



COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: Karin Clark
Virginia Department of Social Services

FROM: Susan P. D. Whyte *sw*
Assistant Attorney General

DATE: July 31, 2026

SUBJECT: Exempt Final Stage Review of 22VAC40-191
Amend the Background Checks for Child Welfare Agencies
Regulation to Implement 2026 Legislation

You have asked the Office of the Attorney General to review the attached regulation and determine if the State Board of Social Services ("State Board") has the statutory authority to promulgate the exempt regulatory amendments and if the amendments comport with applicable state law.

Pursuant to Virginia Code § 63.2-217, the State Board is required to promulgate regulations as may be necessary or desirable to carry out the purposes of Title 63.2 of the Virginia Code. I have reviewed the attached regulation, and it is my opinion the State Board has the authority to promulgate this regulation subject to compliance with the provisions of Executive Order 17, and that in so doing the State Board does not exceed that authority.

This regulation is exempt from the procedures of Article 2 of the Virginia Administrative Process Act. Specifically, the changes proposed are exempt pursuant to Virginia Code § 2.2-4006(A)(4)(a) because they are necessary to conform to changes in Virginia statutory law where no agency discretion is involved.

If you have any questions, please feel free to call me at 804.786.3450.

Department of Social Services

Amend Background Checks for Child Welfare Agencies to Implement 2026 Legislation

22VAC40-191-20. Describing background checks.

A. The background checks covered by this regulation are:

1. Sworn statement or affirmation;
2. Criminal history record check;
3. National criminal background check; and
4. Central registry search.

B. The provisions for background checks are in §§ 63.2-901.1, 63.2-1720, 63.2-1721, 63.2-1722, and 63.2-1723 of the Code of Virginia.

C. Provisions for enforcement of background check regulations and other licensing and approval standards are in § 63.2-901.1 and Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia.

D. The sworn statement or affirmation is a written document in which a person must disclose any criminal conviction and any pending criminal charges within or outside Virginia.

1. Conviction includes any juvenile conviction or determination of delinquency if the offense involved would be a felony if committed by an adult within or outside Virginia.
2. The person must also disclose any instance of being the subject of a founded complaint of child abuse or neglect within or outside Virginia.
3. The person must use either the model form prepared by the department or use a self-created form that includes all of the information that appears on the model form.

The department provides the model sworn statement or affirmation form on its website. Requesters are permitted to submit copies of the form. The person who signs the sworn statement or affirmation affirms the truth of the statement.

E. The criminal history record check is the process of the Department of State Police to generate a criminal record report on a person. The report must be either the criminal record clearance or the criminal history record. The criminal record clearance shows whether the person is guilty of:

1. A barrier crime, as defined in § 19.2-392.02 of the Code of Virginia; or
2. Any other felony not included in the definition of barrier crime unless five years have elapsed since the conviction.

The criminal history record report shows all convictions.

F. The person must use the form and process of the Central Criminal Records Exchange (CCRE) of the Department of State Police for this check. The Department of State Police provides original criminal history record check forms to facilities upon receipt of request. The Department of State Police also provides website access to this form for facilities that are noncriminal justice inquiry interface users. The CCRE verifies criminal history record reports.

G. The national criminal background check is the process of obtaining criminal history record information from the Federal Bureau of Investigation through the Central Criminal Records Exchange.

1. The person must submit to fingerprinting and provide personal descriptive information.
2. The person must use the process of the department's Office of Background Investigations (OBI) to request and receive a national criminal background check.

H. The search of the central registry is a check to determine if the person has ever been the subject of a founded complaint of child abuse or neglect in Virginia.

I. The person must use the form and process of the OBI. The department provides the central registry request form on its website. Requesters are permitted to submit copies of this form. OBI verifies child protective services central registry check findings.

22VAC40-191-50. Explaining requirements for satisfactory background checks.

A. The department and registering and approving authorities must require documentation of satisfactory background checks for applicants, agents, employees, volunteers, and others living in foster and adoptive homes as specified in 22VAC40-191-40.

1. A satisfactory sworn statement or affirmation is:

- a. A fully completed statement that states that the person does not have an offense; and
- b. There is no other knowledge that the individual has a disqualifying background check.

Criminal convictions include prior adult convictions and juvenile convictions or adjudications of delinquency based on a crime that would be a felony if committed by an adult within or outside the Commonwealth. Convictions also include convictions in other states that are equivalent to those specified in this section.

2. A satisfactory central registry finding is one in which:

- a. A copy of the department's child protective services check form is returned to the requesting agency or state or local Department of Social Services indicating that, as of the date on the reply, the individual whose name was searched is not identified in

the central registry as an involved caregiver with a founded disposition of child abuse/~~neglect~~ abuse or neglect; and.

b. There is no other knowledge that the individual has a founded disposition in Virginia or elsewhere.

