



# Virginia

## Regulatory Town Hall

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| <b>Agency Name:</b>        | Board (Department) of Juvenile Justice          |
| <b>VAC Chapter Number:</b> | 6 VAC 35-20                                     |
| <b>Regulation Title:</b>   | Regulations Governing the Certification Process |
| <b>Action Title:</b>       | Proposed Regulation                             |
| <b>Date:</b>               | September 11, 2000                              |

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

*Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

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The regulation provides the process by which, in accordance with Code of Virginia Sections 66-10, 16.1-234, 16.1-349, 16.1-309.1, 16.1-309.9.B, and 16.1-309.10, the Board and the Department of Juvenile Justice will monitor and approve residential and nonresidential programs that are part of the Commonwealth's juvenile justice system. Changes are required to the existing regulation because many procedural steps required in the regulation are no longer practical or in some cases even possible due to organizational changes in the Department of Juvenile Justice.

*Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.*

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The basis for this regulation is the Code of Virginia. Section 66-10 gives the State Board of Juvenile Justice the power and the duty "to promulgate such regulations as may be necessary to carry out the provisions of this title and other laws of the Commonwealth administered by the Director or the Department." In addition to the authority to promulgate regulations, the Code of Virginia also gives the State Board the duty and the responsibility to exercise regulatory oversight in, for example, Code of Virginia Section 309.10, which provides that "in, the event that a detention home, group home or other residential care facility for children in need of services or delinquent or alleged delinquent youth is established by a county, city or any combination thereof, it shall be subject to visitation, inspection and regulation by the State Board or its agents...." Finally, Code of Virginia Section 16.1-309.9 gives the Board enforcement powers in subsection B: "The State Board may prohibit, by its order, the placement of juveniles in any place of residence which does not comply with the minimum standards. It may limit the number of juveniles to be detained or housed in a detention home or other facility and may designate some other place of detention or housing for juveniles who would otherwise be held therein.... D. Orders of the State Board of Juvenile Justice shall be enforced by circuit courts as is provided for the enforcement of orders of the State Board of Corrections under § 53.1-70."

The Office of the Attorney General advised the agency on July 19, 2000 that "the Board of Juvenile Justice has the authority to promulgate Regulations Governing the Certification Process and that the proposed Regulations do not conflict with existing law."

*Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.*

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The regulation is needed to provide an orderly and equitable process by which the Board will exercise its regulatory oversight of juvenile justice programs and facilities. This procedural regulation establishes how the Board will measure compliance with its

regulations and standards, establishes the thresholds for various regulatory actions that the Board might take, and sets minimum requirements for the Department, as the Board's regulatory agent, to monitor programs and report its findings. A number of changes are proposed to ensure that certification and enforcement actions taken by the Board are consistent over time and across programs. The regulation also designates, from among other regulations promulgated by the Board, a number of standards that are designated as "mandatory" and that must be complied with at all times, and provides for monitoring on conditions that affect the life, health and safety of juveniles and staff members in juvenile residential facilities.

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.*

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The current regulation in many places specifies a step-by-step process for scheduling, conducting, reviewing and approving certification audits in preparation for a final report to the Board. Many of these procedural steps are no longer practical because of organizational changes in the Department. The proposed regulation is silent on many of these procedural steps, allowing the Department to allocate personnel and resources as available, provided the final report to the Board meets certain standards. The regulation also outlines the various options that are available to the Board upon receipt of the certification audit report, and establishes thresholds for the various actions. The regulation also designates a number of specific standards, identified from substantive regulations promulgated by the Board, which are "mandatory" in the sense that they must be complied with at all times in order for a program to maintain its certification status. Finally, the proposed regulation directs the Department to monitor programs for violations that might pose a threat to the life, health or safety of juveniles or staff of juvenile residential facilities, and gives the Department broad discretion in identifying such violations.

*Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.*

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The primary advantages to the public, to public and private program providers, to the Department and the Board is that the revised regulation clarifies the process for monitoring and certifying juvenile justice programs. There are no known disadvantages resulting from the proposed revisions to the existing regulation.

*Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.*

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- a. the projected cost to the state to implement and enforced the proposed regulation on an annual basis is \$354,760 for personnel and \$19,165 for travel-related expenses, for a total annual cost of \$373,925.
  - i. fund source/ fund detail: General Fund
  - ii. budget activity; program/ subprogram:  
Program: 31900 Program Administration and support services  
Subprogram: 31901 General Management and direction
  - iii. All costs (personnel and travel-related) are on-going expenses.

*(b) the projected cost of the regulation on localities:*

The cost to the locality of receiving monitoring and auditing visits is incidental. When the results of the monitoring or audit visit are reported to the Board for certification action, the locality may opt to send a representative to the Board meeting. This may involve travel costs and the cost of staff time. However, the costs are impossible to generalize since attendance at the Board meeting is optional, the number of persons attending is optional, and the cost of travel and time required will vary depending on the location of the Board meeting. (The Board varies its meeting locations to provide easier access to localities, but the schedule for program certifications does not always coincide with the rotation of board meeting locations.)

