medical emergencies and general emergencies;
5. Policy for any administration of medication; and
6. Procedures for response to natural and man-made disasters.

C. Program directors and staff who work directly with children shall annually attend 10 hours of staff development activities that shall be related to child safety and development and the function of the center. Such training hours shall increase according to the following:

1. June 1, 2006 - 12 hours

2. June 1, 2007 - 14 hours

3. June 1, 2008 - 16 hours

4. Staff development activities to meet this subsection may include up to two hours of training in first aid or cardiopulmonary resuscitation. Staff development activities to meet this subsection may not include rescue breathing and first responder as required by 22VAC40-185-530 and training in medication administration and daily health observation of children as required by subsection D of this section.

5. Exception (a): Staff who drive a vehicle transporting children and do not work with a group of children at the center do not need to meet the annual training requirement.

~~Exception (b): Parents who participate in cooperative preschool centers shall complete four hours of orientation training per year~~ In a cooperative preschool center that is organized, administered, and maintained by parents of children in care, parent volunteers or other persons who participate and volunteer in a cooperative preschool center on behalf of a child attending such cooperative preschool center, including such volunteers who are counted in the staff-to child ratios required in 22VAC40-185-340, shall complete four hours of training per year and shall be exempt from orientation and training requirements applicable to staff of child day programs. This orientation and training exemption shall not apply to any parent volunteer or other person as referred to in this subdivision if the cooperative preschool center has entered into a contract with the

Department or a local department to provide child care services funded by the Child Care and Development Block Grant.

Exception (c): Staff who are employed at a short-term program shall obtain 10 hours of staff training per year.

D. 1. To safely perform medication administration practices listed in 22VAC40-185-510, whenever the center has agreed to administer prescribed medications, the administration shall be performed by a staff member or independent contractor who has satisfactorily completed a training program for this purpose approved by the Board of Nursing and taught by a registered nurse, licensed practical nurse, doctor of medicine or osteopathic medicine, or pharmacist; or administration shall be performed by a staff member or independent contractor who is licensed by the Commonwealth of Virginia to administer medications.

a. The approved training curriculum and materials shall be reviewed by the department at least every three years and revised as necessary.

b. Staff required to have the training shall be retrained at three-year intervals.

2. The decision to administer medicines at a facility may be limited by center policy to:

a. Prescribed medications;

b. Over-the-counter or nonprescription medications; or

c. No medications except those required for emergencies or by law.

3. To safely perform medication administration practices listed in 22VAC40-185-510, whenever the center has agreed to administer over-the-counter medications other than topical skin gel, cream, or ointment, the administration must be performed by a staff member or independent contractor who has satisfactorily completed a training course developed or approved by the Department of Social Services in consultation with the

Department of Health and the Board of Nursing and taught by an R.N., L.P.N., physician, or pharmacist; or performed by a staff member or independent contractor who is licensed by the Commonwealth of Virginia to administer medications.

- a. The course, which shall include competency guidelines, shall reflect currently accepted safe medication administration practices, including instruction and practice in topics such as, but not limited to, reading and following manufacturer's instructions; observing relevant laws, policies and regulations; and demonstrating knowledge of safe practices for medication storage and disposal, recording and reporting responsibilities, and side effects and emergency recognition and response.
 - b. The approved training curriculum and materials shall be reviewed by the department at least every three years and revised as necessary.
 - c. Staff required to have the training shall be retrained at three-year intervals.
4. Any child for whom emergency medications (such as but not limited to albuterol, glucagon, and epipen) have been prescribed shall always be in the care of a staff member or independent contractor who meets the requirements in subdivision 1 of this subsection.
5. There shall always be at least one staff member on duty who has obtained within the last three years instruction in performing the daily health observation of children.
6. Daily health observation training shall include:
- a. Components of daily health check for children;
 - b. Inclusion and exclusion of the child from the class when the child is exhibiting physical symptoms that indicate possible illness;

c. Descriptions of how diseases are spread and the procedures or methods for reducing the spread of disease;

d. Information concerning the Virginia Department of Health Notification of Reportable Diseases pursuant to 12VAC5-90-80 and 12VAC5-90-90, also available from the local health department and the website of the Virginia Department of Health; and

e. Staff occupational health and safety practices in accordance with Occupational Safety and Health Administration's (OSHA) Bloodborne Pathogens regulation.

E. Before assuming job responsibilities, staff who work with children in therapeutic child day programs and special needs child day programs shall receive training in:

1. Universal precautions procedures;
2. Activity adaptations;
3. Medication administration;
4. Disabilities precautions and health issues; and
5. Appropriate intervention strategies.

F. For therapeutic child day programs and special needs child day programs, staff who work directly with children shall annually attend 24 hours of staff development activities. At least eight hours of this training shall be on topics related to the care of children with special needs.