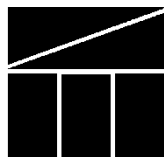


Adverse impact notification sent to Joint Commission on Administrative Rules, House Committee on Appropriations, and Senate Committee on Finance (COV § 2.2-4007.04.C): Yes<sup>1</sup>  Not Needed

If/when this economic impact analysis (EIA) is published in the *Virginia Register of Regulations*, notification will be sent to each member of the General Assembly (COV § 2.2-4007.04.B).



## Virginia Department of Planning and Budget Economic Impact Analysis

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### **22 VAC 40-191 Background Checks for Child Welfare Agencies**

**Virginia Department of Social Services**

**Town Hall Action/Stage: 5077/8669**

October 5, 2019 (Revised on October 10 and November 5, 2019 to add new information and make corrections based on information received after posting, respectively).

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### **Summary of the Proposed Amendments to Regulation**

The State Board of Social Services ('Board') proposes to repeal 22 VAC 40-191 *Background Checks for Child Welfare Agencies* and replace it with 22 VAC 40-192, title unchanged. The repeal-and-replace is intended to update the background check requirements to conform to the federal Child Care and Development Block Grant Act of 2014 (42 US Code Subchapter II-B, henceforth 'Childcare Block Grant'), and the 2015 Acts of Assembly (cc. 758, 770, affecting the Code of Virginia §§ 63.2-1704, 63.2-1720, 63.2-1721.1, 63.2-1725).

The main changes, which are based on the Childcare Block Grant, are the requirements that child welfare agencies ('agencies') (i) submit Federal Bureau of Investigation (FBI) fingerprint checks, and (ii) request a search of another state's child abuse and neglect registry for any prospective employee or volunteer who lived in that state in the past five years. These requirements are newly directed at various types of child daycare facilities,<sup>2</sup> including unlicensed subsidy vendors.<sup>3</sup> In addition, the Board proposes to update the timing of background checks

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<sup>1</sup> Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

<sup>2</sup> The types of child daycare facilities include: licensed family day homes, licensed family day systems, family day homes approved by licensed family day systems, voluntarily registered family day homes, licensed child day centers, and religiously exempt child day centers.

<sup>3</sup> Unlicensed subsidy vendors are child day centers that receive federal, state, or local funding but are exempt from licensure under §§ 63.2-1715 of the Code of Virginia, and did not previously voluntarily register.

(including repeat checks) for licensed child-placing agencies (LCPAs), foster and adoptive homes approved by LCPAs, and independent foster homes, which were already subject to the fingerprint checks.<sup>4</sup> Finally, the Board proposes to make a number of changes that update definitions, simplify the language, and correct outdated references to the *Code of Virginia*, thereby meeting the objectives of a periodic review.

## Background

Prior to the passage of the Block Grant Act in 2014 and the 2015 Acts of Assembly,<sup>5</sup> background checks for childcare programs (see footnotes 2 and 3) consisted of

- A sworn statement signed by the applicant for employment;
- A criminal history check (meaning a name-based search of the Central Criminal Records Exchange (CCRE) by the Virginia State Police (VSP), which returned charges and convictions within the state);
- A search of Virginia's child abuse and neglect registry (conducted by the Office of Background Investigations (OBI) in the Department of Social Services (DSS)).

The requirements listed above applied to all childcare programs that were required to be licensed, registered, or approved by the Board, religiously exempt programs, and family day homes that were approved by a licensed childcare program. The requirements for repeat checks varied across the different types of agencies.<sup>6</sup>

The proposed regulation<sup>7</sup> would expand existing background check requirements for child daycare programs: all licensed, registered, or approved agencies, plus all religiously

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<sup>4</sup> 'Adoptive homes' as used in the regulation and here refer only to homes that have been approved for adoption by a licensed child-placing agency, but have not yet had their adoption finalized. Once the adoption is finalized, adoptive homes are not required to repeat any background check procedures.

<sup>5</sup> The 2015 Acts of Assembly cc. 758, 770 required the fingerprint-based search as of July 1, 2017. Legislation in subsequent years amended the types of entities to which these requirements are directed, possible waivers, and the dates on which specific versions of the Acts expire or become effective; see also the 2017 Acts of Assembly cc. 189, 751, 809, the 2018 Acts of Assembly cc. 146, 278, and the 2019 Acts of Assembly c. 447.

<sup>6</sup> Licensed child day centers and licensed family day homes were required to repeat the background check every three years. Voluntarily Registered Family Day Homes had a two year repeat check requirement. Religiously exempt agencies were required to run a background check for new employees, but were not required to subsequently repeat the checks. Foster homes, the LCPAs that approved them, and independent foster homes were required to repeat the background check process every three years. Adoptive homes would have had to repeat the process after three years only if the adoption had not been finalized in the interim.

