



COMMONWEALTH of VIRGINIA

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TO: MARGARET SCHULTZE, Commissioner
Virginia Department of Social Services

FROM: ELLEN FULMER MALENKE *elm*
Assistant Attorney General

DATE: July 28, 2016

SUBJECT: Exempt Regulation Section - 22VAC40-180 (Amend Licensure Threshold-Voluntary Registration)

I am in receipt of the attached regulation. You have asked the Office of the Attorney General to review and determine if the State Board of the Virginia Department of Social Services has the statutory authority to promulgate the proposed regulation and if the proposed regulation comports with applicable state and federal law.

This regulatory action serves to bring the Voluntary Registration of Family Day Homes – Requirements for Providers into conformity with §§ 63.2-100 and 63.2-1704 of the Code of Virginia, to comply with House Bill 1570 and Senate Bill 1168 (2015). The legislation lowered the licensure threshold for family day homes and amended definitions and capacity references.

It is my opinion that the State Board of DSS has the authority to promulgate this regulation, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and has not exceeded that authority.

Further, it is my view that this regulation is exempt from the procedures of Article 2 of the APA pursuant to Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about these regulations, please contact me at 786-4856.

cc: Kim F. Piner, Esquire
Attachment

DEPARTMENT OF SOCIAL SERVICES

Amend Licensure Threshold-Voluntary Registration

Part I

Introduction

22VAC40-180-10. 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 appropriate" means suitable to the chronological age range and developmental characteristics of a specific group of children.

"Age groups" means the following:

"Infant" means children from birth to 16 months.

"Toddler" means children from 16 months to 31 months.

"Preschooler" means children from 31 months up to the age of eligibility to be enrolled in kindergarten or an equivalent program.

"School age" means children who are eligible to be enrolled in kindergarten or attend public school.

"Age of eligibility to attend public school" means five years of age or older by September 30.

"Care, protection and guidance" means responsibility assumed by a family day home provider for children receiving care in the home, whether they are related or unrelated to the provider.

"Certificate of registration" means a document issued by the commissioner to a family day provider, acknowledging that the provider has been certified by the contracting organization or the department and has met the Requirements for Voluntary Registration of Family Day Homes. (22VAC40-180-10 et seq.).

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

"Commissioner" means the Commissioner of Social Services.

"Commissioner's designee" means a designated individual or division within the Department of Social Services that is delegated to act on the commissioner's behalf in one or more specific responsibilities.

"Contracting organization" means the agency which has contracted with the Department of Social Services to administer the voluntary registration program for family day homes.

"Denial of a certificate of registration" means a refusal by the commissioner to issue an initial certificate of registration.

"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 ~~in carrying out the responsibilities and duties specified in Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia.~~

"Evaluate" or "evaluation" means the review of a family day provider by a contracting organization upon receipt of an application for a certificate of registration to verify that the applicant meets the Requirements for Providers.

"Family day home" means a child day program offered in the residence of the provider or the home of any of the children in care for one through 12 children under the age of 13, exclusive of

the provider's own children and any children who reside in the home, when at least one child receives care for compensation. ~~From July 1, 1993, until July 1, 1996, family day homes serving nine through 12 children, exclusive of the provider's own children and any children who reside in the home, shall be licensed. Effective July 1, 1996, family day home serving six through 12 children, exclusive of the provider's own children and any children who reside in the home, shall be licensed. However, no family day home shall care for more than four children under the age of two, including the provider's own children and any children who reside in the home, unless the family day home is licensed or voluntarily registered. However, a family day home where the children in care are all grandchildren of the provider shall not be required to be licensed. A family day home serving five through 12 children, exclusive of the provider's own children and any children who reside in the home shall be licensed. A family day home caring for more than four children under the age of two, including the provider's own children and any children who reside in the home, shall be licensed or voluntarily registered. A family day home where the children in care are all related to the provider by blood or marriage shall not be required to be licensed.~~

"Family day provider applicant" or "provider applicant" means a person 18 years of age or older who has applied for a certificate of registration.

"Monitor" or "monitoring visit" means to visit a registered family day provider and to review the provider's compliance with the applicable requirements described in the Requirements for Providers.