*(c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation;*

The regulation will affect all state and local programs that are subject to standards issued by the State Board of Juvenile Justice. In particular, it will apply to all residential programs, court service units and offices on youth, and all nonresidential programs established under the Virginia Juvenile Community Crime Control Act (Article 12.1 of Title 16.1 of the Code of Virginia) (See 6 VAC 35-20-60 .)

*(d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.*

**The agency's best estimate of the number of entities affected by this regulation, defined as residential and non-residential programs in the juvenile justice system is 450. This total includes 23 state operated court service units; 3 locally operated court service units; eight state operated juvenile correctional centers; one state-**

**operated juvenile detention facility; 15 locally- or regionally-operated juvenile detention facilities; approximately twelve other residential programs including halfway houses, group homes and less secure detention facilities; 27 offices on youth; approximately 300 non-residential programs, mostly operating under the Virginia Juvenile Community Crime Control Act.**

Approximately 18,000 juveniles annually are residents, for varying lengths of time, in the residential programs covered by this regulation.

*Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.*

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The proposed regulation deletes a number of definitions that refer to terms that are no longer used in the revised regulation, many of which relate to positions in the Department of Juvenile Justice that no longer exist. In addition, new terms are added that introduce important new concepts to the regulatory process, including "systemic deficiency," "monitoring visit," and "random sampling." Many of the terms that are retained from the current regulation are amended to be more precise or more descriptive.

The proposed regulation updates the legal basis for the regulation to reflect changes to the Code of Virginia since the regulation was originally adopted in 1992. (See 6 VAC 35-20-20.)

New 6 VAC 35-20-35 requires the Department to prepare "guidance documents" to help programs meet the Board's standards.

6 VAC 35-20-50, detailing the "pre-audit process" is deleted. That process will now be determined by Department procedures.

6 VAC 35-20-60 is amended to provide for interim monitoring visits, with different monitoring requirements for residential programs and non-residential programs, and a "review" of all non-residential programs established under the Virginia Juvenile Community Crime Control Act.

New requirements: The Department must report to the Board the findings of monitoring visits (6 VAC 35-20-63) and any findings of life, health or safety violations (6 VAC 35-20-65).

New 6 VAC 35-20-69 establishes minimum conditions that must be met before the Department may approve the placement of juveniles in a new or renovated residential facility.

6 VAC 35-20-75 establishes that juvenile residential facilities, court service units and offices on youth will be individually certified, but not other non-residential programs

6 VAC 35-29-80, describing the procedures for on-site audits, is repealed. Department procedures will determine how audits will be conducted.

6 VAC 35-20-90 is amended to clarify what materials must come to the Board and allowing the Department to determine how the materials will be reviewed and approved.

6 VAC 35-20-100 is amended, and a chart is added, to provide fuller guidance as to the certification actions the Board may take based on a program's current status and the certification audit findings.

6 VAC 35-20-110 is amended to describe the requirements for communicating the board's certification action to interested parties.

6 VAC 35-20-120 is amended to clarify the actions that may be taken following decertification or denial of certification, including a provision for the Board to make a recommendation to the Governor and the Secretary of Public Safety when a Department-operated program fails to re-establish certification.

6 VAC 35-20-140, providing for a transitional period before newly adopted standards will be enforced, is repealed. The Board has the authority, when it promulgates new or revised regulations, to specify the effective date of the new or revised regulation.

*Please describe the specific 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.*

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Since this regulation sets forth the process by which the Board and the Department will oversee compliance with standards promulgated by the state Board, there appear to be two alternatives to the proposed revised regulation.

One alternative would be to abolish the regulation and permit the Department to conduct monitoring visits entirely in its own discretion and without guidelines, reporting to the Board when it deemed fit and on such matters as it might choose to address. (Code of Virginia § directs the Department to periodically review all services established under the Virginia Juvenile Community Crime Control Act, for example.) This alternative appears to be more intrusive on juvenile justice programs than the regulated certification process, in that it leaves localities and programs no guidance as to what to expect by way of monitoring visits and no due process protections for challenging contested audit findings.

The second alternative would be to abolish the existing regulation but to require the Department to develop policies and procedures (not regulations) for conducting the monitoring visits and reporting to the Board. This alternative has the advantage of providing notice to program providers and establishing a schedule for reporting to the Board. But this alternative is less desirable than the proposed regulation because it could be entirely unilateral on the part of the Department. When the regulatory process itself is established

pursuant to a regulation, the requirements of the Administrative Process Act ensure that all affected programs, as well as other interested parties and the general public, have an opportunity to comment on and shape the ultimate outcome. Once adopted, that regulatory process can be modified only through the same public process.

*Please summarize all public comment received during the NOIRA comment period and provide the agency response.*

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COMMENT: Strengthen or enhance the substantive standards promulgated by the Board of Juvenile Justice.

RESPONSE: However desirable it may be to do so, those substantive standards are promulgated separately and may not be amended through these primarily procedural Certification Regulations, but must be submitted separately for comment and review pursuant to the Administrative Process Act.

