




COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

TO: MARGARET SCHULTZE, Commissioner
Virginia Department of Social Services

FROM: ELLEN FULMER MALENKE 
Assistant Attorney General

DATE: July 12, 2017

SUBJECT: Exempt Regulation Section - 22VAC40-120 (Minimum Standards for
Licensed Family Day-Care Systems)

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 minimum standards for licensed family day-care systems into conformity with § 63.2-1701 of the Code of Virginia, to comply with Chapter 196 of the 2017 Acts of Assembly (HB 2156, effective July 1, 2107). The legislation amends the definition of person who operates or maintains a child welfare agency. The definition of person was amended to allow state operated child welfare agencies to be licensed.

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 Licensed Family Day Systems to Conform with Code

22VAC40-120-10. Definitions; license provisions.

A. Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia sets forth the responsibility of the Department of Social Services for licensure of family day-care systems, including the authority and responsibility of the State Board of Social Services for the development of regulations containing minimum standards and requirements.

It is a misdemeanor to operate a family day-care system without a license. (§ 63.2-1712 of the Code of Virginia)

B. Definitions. The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Abused or neglected child" (see § 63.2-100 of the Code of Virginia) means any child younger than 18 years of age whose parents or other persons responsible for his or her care:

- a. Create or inflict, threaten to create or inflict, or allow to be created or inflicted a physical or mental injury by other than accidental means, or create a substantial risk of death, disfigurement, or impairment of bodily or mental functions;
- b. Neglect or refuse to provide care necessary for the child's health, unless the child is, in good faith, under treatment solely by spiritual means through prayer, according to the practice of a recognized church or denomination;
- c. Abandon the child;
- d. Commit or allow to be committed any sexual act upon a child in violation of the law.

"Child" means any person younger than 18 years of age.

"Commissioner" means the Commissioner of Social Services also known as the Director of the Virginia Department of Social Services. (§ 63.2-100 of the Code of Virginia)

"Complaint" means an accusation received either orally or in writing that:

- a. A licensed family day-care system is not in compliance with one or more of these standards or one or more statutory requirements; or
- b. A family day-care system home is not in compliance with one or more applicable requirements of these standards or one or more requirements as established by the family day-care system; or
- c. A child or children in the care of a family day-care home, which is a member of a licensed family day-care system is or are being abused or neglected.

"Day-care" means care, protection, and guidance provided to a child or group of children separated from their parents or guardian for less than 24 hours per day at a location other than the home of the parents or guardian.

"Day-care provider" means an individual who, by contract with a family day-care system, provides day-care in his home.

"Department" means the Virginia Department of Social Services.

"Department representative" means an employee of the department, acting as the authorized agent of the commissioner in carrying out the responsibilities and duties specified in Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia.

"Director" means the licensee or a person designated by the licensee who oversees the day-to-day operation of the system, including compliance with all minimum standards for licensed family day-care systems.

"Family day-care system" means any person who approves family day-care homes as members of its system; who refers children to available day-care homes in that system; and who through contractual arrangement may provide central administrative functions, including, but not limited to, training of operators of family day-care homes; technical assistance and consultation to operators of family day-care homes; inspection, supervision, monitoring, and evaluation of family day-care homes; and referral of children to available health and social services. (§ 63.2-100 of the Code of Virginia)

"Family day-care system home" means any private family home, which is an approved member of a family day-care system and receives nine or fewer children for care, protection, and guidance during any part of the 24-hour day except children who are related by blood or marriage to the person who maintains the home. Family day-care homes that are members of a licensed day-care system and are approved by that system to care for five or more children are not subject to direct licensure by the department. (§ 63.2-100 of the Code of Virginia)

"Licensee" means any person, association, partnership, or corporation to whom the license is issued.