"Parent" means a biological, foster or adoptive parent, legal guardian, or any person with responsibility for, or custody of, a child enrolled or in the process of being enrolled in a family day home.

"Physician" means a person licensed to practice medicine.

"Provider" or "registered family day provider" means a person who has received an initial or renewed certificate of registration issued by the commissioner. This provider has primary responsibility for providing care, protection, supervision, and guidance to the children in the registered home.

"Provider assistant" means a person 14 years of age or older who has been designated by the family day provider and approved by the contracting organization to assist the provider in the care, protection, supervision, and guidance of children in the home.

"Refusal to renew a certificate of registration" means the nonissuance of a certificate of registration by the commissioner after the expiration of the existing certificate of registration.

"Registration fee" means the payment to a contracting organization by a provider or applicant upon filing an application for a certificate of registration.

"Registered family day home" means any family day home which has met the standards for voluntary registration for such homes pursuant to regulations promulgated by the State Board of Social Services and which has obtained a certificate of registration from the commissioner.

"Renewal of a certificate of registration" means the issuance of a certificate of registration by the commissioner after the expiration of the existing certificate of registration.

"Requirements for Providers" means the procedures and general information set forth for providers operating family day homes who voluntarily register. This includes staffing requirements and a self-administered health and safety checklist.

"Revocation of a certificate of registration" means the removal of a provider's current certificate of registration by the commissioner for failure to comply with the applicable Requirements for Providers.

"Substitute provider" means a provider who meets the Requirements for Providers and who is readily available to provide substitute child care in a registered provider's home or in the substitute provider's home.

"USDA" means United States Department of Agriculture.

22VAC40-180-20. Legal authority.

~~Section 63.1-196.04 of the Code of Virginia was amended and reenacted in the 1993 General Assembly session to establish~~ 63.2-1704 of the Code of Virginia establishes provisions for the voluntary registration of family day homes.

Part II

Provider Registration and General Procedures

22VAC40-180-30. Provider eligibility.

- A. A family day provider and substitute provider shall be 18 years of age or older.
- B. A family day assistant shall be 14 years of age or older.
- C. A family day provider, assistant or assistants and substitute provider shall be able to read, write, understand and carry out the responsibilities in the Requirements for Providers.
- D. A family day provider and substitute provider shall live in a county, city, or town that does not have a local ordinance for the regulation or licensure of family day homes.
- E. A family day provider that is voluntarily registered pursuant to § 63.2-1704 of the Code of Virginia shall not be required by law to be licensed. Family day homes serving five through 12 children under the age of 13, exclusive of the provider's own children and any children who reside in the home, shall be licensed.

22VAC40-180-40. Application for registration.

A. A family day provider applicant for a certificate of registration shall submit to the contracting organization a completed application form, which shall include, but not be limited to:

1. The health and safety checklist and statements of assurance as noted in Part III (22VAC40-180-120 et seq.);
2. A tuberculosis test report as noted in subsection C of this section;
3. A criminal records check and Child Protective Services Central Registry Clearance as indicated in subsection D of this section;
4. A sworn disclosure statement as noted in subsection D of this section; and
5. General information as noted in subsection B of this section.

B. The provider shall also indicate a preference as to whether:

1. The provider applicant is interested in participating in the USDA food program (if the registrant is not currently participating);
2. The provider applicant is willing and able to serve as a substitute provider (after the primary provider obtains consent from parents of enrolled children) and is interested in being included on the substitute provider list maintained by the contracting organization.

C. Health information shall be submitted on the family day provider applicant, assistant or assistants and substitute providers, if any, and any other adult household member who comes in contact with children or handles food served to children. The applicant shall return the completed application form along with a tuberculosis (TB) form which provides written proof of the results of a tuberculosis examination for the applicant, the provider assistant, if any, and all other persons who care for children in the family day home as follows:

1. Initial tuberculosis examination and report.

- a. Within 90 days before the date of initial application for registration or within 30 days before employment or having contact with children in a registered home, each individual shall obtain a tuberculin skin test indicating the absence of tuberculosis in a communicable form;
- b. Each individual shall submit a statement that he is free of tuberculosis in a communicable form, including the results of the test;
- c. The statement shall be signed by a physician, the physician's designee, or an official of a local health department; and
- d. The statement shall be filed in the individual's record maintained at the family day home.