COMMENT: Expand the list of "life, health and safety standards" designated from among the substantive standards by the Board. Historically, the Certification Regulations have required that programs remain in 100% compliance with all "life, health and safety standards."

RESPONSE: The agency, however, is proposing to terminate the listing of "life, health and safety standards" and instead to designate a number of "mandatory" standards. This change is not merely a change in terminology, but is based on practical considerations. For example, the purpose of a "life, health and safety standard" is to protect the life, health or safety of residents and staff. But many examples were found where a violation of the standard as written did not constitute a threat to the life, health or safety of any person. On the other hand, examples were found of situations that could, in fact, pose a threat to the life, health or safety of residents or staff, and yet would not be a violation of the designated "life, health and safety standards." The agency's proposed solution is twofold.

First, the proposed regulation will designate certain standards as "mandatory" without implying that every violation would necessarily threaten life, health or safety. This approach is consistent with the practice of the American Correctional Association, the National Institute for Correctional Health Care, and the three agencies that co-promulgate with the Board of Juvenile Justice the Standards for the Interdepartmental Regulation of Residential Facilities for Children. The proposed "mandatory" standards are selected to correspond closely to the "mandatory" standards of the American Correctional Association. This approach to "mandatory" standards will allow the Board to designate certain standards are critically important even though a violation might not immediately threaten the wellbeing of residents or staff.

Second, the proposed regulation requires the Department and the Board to address "life,

health or safety violations" wherever they occur, even if the violation is not associated with a "mandatory" standard. In this way, the proposed regulation gives agency regulatory inspectors the flexibility to identify and demand corrective action for any threat to life, health or safety of residents or staff, without being constrained by a list of standards which might never have contemplated the particular situation encountered.

COMMENT: Increase the compliance requirements to qualify for each level of certification.

RESPONSE: The proposed regulation adopts this suggestion in general, but not necessarily the specific percentage requirements suggested for each category.

COMMENT: Include more specific definitions.

RESPONSE: Where it was felt that the context did not provide an adequate understanding of a term, the suggestion was generally followed.

COMMENT: Specify what actions the Board could and would take in the event that a Department-operated program were to be de-certified and subsequent fail to re-qualify for certification, including closing the facility.

RESPONSE: Recognizing that the Board of Juvenile Justice lacks the statutory authority to unilaterally close a department-operated program for any reason, the proposed regulation specifies only that "if after 90 days the program has not met the requirements for at least conditional certification and the Department has not closed the program, the Board shall recommend to the Governor and the Secretary of Public Safety appropriate action to be taken under the circumstances."

COMMENT: The Board should individually certify non-residential programs.

RESPONSE: There is no basis in law for individually "certifying" non-residential programs, and the administrative burden of individually certifying hundreds of VJCCCA programs is beyond the resources of the Department or the Board. The Code of Virginia provides for Board oversight of VJCCCA programs through its approval of the local VJCCCA plans, and that is the process contemplated by this regulation for overseeing individual non-residential VJCCCA programs.

COMMENT: The regulation should continue to specify the on-site audit procedures.

RESPONSE: The proposed regulation will allow Department procedures to determine the steps of the audit process, thus allowing for adaptation based on resources and circumstances. The Board retains the authority to hear appeals challenging the propriety of any particular

audit.

*Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.*

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The agency has examined the regulation and the relevant public comments, and has determined that, although there are differences of opinion as to what certain sections of the regulation SHOULD say, the regulation is clearly written and easily understandable by the individuals and entities affected.

*Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.*

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In September 2003, the Department will initiate a review and re-evaluation to determine if the regulation should be continued, amended or terminated. The specific and measurable regulatory goals are:

1. All juvenile residential programs, all court service units serving Juvenile and Domestic Relations District Courts, and all offices on youth shall receive at least one announced and one unannounced monitoring visit per year.
2. All nonresidential programs established under the Virginia Juvenile Community Crime Control Act shall be reviewed at least once every two years to determine compliance with the approved local plans and Board standards.
3. To help programs meet all regulatory and policy requirements, the department shall prepare guidance documents compiling all applicable standards and policies and stating how compliance will be assessed. (6 VAC 35-20-35).
4. All life, health or safety violations shall be reported to the Board, along with the action taken by the department or the program to correct the deficiency, (6 VAC 35-20-65.)
5. Certification actions by the Board will be applied uniformly and fairly within the parameters set out in 6 VAC 35-20-100.

*Please provide an analysis of the proposed regulatory action that assesses the potential impact on the*

*institution of the family and family stability including the extent to which 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.*

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The proposed regulation is procedural in nature, directing the certification audit process, rather than substantive. Consequently, the regulation will have no impact on the institution of the family and family stability. The regulation will neither strengthen nor erode the authority and rights of parents in the education, nurturing and supervision of their children; will neither encourage nor discourage economic self-sufficiency, self-pride and the assumption of responsibility for oneself, one's spouse and one's children or elderly parents; will neither strengthen nor erode the marital commitment; and will neither increase nor decrease disposable family income.