"Person" means any ~~natural person or any association, partnership, or corporation. For the purpose of these standards public agencies are not included in this definition.~~ individual; corporation; partnership; association; limited liability company; local government; state agency, including any department, institution, authority, instrumentality, board, or other administrative agency of the Commonwealth; or other legal or commercial entity that operates or maintains a child welfare agency.

"Referral" means any activity by the family day-care system that provides assistance in locating or arranging day-care for children in homes that have been accepted or approved as members of the system, or in locating or arranging for health or social services from other sources based upon identified needs.

"Sponsor" means an individual, association, partnership, or corporation having the responsibility for planning and operating a family day-care system subject to licensure. The licensee is the sponsor of a family day-care system. (The sponsor may not, in all cases, be the owner of the physical plant including buildings or real estate, or both, in or on which the family day-care system office is located. In these instances the term "sponsor" as defined here and used in this chapter is considered to be the person, partnership, association, or corporation that owns the enterprise rather than the physical plant or real estate, or both.)

C. The license.

1. A license to operate a family day-care system is issued to a specific person, partnership, association, or corporation for an exact location, which will be indicated on the license.
2. The family day-care system shall be operated and conducted in the name of the sponsor or in such name as shall be designated on the application and as indicated on the license.
3. The license expires automatically and is not transferable when there is a change of sponsorship.
4. The current license shall be posted at all times at a place that is conspicuous to the public in the building housing the system office. If the system has more than one office, copies of the current license shall be posted in a place that is conspicuous to the public in each office.
5. An annual license is one issued to a family day-care system when the activities, services, and facilities meet substantially the minimum standards and requirements for a license that are set forth in this chapter and any additional requirements that may be

specified in Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia. The annual license is effective for 12 months unless it is sooner revoked or surrendered.

6. When an annual license expires, a provisional license may be issued for any period not to exceed six months if the applicant is temporarily unable to comply with all of the requirements; however, no facility may operate under any such provisional license and renewals of that license for a longer period than six successive months.

7. At the discretion of the commissioner, a conditional license may be issued to operate a new facility in order to permit the applicant to demonstrate compliance with all requirements. A conditional license and any renewal of that shall be for no longer a period than six successive months.

8. Terms of the license.

a. The terms of any license issued include:

(1) The operating name of the family day-care system;

(2) The name of the individual, the partnership, the association, or the corporation to whom the license is issued;

(3) The physical location;

(4) The number of homes that may be under contract to the system;

(5) The period of time for which the license is effective; and

(6) The total number of children who may be referred by the system and be receiving care at any given time in all homes that are members of the system.

b. The terms of the license may include other limitations that the commissioner may prescribe within the context of this chapter.

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

D. The licensing process.

1. Pre-application consultation. Upon request, the department's representative will provide consultation to any person seeking information about obtaining a license for a family day-care system. The purpose of such consultation is:

- a. To explain standards;
- b. To help the potential applicant to explore the operational demands of a licensed family day-care system;
- c. To provide assistance in locating sources of information and technical assistance;
- d. To alert the potential applicant of the need to determine whether local ordinances will affect the proposed operation (e.g. zoning, business license, etc.);
- e. To provide an on-site visit to a proposed family day-care system office, upon request.

2. The application.

a. The application for a license to operate a family day-care system shall be obtained from the department.

b. The application, together with all required information, shall be submitted to the department at least two months in advance of the planned opening date.

This is required in order that a determination of compliance with the provisions of Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia and with the Standards for Licensed Family Day-Care Systems as set forth in this chapter may be made.

Among other things, the information submitted shall be sufficient to enable the department's representative to determine, during the subsequent investigation, the specific services to be offered, the adequacy of staff to provide these services, the financial capability of the applicant, the character and reputation of the applicant, including the officers and agents of any association, partnership, or corporation as mandated by § 63.2-1702 of the Code of Virginia.

c. The application shall be signed by the individual responsible for the operation of the family day-care system. The application for a family day-care system to be operated by a board shall be signed by an officer of the board, preferably the chairman.