<sup>7</sup> These requirements have been in effect since July 1, 2017 as required by the 2015 Acts of Assembly Chapters 758 and 770. See footnote 5 for more details.

exempt agencies would be required to add a national criminal background check (a fingerprint-based search of the FBI's national criminal history database) and a search of others states' child abuse and neglect registries to the requirements listed above. As before, all components of the background check requirements would apply towards employees and volunteers alike. The proposed regulation would also require unlicensed subsidy vendors to the list of regulants to comply with the expanded requirements.

Certain requirements pertaining to the frequency and type of background checks would also be changed. The proposed regulation would now require religiously exempt child day centers to repeat checks every five years, whereas previously they were not required to repeat checks at all, unlike the licensed or registered daycare programs. The newly-added subsidy vendors would also be required to repeat the background check every five years. Foster parents and parents applying to adopt, the LCPAs that approve them, and independent foster homes would be required to repeat the background checks every three years, as before. However, foster parents and parents applying to adopt need only undergo a fingerprint-based search the first time they are required to provide a background check; they have the option to submit a criminal history record check (conducted by the VSP) for subsequent background checks.

In addition to adding fingerprint-based searches, the proposed regulation also conforms to the federal and state law by requiring a search of another state's child abuse and neglect registry if the applicant resided there at any point during the previous five years. DSS maintains a file on its website with information on other states' registries to facilitate requests arising from this requirement, and has developed a form to be submitted by requestors from other states.<sup>8</sup> The regulation describes the documentation that would be deemed acceptable if results from another state's registry cannot be obtained: a documented request for a search of that state's registry and a response (including form letters) indicating that the information cannot be provided.

### **Estimated Benefits and Costs**

The proposed regulation sets forth standards that are intended to protect the health, safety, and welfare of children who are in out-of-home care. To the extent that the fingerprint-based searches and out-of-state registry searches yield information that may not have been

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<sup>8</sup> See [https://www.dss.virginia.gov/family/children\\_background.cgi](https://www.dss.virginia.gov/family/children_background.cgi) The 'Adam Walsh state contacts...' file contains the contact details for those seeking a search of another state's child abuse and neglect registry.

revealed under the previous background check requirements, the proposed regulation benefits children, parents, and childcare workers by further reducing the probability that they will unwittingly be exposed to potential child abusers. Further, the Board is required to implement the requirements of the federal Childcare Block Grant for the state to continue to receive these funds. Virginia's federal allocation for (federal) fiscal year 2018 was \$161.7 million, and this funding was contingent, in part, on the Board's compliance with these requirements.

However, these benefits require providers to incur certain costs. The cost of the fingerprint-based search to individuals is \$39 for volunteers and \$59 for employees (DSS states that this difference results from differences in FBI rates for volunteers and employees, which the VSP and OBI rates reflect). Regulants already pay \$27 to VSP for the CCRE search, plus \$10 to OBI for a search of the child abuse and neglect registry, amounting to a total of \$37 per person for an initial or repeat background check.

DSS initially offered to cover the costs of the fingerprint-based search until September 30, 2019, and has recently extended its coverage for another year. If DSS were to stop covering the fees for the fingerprint-based checks, regulants would have to pay more than double the current fees for the fingerprint-based checks, at a minimum. Hence, the additional costs created by this regulation consist of

- (i) The monetary cost for the fingerprint-based search, which DSS is incurring through September 2020 and which agencies will have to pay thereafter;
- (ii) The time cost of waiting for the results, since employees and volunteers may not commence work until the results are received; and
- (iii) The monetary costs of searching another state's child abuse and neglect registry.

The Agency Background Document states that the OBI, which initiates the fingerprint-based search through the third-party vendor's platform, reported that about 86,000 fingerprint-based background checks had been conducted for child day program providers in Virginia during calendar year 2018. DSS reports that it expended \$5,829,852 covering these fees. However, this experience may be atypical, and DSS reports there was a 'bump' in the first year because all

current employees were required to complete a fingerprint background check by September 30, 2018.

Finally, some of these costs might be ameliorated if the regulation allowed agencies and workers greater flexibility in the hiring process. The Code of Federal Regulations allows states to adopt regulations that would permit employees and volunteers to transfer their background check between employers; this is discussed in greater detail below.

### **Businesses and Other Entities Affected**

According to the Board, this regulation affects an estimated 6,000 licensed family day homes, licensed family day systems and family day homes approved by them, licensed child placing agencies and the foster and adoptive parents approved by them, voluntarily registered family day homes, licensed child day centers, religiously exempt child day centers, independent foster homes, and child day home or family day centers that are either unlicensed or exempt from licensure, but receive any federal, state, or local funding. According to the Board, all providers are small businesses.

