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Fast-Track Regulation Agency Background Document

Agency name	Department of Behavioral Health and Developmental Services (DBHDS)
Virginia Administrative Code (VAC) Chapter citation(s)	12VAC35-46
VAC Chapter title(s)	Regulations for Children's Residential Facilities
Action title	Noncontroversial Regulatory Reductions
Date this document prepared	October 08, 2024

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

In accordance with [Executive Directive 1](#) (2022), this action reduces the administrative burden and compliance costs on licensed providers by repealing or simplifying regulatory provisions that are obsolete, overly prescriptive, duplicative, or confusing.

These noncontroversial amendments to the Regulations for Children's Residential Facilities ("Children's Residential Regulations") will provide clarity and ease of use for providers while maintaining protections for residents.

Draft language was included in a general notice with a 30-day public comment forum that ended on September 6, 2024. From three submissions offered by two commenters, DBHDS made additional clarifying edits to Sections 190 and 200.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.

CSB – Community services board
 DBHDS – Department of Behavioral Health and Developmental Services
 DSS – Department of Social Services
 Children’s Residential Regulations – Regulations for Children’s Residential Facilities (12VAC35-46)
 State Board – State Board of Behavioral Health and Developmental Services
 VDH – Virginia Department of Health

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

At its meeting on September 25, 2024, the State Board of Behavioral Health and Developmental Services approved this fast-track action to amend the Children’s Residential Regulations (12VAC35-46).

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in the ORM procedures, “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

No specific mandate is tied to this action; however, its impetus derives from [Executive Directive 1](#), to remove “regulations not mandated by federal or state statute, in consultation with the Office of the Attorney General, and in a manner consistent with the laws of the Commonwealth.”

DBHDS focused this fast-track action on noncontroversial amendments that lessen the regulatory burden on licensed providers.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

Section [37.2-203](#) of the Code of Virginia authorizes the State Board to adopt regulations that may be necessary to carry out the provisions of Title 37.2 and other laws of the Commonwealth administered by the Commissioner and DBHDS.

Section [37.2-404](#) of the Code of Virginia authorizes the Commissioner, subject to regulations adopted by the State Board, to license providers.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

In response to Executive Directive 1 to move expeditiously forward with regulatory reductions, DBHDS focused first on noncontroversial amendments that lessen regulatory burden, clarify language, or strike obsolete references. Granting discretion where appropriate (i.e., recordkeeping, administrative systems) and allowing providers to devise operational systems that work for their service was a key goal throughout the regulatory reduction project.

Because the Children's Residential Regulations establish parameters of health, safety, and welfare for services licensed and funded by DBHDS, the purpose of this action is to implement Executive Directive 1 while preserving protections for residents.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

Changes to existing regulatory sections are limited to clarifying and technical amendments that reduce the intensity of compliance mandates; simplify requirements and eliminate duplication; streamline processing and modernize operations; and reflect current best practices.

This action also repeals several sections, primarily through consolidation.

Issues

Identify the issues associated with the regulatory change, including: 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, include a specific statement to that effect.

1. The primary advantage of this action is that it lessens and clarifies the regulatory requirements, improving ease of use and understanding by licensed providers, residents receiving services, and other stakeholders. As the action does not add additional burden or remove protections for individuals, there are no disadvantages to the public.
2. The primary advantages to DBHDS and the Commonwealth are that the regulatory language is reflective of current practice and simplified to promote increased compliance. There is no disadvantage to the Commonwealth.
3. There are no other pertinent matters of interest.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no regulatory changes more restrictive than applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected

- No other state agencies are particularly affected.

Localities Particularly Affected

- CSBs involved in providing residential services to children are particularly affected as they are also licensed providers; however, the changes do not increase regulatory burden.

Other Entities Particularly Affected

- Children needing or receiving residential services from providers, their families, as well as employees, contractors, volunteers, and interns are particularly affected by this regulatory action.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is the proposed change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and</p>	<p>There is no fiscal impact on DBHDS from this regulatory action other than to require modifications in its web-based reporting application to update regulatory section information. Those costs can be absorbed.</p>
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c) whether any costs or revenue loss can be absorbed within existing resources	
<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	There is no fiscal impact on other state agencies from this regulatory action.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	DBHDS will have increased clarity in the use of the regulations, as well as clearer accountability for the processes described in the regulations.

Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

Projected costs, savings, fees or revenues resulting from the regulatory change.	There is no fiscal impact on localities from this regulatory action.
Benefits the regulatory change is designed to produce.	As licensed providers, CSBs will have increased clarity in the use of the regulations, as well as clearer accountability for the processes described in the regulations.

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	An unknown number of small businesses that are licensed providers may be affected by this regulatory change. <i>See Table 4 on the ORM Economic Impact Form.</i>
Agency’s best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	<i>See Table 4 on the ORM Economic Impact Form.</i>
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	<i>See Table 4 on the ORM Economic Impact Form.</i>
Benefits the regulatory change is designed to produce.	<i>See Table 4 on the ORM Economic Impact Form.</i>

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

The purpose of this regulatory action is to lessen regulatory burden while preserving the health, safety, and welfare protections for residents. As such, the only alternative to these noncontroversial amendments is to leave the Children’s Residential Regulations as currently in effect, which include duplicative, overly complex language.

Table 1c of the ORM Economic Impact Form reports on costs and benefits under an alternative approach.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

Table 1c of the ORM Economic Impact Form reports on costs and benefits under an alternative approach.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

Consistent with § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

DBHDS is providing an opportunity for comments on this regulatory proposal, including (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Ruth Anne Walker, P.O. Box 1797, Richmond, VA 23218-1797, fax 804-371-4609, and email ruthanne.walker@dbhds.virginia. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

Table 1: Changes to Existing VAC Chapter(s)

** Notations with asterisk in response to public comment.*

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
<p>→NOTE: A more detailed explanation for the rationale for the changes may be found beginning on page 48 of this meeting packet.</p>			
12VAC35-46-20.		Service description and applications; required elements.	<p>Stricken language in subsection D 1 to comply with Registrar’s Style Guide.</p> <p>The stricken reference language in subsection D 1 is a confusing requirement to providers as they are unsure whether to submit business or personal references, as well as who the references are for when the provider is a large entity. Moreover, the department does not have the resources to check these references.</p> <p>Striking the provisions in subsection D 3 reduces administrative burden on providers operated by state or local governments as the funding for those entities is already public. The remaining language still requires the provider to handle funds responsibly and allows DBHDS to cite when necessary.</p>
12VAC35-46-80.		Written corrective action plans.	<p>Subsection C 3 edits are made as the electronic CONNECT process makes this requirement for a signature unnecessary. It is only necessary to know who is responsible. This allows someone else to enter the information in the system.</p> <p>Subsection E edits for clarity. Existing language stricken because it suggests the department is required to approve the plan as submitted.</p>

			Inserted language from analogous section in Chapter 105.
12VAC35-46-110.		Modification.	The requirement in subsection B is arbitrary and not directly related to a decision to approve or disapprove a service modification.
12VAC35-46-170.		Governing body.	(Repealed.) Providers are required to submit such information to the State Corporation Commission. (With the exception of sole proprietors doing business under their own names.)
12VAC35-46-180.		Responsibilities of the provider.	Subsections A and B stricken because it is the provider's responsibility to ensure appropriate administrative organization. Subsection C stricken because target populations and programs are in the service description section (20); therefore, this is redundant.
12VAC35-46-190.		Fiscal accountability.	Removes annual reporting requirement which is burdensome to providers and the department as DBHDS does not have the staff resources to analyze the information in a meaningful way. The remaining language still requires the provider to handle funds responsibly, responds to issues from commenters, and allows DBHDS to cite when necessary for public protection.
12VAC35-46-200.		Insurance.	Reduces burden.
12VAC35-46-220.		Weapons.	These amendments are intended to streamline language and reduce redundancy.
12VAC35-46-230.		Relationship to the department.	This eliminates the need for an information modification that, in most cases, DBHDS does not need to determine if a provider is complying with the regulations.
12VAC35-46-250.		Health information.	This change was suggested by VDH subject matter experts as it is no longer necessary due to reduction in disease prevalence.
12VAC35-46-270.		Qualifications.	Strike obsolete grandfathering language in subsection B. The language in subsection C is not needed as subsection A is all encompassing.
12VAC35-46-280.		Job descriptions.	These amendments streamline language (i.e., not all positions already have an incumbent in the role) and remove unnecessary requirements.
12VAC35-46-300.		Personnel records.	No longer necessary to differentiate between paper and electronic recordkeeping.