EXCEPTION: An individual may delay obtaining the tuberculosis test if a statement from a physician is provided that indicates the test is not advisable for specific health reasons. This statement shall include an estimated date for when the test can be safely administered. The individual shall obtain the test no later than 30 days after this date.

2. Subsequent evaluations.

- a. An individual who had a significant (positive) reaction to a tuberculin skin test and whose physician certifies the absence of communicable tuberculosis shall obtain chest x-rays on an annual basis for the following two years.
 - (1) The individual shall submit statements documenting the chest x-rays and certifying freedom from tuberculosis in a communicable form;
 - (2) The statements shall be signed by a licensed physician, the physician's designee, or an official of a local health department;

(3) The statements shall be filed in the individual's record maintained at the family day home; and

(4) Following the two-year period during which chest x-rays are required annually, additional screening shall be obtained every two years.

b. An individual who had a nonsignificant (negative) reaction to an initial tuberculin skin test shall obtain additional screening every two years thereafter.

c. Any individual who comes in contact with a known case of tuberculosis or who develops chronic respiratory symptoms shall, within 30 days of exposure or development, receive an evaluation in accordance with subdivision C 1 of this section.

3. At the request of the contracting organization or the Department of Social Services, a report of examination by a physician shall be obtained when there is an indication that the safety of children in care may be jeopardized by the physical or mental health of a specific individual.

D. Information certifying that those in contact with children do not have a criminal background shall be submitted. Attachments will include:

1. A criminal records check, as specified in §§ ~~63.1-198.1~~ 63.2-1720 and 63.2-1721 of the Code of Virginia, conducted no more than 90 days before the date of initial application and no more than 90 days before the date of application for renewal, for the provider applicant, the provider assistant, and the substitute provider, if any, and any adults residing in the home;

2. A Child Protective Services (CPS) Central Registry Clearance conducted no more than 90 days before the date of initial application and no more than 90 days before the

date of application for renewal, for the provider applicant, the provider assistant, and the substitute provider, if any, and any adults residing in the home; and

3. A sworn disclosure statement for the provider applicant, the provider assistant, and the substitute provider, if any, and any adults residing in the home.

22VAC40-180-60. Issuance of a certificate of registration.

A. After the provider applicant has satisfactorily met the requirements for voluntary registration, the contracting organization shall certify the provider applicant as eligible for registration to the commissioner and recommend the issuance of a certificate of registration.

B. The commissioner shall issue the certificate of registration, which shall not be transferable, to a specific provider at a specific location.

C. If it is necessary to change any identifying information (name and phone) noted on the certificate of registration prior to the end of the two-year registration period, the provider shall advise the contracting organization no later than 14 calendar days after the change.

D. If the provider changes location prior to the end of the two-year registration period, the provider shall permit and participate in a second home visit and an evaluation of the new residence within 30 days of occupying the residence.

E. The provider shall not claim in advertising or in any written or verbal announcement to be registered with the Commonwealth of Virginia unless a certificate of registration is currently in effect.

F. A provider who has been denied a certificate of registration or who has had a certificate of registration revoked or refused renewal by the commissioner shall not be eligible for issuance of a certificate of registration until six months after the date of such action, unless the waiting period is waived by the commissioner ~~as noted in Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia.~~

22VAC40-180-80. Denials, revocations, refusals to renew and provider appeals procedures.

A. A provider's certificate of registration may be denied, revoked, or refused renewal by the commissioner for cause including, but not limited to:

1. Failure to comply with adult-child ratios, staffing requirements, or other standards set forth in the Requirements for Providers;
2. Use of fraud in obtaining a certificate of registration or in the subsequent operations of the family day home;
3. Any conduct or activity which adversely affects or presents a serious hazard to the health, safety, and general well-being of an enrolled child, or which otherwise demonstrates unfitness by a provider to operate a family day care home;
4. Refusal to furnish the contracting organization or the department with records;
5. Refusal to permit immediate admission to the family day home to the parent of an enrolled child who is present in the home or to an authorized representative of the contracting organization or department when any enrolled child is present; or
6. Documentation maintained by a contracting organization or the department that a certificate of registration has been denied, revoked, or refused renewal by the commissioner to the provider during the six months prior to the date an application is resubmitted for a certificate of registration.