3. The investigation.

a. Following receipt of the application, the department's representative will make an on-site inspection of the proposed office and an investigation of the proposed services, as well as an investigation of the character and reputation of the applicant, and, upon receipt of the initial application, an investigation of the applicant's financial responsibility.

b. Applicants for licensure and licensees shall at all times afford the commissioner reasonable opportunity to inspect all of their facilities, books, and records, and to interview their agents and employees and any person living or participating in such facilities, or under their custody, control, direction, or supervision. (§ 63.2-1706 of the Code of Virginia) The financial records of an initial applicant shall not be subject to inspection if the applicant submits an operating budget and at least one credit reference.

4. Notice to the applicant of commissioner's action. Upon completion of the investigation of the application for a license, the applicant will be notified in writing of the commissioner's decision.

If the license is issued, an accompanying letter will cite any areas of noncompliance with standards. This letter will also include any limitations on the license and may contain recommendations.

If a license is to be denied, the letter will state the reasons for the intent to deny and will set forth the applicant's right to an administrative hearing.

5. Procedures for renewal of annual, provisional, or conditional license. In order to renew an annual, provisional, or conditional license, the licensee must complete the renewal application and return it, together with any required attachments, to the department. In order to assure timely processing, the renewal application should be completed and returned within 10 days after it is received from the department.

The procedure for investigation and issuance or denial of the license as set forth in subdivisions 3 and 4 of this subsection will be followed.

6. Early compliance (replacement of a provisional or conditional license with an annual license).

a. A provisional or conditional license may be voided and an annual license issued when all of the following conditions exist:

(1) The facility complies with all standards listed on the face of the provisional or conditional license well in advance of the expiration date of the provisional or conditional license, and no additional areas of noncompliance exist;

(2) Compliance has been verified by an on-site observation by the department representative or by written evidence provided by the licensee; and

(3) All other terms of the license remain the same.

b. A request to void a provisional or conditional license and to issue an annual license must be made in writing by the licensee to the regional office of the department from which the family day-care system's license to operate was issued.

c. If the request is approved by the department, the effective date of the new annual license will be the same as the beginning date of the provisional or conditional license.

7. Situation requiring a new application. A new application must be filed when sponsorship of the family day-care system changes.

8. Modification.

a. The conditions of the license may be modified during the effective dates of the license with respect to increasing or decreasing the number of homes that may be placed under contract, the number of children who may be referred by the system and be receiving care at a given time, changing the name of the system when there is no change in sponsorship, changing location of the system office, or other conditions caused by changes in staff, program, or facilities.

b. The licensee shall report to the department any contemplated changes in operation that would affect either the terms of the license or the continuing eligibility for a license. (This does not mean the department has to approve changes in staff or program unless they affect the terms of the license or continuing eligibility.)

c. This information shall be submitted in writing by the licensee to the regional office of the department from which the system's license to operate was issued.

d. The department will then determine whether such changes may be approved and the license modified accordingly or whether a new application must be filed.

9. Determination of continued compliance. In order to determine continued compliance with standards during the effective dates of the license, the department's representative will make announced and unannounced visits to the office or offices of the system and may make such visits to homes that are members of the system.

10. Complaint investigation.

a. The department has the responsibility to investigate any complaints regarding alleged violations of minimum standards for licensed family day-care systems and provisions of Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia.

b. The licensee has the responsibility to investigate any complaints regarding any family day-care home that is approved as a member of its system. (See 22VAC40-120-50 C.) At its discretion the department may also investigate complaints against individual homes.

11. Revocation. Any license may be revoked for failure to maintain these standards or for violation of the provisions of Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia.

12. Appeals. The applicant or licensee has the right to request an administrative hearing regarding any denial or revocation of a license, in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

Following the receipt of the final order that transmits the department's decision after the administrative hearing, the applicant/licensee has the right to appeal to a court of record in accordance with § 63.2-1710 of the Code of Virginia.