			<p>Item B.3 edited to be less prescriptive.</p> <p>Item B.6 incorporated into B.2.</p> <p>Subsection C stricken because it is the provider's responsibility to handle appropriately per other laws and regulations.</p>
12VAC35-46-310.		Staff development.	<p>This change in subsection A 9 reduces burden to training as necessary by focusing on specific areas of improvement.</p> <p>Striking Subsection C, which is arbitrary and redundant, assists with workforce issues. Subsection D is duplicative.</p>
12VAC35-46-330.		The applicant.	<p>Clarifying edits.</p> <p>It is the provider's responsibility to ensure staff are qualified for job responsibilities, as applicable.</p>
12VAC35-46-340.		The chief administrative officer.	<p>(Repealed.)</p> <p>It is the provider's responsibility to ensure appropriate administrative organization.</p>
12VAC35-46-380.		Child care staff.	<p>Amendment in subsection A maintains responsibility but removes duplicative language.</p> <p>Amendments to subsection B for applicant clarity.</p> <p>Amendments to subsection C for clarity and to reflect striking of CAO in other sections.</p> <p>The requirement in subsection D does not need to be set out separately.</p> <p>Subsection E contains an amendment to support workforce challenges (and a technical amendment). Staff with no experience cannot work alone.</p>
12VAC35-46-400.		Volunteers and student/interns.	<p>The health, welfare and safety concern of utilizing students and volunteers relates to the supervision aspect. Subsection B addresses this issue.</p> <p>The department feels it should be within the provider's discretion whether to create a policy for students and volunteers outside of the restriction in subsection B.</p> <p>The stricken language is redundant.</p>

12VAC35-46-420.		Buildings, inspections and building plans.	<p>Edit in Subsection C corrects VAC reference.</p> <p>Subsection D is streamlined to cover only VDH food regulations subject to periodic inspection (not building inspections, etc.).</p> <p>Subsection G reduces burden while deferring to health authorities' oversight.</p>
12VAC35-46-470.		Personal necessities.	Revisions maintain the same level of care with simplified language.
12VAC35-46-480.		Sleeping areas.	Subsection K stricken because its provisions are covered by 12VAC35-115-50 C 7, item 13 of subsection 920, and B of subsection 1030.
12VAC35-46-560.		Storage.	<p>(Repealed.)</p> <p>It is the provider's responsibility to arrange for appropriate storage of various items.</p>
12VAC35-46-660.		Maintenance of residents' records.	<p>Amendments to subsection A insert an appropriate cross-reference to the Virginia Health Records Act for clarity and remove unnecessary differentiation between paper and electronic records (aligned with Chapter 105).</p> <p>Amendments to subsection C simplify language and mirror Chapter 105.</p> <p>Requirements in subsection C 2 are already covered by remaining language.</p> <p>Item 4 of subsection C is not needed as it is up to the provider to ensure appropriate staffing for records management.</p> <p>Subdivisions E 1 and E 2 are duplicative of subsection C and HIPAA.</p> <p>If providers are following the retention requirements of state and federal laws for health records, any requirement regarding face sheets will be covered, thus making the language in subsection H unnecessary.</p>
12VAC35-46-690.		Participation of residents in human research.	<p>(Repealed.)</p> <p>Provisions already covered by 12VAC35-180.</p>
12VAC35-46-710.		Application for admission.	Amendments to subsections A and B reduce the intensity of the requirement to a screening and make amendments for clarity.
12VAC35-46-720.		Written placement agreement.	Regarding subsection A amendments, there is nothing in Chapter 11 of Title 37.2 of the Code of Virginia that requires these specifics. (The language comes from juvenile justice regulatory language from 2014.)

