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

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

A handwritten signature in black ink, appearing to read "MLH", positioned to the right of the name "MICHELLE A. L'HOMMEDIÉ".

**DATE:** **July 26, 2019**

**SUBJECT:** **Exempt Final Regulation – Amend General Procedures and Information for Licensure to comply with the legislative changes, 22 VAC 40-80 *et seq.* (5315/8663)**

I am in receipt of the attached regulation to amend the general procedures and information for licensure to operate a facility or agency, regulations 22 VAC 40-80 *et seq.* You have asked the Office of the Attorney General to review and determine if the State Board of Social Services (the "State Board") has the statutory authority to promulgate the proposed regulations and if the proposed regulations comport 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 the laws of the Commonwealth administered by the Virginia Department of Social Services. The current regulations for the administration of licensure are set forth at 22 VAC 40-80 *et seq.* The proposed amendments to these regulations are necessary to reflect the changes to Virginia Code by the adoption of Chapter 449 of the 2019 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 14 (Revised) (2018), and has not exceeded that authority. To date, the State Board has not yet acted on this regulation; and the Agency Background Document available on Town Hall reflects the anticipated future date of State Board action.

Karin Clark  
July 26, 2019  
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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 and Information for Licensure to Comply with the Code**

Part III

The License

**22VAC40-80-60. General.**

A. A license to operate a facility or agency is issued to a specific person or organization to provide out-of-home care to children or adults. An organization may be a partnership, association, corporation, limited liability company, or public entity.

B. Pursuant to § 63.2-1712 of the Code of Virginia, any person, officer, or member of a governing board of any association or corporation that operates an assisted living facility, adult day care center, or child welfare agency shall be guilty of a Class 1 misdemeanor if he:

1. Interferes with any representative of the commissioner in the discharge of his licensing duties;
2. Makes to the commissioner or any representative of the commissioner any report or statement with respect to the operation of any assisted living facility, adult day care center, or child welfare agency that is known by such person to be false or untrue;
3. Operates or engages in the conduct of these facilities without first obtaining a license as required or after such license has been revoked, suspended, or has expired and not been renewed; or
4. Operates or engages in the conduct of one of these facilities serving more persons than the maximum stipulated in the license.

C. When a licensee plans to close or sell a facility, the licensee shall notify the appropriate licensing office at least 60 days prior to the anticipated closure or sale date. When the facility closes or the sale is finalized, the license shall be returned to the appropriate licensing office.

**22VAC40-80-120. Terms of the license.**

A. A facility or agency shall operate within the terms of its license, which are:

1. The operating name of the facility or agency;
2. The name of the individual, partnership, association, corporation, limited liability company, or public entity sponsoring the facility or agency;
3. The physical location of the facility or agency;
4. The maximum number of children or adults who may be in care at any time;
5. The period of time for which the license is effective;
6. For child care facilities or agencies, the age range of children for whom care may be provided; and
7. Any other limitations that the department may prescribe within the context of the regulations for any facility or agency.

B. The provisional license cites the standards with which the licensee is not in compliance.

C. The conditional license cites the standards with which the licensee must demonstrate compliance when operation begins, and also any standards with which the licensee is not in compliance.

D. Prior to changes in operation that would affect the terms of the license, the licensee shall secure a modification to the terms of the license from the department. (See 22VAC40-80-190.)

E. Certain documents related to the terms of the license are required to be posted on the premises of each facility. These are:

1. The most recently issued license. Any provisional license shall be posted at each public entrance of the facility and a notice shall be prominently displayed next to the license that states that a description of specific violations of licensing standards to be corrected and the deadline for completion of such corrections is available for inspection at the facility or on the facility's website, if applicable;
2. The findings of the most recent inspection of the facility;
3. Notice of the commissioner's intent to revoke or deny renewal of the license of an assisted living facility. Such notice will be provided by the department and shall be posted in a prominent place at each public entrance of the facility to advise consumers of serious or persistent violations.
4. A copy of any final order of summary suspension of all or part of ~~an assisted living facility's license~~ a license for an assisted living facility, a child welfare agency, and an assisted living facility operated by an agency of the Commonwealth, or child welfare agency operated by an agency of the Commonwealth shall be prominently displayed by the provider at each public entrance of the facility, or the provider may display a written statement summarizing the terms of the order, printed in clear and legible size and typeface, in a prominent location and identifying the location within the facility where the final order of summary suspension may be reviewed.
5. Notice of the commissioner's intent to take any of the actions enumerated in subdivisions B 1 through B ~~67~~ of § 63.2-1709.2 of the Code of Virginia. Such notice will be provided by the department and a copy of the notice shall be posted in a prominent place at each public entrance of the facility to advise consumers of serious or persistent violations.