B. When a provider is found to be in violation of any of the provisions of subsection A of this section, the contracting organization shall notify the provider of the violation or violations first orally and then in writing, and, when appropriate, shall afford the provider an opportunity to abate the violation or violations within a time frame agreed upon by the contracting organization

and the provider. The provider shall immediately abate the violation or violations in situations where children are at risk of abuse or neglect or serious harm or injury.

C. If the provider fails to abate the violation or violations within the agreed upon time frame or commits a subsequent violation, the contracting organization may recommend to the commissioner that the certificate of registration be denied, revoked, or refused renewal. A statement referencing the standard or standards violated shall be included with the recommendation.

D. Upon notification of the contracting organization's intent to recommend that a certificate of registration be denied, revoked, or refused renewal, a provider may request a review in writing by the contracting organization's review committee within 15 calendar days after receipt of notification.

E. The contracting organization shall submit its recommendation of the provider's eligibility for issuance of a certificate of registration to the commissioner's designee. If a certificate of registration is denied, revoked or refused renewal by the commissioner's designee, the provider may appeal the decision in accordance with the Administrative Process Act (~~§ 9-6.14:1 et seq.~~ 2.2-4000 et seq. of the Code of Virginia) and may request a hearing in writing within 15 calendar days after receipt of notification of the decision.

F. After the hearing, the commissioner shall issue the final order which may be appealed in accordance with the Administrative Process Act.

G. A provider whose certificate of registration is revoked or refused renewal shall notify the parent or parents of each child enrolled within 10 calendar days after receipt of notification of such action.

22VAC40-180-90. Provider reporting requirements.

A. The provider shall verbally notify the local department of social services or call the toll free number for the Child Protective Services Unit (~~1-800-552-7096/TDD~~) (1-800-552-7096) immediately whenever there is reason to suspect that a child has been or is being subjected to any kind of child abuse or neglect by any person.

B. The provider shall report the following incidents to the contracting organization as soon as possible but no later than the beginning of the contracting organization's next working day:

1. A lost or missing child when it was necessary to seek assistance from local emergency or police personnel;
2. Any injury that occurs while in the provider's care that results in the admission of a child to a hospital;
3. The death of a child while in the provider's care;
4. Any damage to the provider's home that affects the provider's compliance with the Requirements for Providers;
5. Any occurrence of a reportable disease, as specified in the list of reportable diseases provided by the contracting organization;
6. The termination of all family day care services by the provider; or
7. The provider's decision to surrender the certificate of registration in accordance with the Requirements of the Voluntary Registration Program.

22VAC40-180-110. Staffing requirements.

A. The provider shall ensure that the total number of children receiving care at any one time does not exceed four, which is the maximum capacity allowed by law (~~§ 63.1-196.04~~ 63.2-1704 of the Code of Virginia) for family day homes that may apply for voluntary registration.

B. The following adult-to-child ratios shall be maintained for children receiving care until October 31, 1993. (NOTE: The adult-to-child ratios for voluntary registration shall be same as those for licensed day homes effective November 1, 1993.)

1. One adult may care for nine children at any one time, within the limitations that follow. This includes provider by blood or marriage the provider's own children and any children who reside in the home.

a. Of the nine children, no more than six shall be under school age without an assistant;

b. Of the children under school age, no more than five shall be under 31 months (2 ½ years of age or younger) even when an assistant is present;

c. Of the children under 31 months, no more than three shall be under 16 months without an assistant.

2. School age children who are 10 years of age and older shall not count in determining the ratio of adults to children for staffing purposes.

FORMS (22VAC40-180)

~~Voluntary Registration Health and Safety Checklist (rev. 8/00).~~

Voluntary Registration Health and Safety Checklist (rev. 6/16)

~~Voluntary Registration Provider Application Form, 032-05-210/2 A (rev. 6/04).~~

~~Voluntary Registration Provider Application Form, 032-05-210/2 B (eff. 6/04).~~