			<p>Court orders specify the necessary information. Further, DBHDS is not the agency involved with placement agreements.</p> <p>The requirements in subsection B and C are incorporated into the first subsection</p>
12VAC35-46-730.		Face sheet.	<p>Active voice amendment to subsection B for clarity.</p> <p>Stricken language in subsections D and E is unnecessary.</p>
12VAC35-46-740.		Initial objectives and strategies.	The stricken language is unnecessary.
12VAC35-46-750.		Individualized service plans/quarterly reports.	The requirements of newly ordered subsection C are covered by subsection D.
12VAC35-46-760.		Resident transfer between residential facilities located in Virginia and operated by the same sponsor.	<p>Language in subsection A 1 is redundant of A 2 and other parts stricken for clarity.</p> <p>The simplification of subsection B retains the important elements of documentation.</p>
12VAC35-46-800.		Structured program of care.	<p>Amendments to subsection C incorporate stricken subsection E for streamlining.</p> <p>The edit of subsection H removes unnecessary language.</p>
12VAC35-46-810.		Health care procedures.	<p>Providers are always required to ensure documentation is accessible and up to date. The stricken language in subsection A is redundant. The added language is clarifying and allows for the repeal of section 820.</p> <p>Subsection C is not necessary as providers are always required to ensure documentation is accessible and up to date.</p>
12VAC35-46-820.		Written policies and procedures for a crisis or clinical emergency.	<p>(Repealed.) With the amendments to section 810 A, this section is duplicative.</p>
12VAC35-46-830.		Documenting crisis intervention and clinical emergency services.	The stricken language in C is unnecessary given current and amendment language in other sections, and the list has no impact on the referral process.
12VAC35-46-850.		Medication.	Amendments to subsection A 1 a-b are covered by remaining language in newly numbered 5.

			<p>Amendments to the list bring two specifics from the stricken subsection J.</p> <p>Edits to subsection C to clarify (also align with amendment to Chapter 105).</p> <p>Subsection J is repetitive of language; two items are moved to subsection A.</p>
12VAC35-46-860.		Nutrition.	<p>Subsection B is administratively burdensome and there is no need to review six-month-old menus.</p> <p>Provisions of Subsection G are covered by subsection E.</p>
12VAC35-46-880.		Emergency telephone numbers.	<p>Subsection A covers every circumstance; language in subsection B is not necessary.</p>
12VAC35-46-890.		Searches.	<p>Strips searches are not appropriate and are not in line with the Human Rights Regulations.</p>
12VAC35-46-900.		Behavior support.	<p>The language in subsection D is duplicative of language in Chapter 115.</p>
12VAC35-46-940.		Behavior interventions.	<p>Appropriate cross references are made to the Human Rights regulations and language streamlined.</p>
12VAC35-46-950.		Seclusion.	<p>Appropriate cross reference added for clarity.</p>
12VAC35-46-990.		Recreation.	<p>Stricken language is overly prescriptive, to the point of possibly deterring providers from seeking these kinds of recreational activity.</p> <p>Providers are always required to ensure documentation is accessible and up to date. Statements about the policies to 'ensure' safety are sufficient.</p> <p>Subsection C 5 would be addressed within an ISP if additional time was needed to prepare for change.</p> <p>Subsection C 9 is covered by subsection B.</p>
12VAC35-46-1010.		Clothing.	<p>Subsections A and C are sufficient.</p>
12VAC35-46-1020.		Allowances and spending money.	<p>Subsection C incorporates A and B. The department feels that subsection A is outside of the department's purview and should be covered by schooling which is required by section 970.</p>
12VAC35-46-1040.		Visitation at the facility and to the resident's home.	<p>(Repealed.) Requirements are covered by Chapter 115.</p>

12VAC35-46-1060.		Vehicles and power equipment.	Subsection C is covered by remaining language as well as general provisions for safety in this chapter and Chapter 115.
12VAC35-46-1090.		Grievance procedures <u>Human rights complaint process.</u>	This language is duplicative of Section 150 of Chapter 115.
12VAC35-46-1100.		Disaster or emergency planning.	(Repealed.) This language is covered by section 1110.
12VAC35-46-1120.		Independent living programs.	(Repealed.) Independent living falls under the authority of DSS, not DBHDS.
12VAC35-46-1130.		Mother/baby programs.	(Repealed.) Independent living falls under the authority of DSS, not DBHDS.
12VAC35-46-1140.		Campsite programs or adventure activities.	(Repealed.) These programs are not licensed by DBHDS.