3. A satisfactory criminal history record check report is one in which:

a. An original hard copy or Internet inquiry reply from the Department of State Police is returned to the agency, individual or authorized agent making the request with:

(1) No convictions indicated; or

(2) Convictions indicated, but no barrier crimes, offenses, or other felony convictions in the last five years;

b. A letter is received from the Office of Background Investigations with a finding of "eligible"; and

c. There is no other knowledge that the individual has an offense in Virginia or elsewhere.

The facility must have viewed an original criminal history record report maintained by a contract employee or contract agency that is dated less than six months before the independent contract employee or contract employee is hired by a contract agency begins providing services at the facility. (See also 22VAC40-191-90.)

4. A child-placing agency may approve as an adoptive or foster parent home, where an applicant and any adult household member have been each convicted of not more than one misdemeanor of assault and battery, as defined in § 18.2-57 of the Code of Virginia, or any substantially similar offense under the laws of another jurisdiction, not involving

abuse, neglect or moral turpitude, ~~or of~~ of a minor, provided 10 years have elapsed following the conviction.

5. A child-placing agency may approve ~~as a foster parent~~ an adoptive or foster home, where an applicant and any adult household member have been convicted of ~~statutory burglary for breaking and entering a dwelling home or other structure with intent to commit larceny who~~ any offense set forth in clause (iii) of the definition of barrier crime in § 19.2-392.02 of the Code of Virginia, who has had his their civil rights restored by the Governor or other appropriate authority, provided ~~25~~ 20 years have elapsed following the conviction.

6. A child-placing agency must consider the results of background checks on a birth parent prior to placing the child of the birth parent with the birth parent, when the child is in a foster care placement (unless the birth parent has revoked an entrustment agreement pursuant to § 63.2-1223 or 63.2-1817 of the Code of Virginia or a local board or the birth parent revokes a placement agreement with legal custody remaining with the parent, parents, or guardians pursuant to § 63.2-900 of the Code of Virginia).

7. No petition for adoption shall be granted if an adoptive parent has been convicted of a sexually violent offense or an offense requiring registration pursuant to § 9.1-902 of the Code of Virginia.

8. A child-placing agency may approve ~~as an adoptive or foster parent~~ home, where an applicant and any adult household member have been convicted of ~~felony possession of drugs~~ any offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02 of the Code of Virginia, (i) who has had his their civil rights restored by the Governor or other appropriate authority, provided 10 years have elapsed following the conviction ~~pursuant to § 63.2-1721 G of the Code of Virginia~~ or (ii) eight years have elapsed following the conviction and the individual (a) has complied with all obligations imposed by the criminal court, (b) has completed a substance abuse treatment program, (c) has

completed a drug test administered by a laboratory or medical professional within 90 days prior to being approved and such test returned with a negative result, and (d) complies with any other obligations as determined by the department.

9. A child-placing agency may approve as a kinship foster care parent an applicant convicted of the following offenses, provided that 10 years have elapsed from the date of the conviction and the local board or child-placing agency makes a specific finding that approving the kinship foster care placement would not adversely affect the safety and well-being of the child: (i) a felony conviction for possession of drugs as set out in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2 of the Code of Virginia, but not including a felony conviction for possession of drugs with the intent to distribute; (ii) a misdemeanor conviction for arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2; or (iii) an equivalent offense in another state.

B. Background checks results are not open ended.

1. If a person leaves a facility and the criminal history record report or central registry check finding is less than 91 days old, the person must be permitted to take the report or reports with him. The facility must keep a copy of any report a person takes and write on it that it is a copy, and that the original of any criminal history record report was verified.

2. Unless there is a criminal conviction or a founded complaint of child abuse and neglect during that period, a background check remains valid at a facility if no more than 12 consecutive months have passed from when a person:

- a. Began a leave of absence from that facility;
- b. Was terminated from employment at that facility; or
- c. Was transferred to a center owned and operated by the same employer or entity.

3. The facility, department, or approving authority may require a new background check relevant to this suspicion if there is reason to suspect that a person who has submitted acceptable background checks, as required by this regulation, has an offense in Virginia or elsewhere.

4. When the facility, department, or approving authority chooses to require a new background check:

a. The facility, department, or approving authority may allow the person to continue the same relationship with the child welfare agency until the licensing or approval authority receives the new Virginia background check information or equivalent documentation from another state; or

b. If there is reason to suspect that a person has an offense, the facility, department, or approving authority may require that the person not be alone with children, even if the documentation is not Virginia background check information or equivalent information from another state.

C. Waivers of some criminal convictions are possible. Refer to 22VAC40-191-90 through 22VAC40-191-130 for an explanation of the waiver.