### **Localities<sup>9</sup> Affected<sup>10</sup>**

The proposed amendments do not introduce new costs for local governments and are unlikely to disproportionately affect any locality in particular.

### **Projected Impact on Employment**

The proposed amendments are unlikely to affect total employment in the industry, since the number of childcare personnel required is unlikely to change in the short run. However, if providers have to start covering the fees for the fingerprint-based search, this could lead them to try to substitute employees with volunteers, to the extent that the difference in background check fees affects their hiring practices. Similarly, to the extent that background check fees affect the overall cost of hiring childcare workers, licensed child day centers may employ fewer workers who may be required to work more hours, or oversee more children simultaneously or lower wages while maintaining the same level of employment, if for example licensing regulations require a fixed ratio of caregivers to children. Unlicensed subsidy vendors may encounter

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<sup>9</sup> “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>10</sup> § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

difficulties, especially if they have many family members living in the home and cannot pass on the increased costs to their customers.

### **Effects on the Use and Value of Private Property**

Real estate development costs do not appear to be directly affected.

### **Adverse Effect on Small Businesses<sup>11</sup>:**

#### Types and Estimated Number of Small Businesses Affected

According to the Board, all providers are small businesses. The Board states that this regulation would affect an estimated 6,000 licensed family day homes, licensed family day systems and family day homes approved by them, licensed child placing agencies and the foster and adoptive parents approved by them, voluntarily registered family day homes, licensed child day centers, religiously exempt child day centers, independent foster homes, and child day home or family day centers that are either unlicensed or exempt from licensure, but receive any federal, state, or local funding.

#### Costs and Other Effects

The cost of the fingerprint-based search is \$39 for volunteers and \$59 for employees. Until now, regulants have had to pay \$27 to the state police for the CCRE search, \$10 to OBI for the child abuse and neglect registry, amounting to a total of \$37 per person for an initial or repeat background check. If DSS were to stop covering the fees for the fingerprint-based checks, regulants would have to pay more than double the current per-person cost, at a minimum. This does not include any fees that they may have to pay to an out-of-state registry.

#### Alternative Method that Minimizes Adverse Impact

An adverse impact is indicated because of the increase in cost incurred by providers. If a regulation may have an adverse effect on small businesses, the *Administrative Process Act* (§ 2.2-4007.04) directs the Department of Planning and Budget to describe “any less intrusive or less costly alternative methods of achieving the purpose of the regulation.” Accordingly, and to the extent permitted by law, the board

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<sup>11</sup> Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

could consider some of the background check provisions recently made by the Department of Health and Human Services to the Child Care and Development Fund (45 CFR Part 98) in response to the Childcare Block Grant.

The CFR allows states to implement regulations that meet the requirements of the Childcare Block Grant but may allow providers more flexibility.<sup>12</sup> For instance, the proposed regulation would require every employer to conduct a new background check, and does not allow any component of it to be more than 90 days old, even though the *Code of Virginia* does not explicitly prohibit the portability of background check results across employers. The *Code* states that employees and volunteers may not begin work until and unless the employer has received the results of the background check, but it does not require that each employer apply for a new background check for each employee. The CFR appears to provide more flexibility by allowing agencies to use reports of clear background checks that had been obtained by other agencies in the state within the previous five years, as long as the applicant for employment had not been unemployed in the interim for more than six months. Specifically, the CFR states that:

*(3) A child care provider shall not be required to submit a request under paragraph (d)(2) of this section for a child care staff member if:*

*(i) The staff member received a background check described in paragraph (b) of this section:*

*(A) Within 5 years before the latest date on which such a submission may be made; and*

*(B) While employed by or seeking employment by another child care provider within the State;*

*(ii) The State provided to the first provider a qualifying background check result, consistent with this subchapter, for the staff member; and*

*(iii) The staff member is employed by a child care provider within the State, or has been separated from employment from a child care provider within the State for a period of not more than 180 consecutive days.*

An alternative method, therefore, could be to use a process similar to the federal regulations quoted above. To the extent permitted by Code of Virginia, using the process outlined by the federal regulations could potentially reduce time costs and fees for hiring agencies without substantially increasing the risk to children or families.

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<sup>12</sup> See <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=11d1dedba284f82bd70d5149d7fcc28c&ty=HTML&h=L&mc=true&r=PART&n=pt45.1.98> specifically §98.43 Criminal Background Checks.

This alternative would serve to minimize the adverse impact of the regulation, while still meeting policy goals. Two of the commenters at the NOIRA stage specifically mentioned allowing background checks to be transferable from one employer to the next.

## Legal Mandates

**General:** The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

**Adverse impacts:** Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.