6. A copy of any special order issued by the department shall be posted in a prominent place at each public entrance of the licensed premises to advise consumers of serious or persistent violations.

7. Any other documents required by the commissioner.

**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 Behavioral Health and Developmental 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~~ immediate 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~~ immediate 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 notice of 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 or pursuant to proceedings set forth in § 63.2-1710.1 for assisted living facilities operated by agencies of the Commonwealth in conjunction with any proceedings for revocation, denial, or other action when conditions or practices exist that pose an ~~imminent~~ immediate 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:~~ 6. Issuing a notice of summary suspension of the license to operate a child welfare agency pursuant to proceedings set forth in § 63.2-1709.1 C of the Code of Virginia or pursuant to proceedings set forth in § 63.2-1710.1 for child welfare agencies operated by an agency of the Commonwealth in conjunction with any proceedings for revocation, denial, or other action, when conditions or practices exist in the child welfare agency that pose an immediate and substantial threat to the health, safety, and welfare of children receiving care; and

7. 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 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.



**22VAC40-80-345. Summary suspension procedures.**

A. In conjunction with any proceeding for revocation, denial, or other action when conditions or practices exist that pose an ~~imminent~~ immediate and substantial threat to the health, safety and welfare of the residents, the commissioner may issue a notice of summary suspension of the license to operate an assisted living facility or a child welfare agency or of certain authority of the licensee to provide certain services or perform certain functions.

B. ~~Upon determining that summary suspension is appropriate, the~~ The hearing coordinator will select a hearing officer from a list prepared by the Executive Secretary of the Supreme Court of Virginia and will schedule the time, date, and location of the hearing to determine whether the suspension is appropriate as required by § 63.2-1709 C or § 63.2-1709.1 C of the Code of Virginia.

C. Simultaneously with the issuance of a notice of revocation, denial or other action, the commissioner will issue to the licensee a notice of summary ~~order of~~ suspension setting forth the following:

1. The procedures for the summary ~~order of~~ suspension;
2. The hearing and appeal rights as set forth below;
3. Facts and evidence that formed the basis for which the summary order of suspension is sought; and
4. The time, date, and location of the hearing.

D. Notice of the summary ~~order of~~ suspension ~~will~~ shall be served on the licensee or his designee by personal service or by certified mail, return receipt requested, to the address of record of the licensee as soon as practicable after issuance thereof.

E. The hearing shall take place in the locality where the assisted living facility or child welfare agency operates unless the licensee or his designee expressly waives this venue provision.

1. The hearing shall be held no later than 15 business days after service of notice on the licensee. The hearing officer may grant a continuance upon written request and for good cause shown. In no event shall any continuance exceed 10 business days after the initial hearing date.

2. The hearing coordinator will forward a copy of the relevant licensing standards to the hearing officer.

3. The hearing will be conducted in accordance with the procedures set forth in 22VAC40-80-480 through 22VAC40-80-500.

4. The department may be represented either by counsel or by agency staff authorized by § 2.2-509 of the Code of Virginia.

F. Within 10 days of the conclusion of the hearing, the hearing officer shall provide to the commissioner written findings and conclusions, together with a recommendation as to whether the license should be summarily suspended. The department shall have the burden of proof in any summary suspension hearing. The decision of the hearing officer shall be based on the preponderance of the evidence presented by the record and relevant to the basic law under which the agency is operating.

G. Within 10 business days of receipt of the hearing officer's ~~report and recommendation, findings, conclusions, and recommendation~~, the commissioner shall either (i) ~~adopt the hearing officer's recommendation~~ or (ii) ~~reject the hearing officer's recommendation if it would be an error of law or department policy to accept it.~~ may issue a final order of summary suspension or

an order that such summary suspension is not warranted by the facts and circumstances presented.

H. ~~The commissioner shall issue and shall serve on the licensee or his designee by personal service or by certified mail, return receipt requested either:~~

~~1. A final order of summary suspension including (i) a detailed statement of the basis for rejecting the hearing officer's recommendation, if applicable, and (ii) notice that the licensee may appeal the commissioner's decision to the appropriate circuit court no later than 10 days following service of the order; or~~

~~2. A final order that summary suspension is not warranted by the facts and circumstances presented. In issuing a final order of summary suspension, the commissioner may:~~

~~1. Suspend the license of the assisted living facility or child welfare agency; or~~

~~2. Suspend only certain authority of the assisted living facility or child welfare agency to provide certain services or preform certain functions that the commissioner determines should be restricted or modified in order to protect the health, safety, and welfare of the individuals receiving care.~~

I. ~~A copy of any final order of suspension shall be prominently displayed at each public entrance of the facility as required in 22VAC40-80-120. The commissioner shall adopt the hearing officer's recommended decision unless to do so would be an error of law or Department policy.~~

J. ~~In the event the commissioner rejects a hearing officer's findings, conclusions, or recommended decision, the commissioner shall state with particularity the basis for rejection.~~

K. ~~A copy of any final order of summary suspension shall be prominently displayed at each public entrance of the facility as required in 22VAC40-80-120.~~

4. L. The signed, original case decision shall remain in the custody of the agency as a public record, subject to the agency's records retention policy.

**22VAC40-80-370. Appeal process.**

A. The applicant or licensee will receive a notice of the department's intent to impose an administrative sanction. This notice will describe the sanction or sanctions and the reasons for the imposition. Service of the notice of adverse action is achieved by certified mailing of the notice to the applicant or licensee, unless service is made by other means and acknowledged by the applicant or licensee. If the applicant or licensee wishes to appeal the notice of adverse action, he shall have 15 days after receipt of the notice to note his appeal.

B. Upon receipt of the notice to impose an administrative sanction, the applicant or licensee has the right to appeal the decision in accordance with the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). The procedures for filing an appeal will be outlined in the notice. The applicant or licensee shall submit any appeal of imposition of an administrative sanction in writing within 15 days of receipt of the notice.

C. If the applicant or licensee fails to appeal the notice of adverse action within 15 days of receipt of the notice, the final order will be entered. The decision will take effect 30 days after receipt of the notice.

D. The appeal process available is governed by law. Where the sanction is imposed by means of a special order as provided in ~~§ 63.2-1709~~ § 63.2-1709.2 of the Code of Virginia, the case decision is issued by the commissioner following findings and conclusions resulting from the informal conference. Other sanctions include a provision for an administrative hearing, which is described in § 2.2-4020 of the Code of Virginia, prior to the issuance of the case decision. For ease of reference, the process steps are displayed in the following chart:

List of Sanctions with Appeal Provisions
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	Informal Conference	Administrative Hearing	Circuit Court Review of Case Decision
ADMINISTRATIVE SANCTION			
Place licensee on probation	X		X
Reduce licensed capacity	X		X
Restrict admissions	X		X
Mandate training for licensee or staff	X		X
Assess civil penalty	X		X
Require written contact with responsible persons	X		X
Prevent receipt of public funds	X		X
Deny application for new or renewal license	X	X	X
Revoke license	X	X	X
File petition for appointment of a receiver			X
Require assisted living facility to contract with administrator	X	X	X

E. A final order of summary suspension for an assisted living facility or child welfare agency not operated by an agency of the commonwealth shall include notice that the licensee may appeal the commissioner's decision to the appropriate circuit court no later than 10 days following service of the order.

1. The sole issue before the court shall be whether the commissioner had reasonable grounds to require the licensee to cease operations during the pendency of the concurrent revocation, denial, or other proceedings.

2. The concurrent revocation, denial, or other proceedings shall not be affected by the outcome of any hearing on the appropriateness of the summary suspension.

**22VAC40-80-375. Failure to pay civil penalty.**

A. If an outstanding civil penalty assessed after a case decision is not paid as required, the commissioner shall have the authority to:

1. Assess a late fee if the civil penalty payment is 60 days overdue, provided the total of the civil penalty and late fee do not exceed the penalty set forth in ~~§ 63.2-1709~~ § 63.2-1709.2 of the Code of Virginia;

2. Reduce the duration of the licensure period if the civil penalty payment is 60 days overdue; and

3. Deny renewal or revoke the license if the civil penalty payment is 90 days overdue.

B. The department will also institute legal collection procedures to collect unpaid penalties.

C. If a licensee appeals the imposition of a civil penalty, the provisions of this section shall not apply until the appeal is complete.