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Final Regulation Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) Chapter citation(s)	22 VAC 40-201
VAC Chapter title(s)	Permanency Services-Prevention, Foster Care, Adoption, and Independent Living
Action title	Amend Permanency Regulation 2018
Date this document prepared	December 15, 2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), 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.

The permanency regulation, 22VAC40-201, provides standards for local departments of social services (LDSS) for prevention, foster care, adoption, and independent living services. This regulatory action makes changes consistent with the Code of Virginia, specifically the establishment of the Kinship Guardianship Assistance Program, as well as clarifying the procedure for the filing of petitions related to foster care court proceedings. The intent of this action is to make the regulation consistent with the Code of Virginia and federal laws, and to make any other changes the agency deems necessary after comments and review.

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.

LDSS-local departments of social services
VDSS-Virginia Department of Social Services
OCS-Office of Children’s Services

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.

The State Board of Social Services took final action on 22VAC40-201 Permanency Services-Prevention, Foster Care, Adoption, and Independent Living on December 15, 2021.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

The mandate for this regulatory change is § 63.2-1305 of the Code of Virginia that requires the State Board of Social Services to promulgate regulations for the Kinship Guardianship Assistance program that are necessary to comply with title IV-E requirements, including those set forth in 42 U.S.C. § 673. There is no mandate for the regulatory change regarding the unauthorized practice of law, but recent errors in practice have made it apparent that additional clarification is necessary.

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.

The state’s legal basis for this action is § 63.2-217 of the Code of Virginia that requires the State Board of Social Services to adopt such regulations as may be necessary to carry out the purpose of title 63.2. This regulatory action is to comply with the 2018 Acts of Assembly Chapters 769 and 770 (HB 1333 and SB 636) establishing the Kinship Guardianship Assistance Program in the Code of Virginia and the 2016 Acts of Assembly Chapter 704 (SB417) outlining the petitions LDSS employees are authorized to file. This regulatory action will provide comprehensive and accurate direction regarding the Kinship Guardianship Assistance Program as well as clarifying the procedure for the filing of petitions related to foster care court proceedings.

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’s intended to solve.

The proposed action will incorporate the Kinship Guardianship Assistance Program that went into effect on July 1, 2018. The Kinship Guardianship Assistance Program provides an additional permanency option for youth in foster care. In order for the youth and relative to be eligible for the program, the youth must (1) be in foster care and have been placed in the relative foster home for six consecutive months, (2) the goals of return home and adoption must have been determined to not be appropriate, (3) the relative must be willing to accept custody of the youth, and (4) the relative must commit to providing a permanent and self-sustaining relationship with the child. The program allows the relative custodians to continue to receive financial support in the form of maintenance payments after custody is transferred and the youth is discharged from foster care. This allows the youth to achieve permanency while providing the necessary support and services to the youth and relative to ensure that the youth does not return to foster care. Additionally, the proposed action will update the regulation to outline the types of petitions allowed by the Code of Virginia to be completed by the designated non-attorney employee of the LDSS.

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.

This regulatory action will incorporate technical information, language and processes necessary to ensure consistency with the Code of Virginia, federal legislation, and requirements that have been passed into law since the introduction of the current Permanency Services regulation. This regulatory action includes adding a new section that will outline the Kinship Guardianship Assistance Program. The section will include eligibility criteria, the process by which the maintenance payments will be negotiated, and the annual review process. Additionally, information will be incorporated regarding the types of petitions that may be completed by the designated non-attorney employee of the LDSS.

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.

This regulatory action poses no disadvantages to the public or the Commonwealth. This regulatory action proposes amendments to the Permanency regulation, which provides for the safety of children who come into the child welfare system and for children in the Commonwealth who are adopted. In particular, this action addresses recent Code changes to incorporate the Kinship Guardianship Assistance Program that went into effect on July 1, 2018. This program must comply with title IV-E requirements as set forth in 42 U.S.C. § 673. Compliance with federal mandates are a requirement for continuing to receive federal funding for the operation of child welfare service programs in Virginia. Additionally, this regulatory action clarifies procedures for filing petitions related to foster care court proceedings to ensure that LDSS employees are not engaging in the unauthorized practice of law.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than

applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There are no requirements in this regulatory action that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

Other State Agencies Particularly Affected

The Office of Children’s Services (OCS) is impacted by the implementation of the Kinship Guardianship Assistance Program.

Localities Particularly Affected

This regulation impacts LDSS. LDSS are located statewide and no individual locality will be particularly affected.

Other Entities Particularly Affected

This regulatory action will impact prospective kinship guardianship assistance guardians, children in foster care for whom reunification or adoption is not appropriate, and children who are discharged from foster care to the custody of a relative.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

Commenter	Comment	Agency response
Valerie L'Herrou, Virginia Poverty Law Center	<p>Permanency Regulations 2018</p> <p>Kinship Guardianship Assistance Program:</p> <p>While these regulations will provide guidance to local departments seeking to allow a relative to take custody of a child in foster care, because Virginia lags behind other states in its utilization of relatives as foster parents, and because a relative must first be the child's foster parent before taking custody of the</p>	<p>VDSS has finalized regulations for the State Funded Kinship Subsidy Program that will address some of these concerns mentioned. Unfortunately this regulation cannot address the barrier crime concerns nor the appeal process for denial to become a foster home as the authority/requirements are delineated in Virginia Code and would require legislative action first.</p>

	<p>child to receive the financial support, the impact of the Kinship Guardian Assistance Program is likely to remain insignificant.</p> <p>Virginia lags in utilizing relatives as foster care placements partly due to practices of kinship diversion—placing children with relatives outside the foster care system—and due to failing to approve relatives as foster care placements.</p> <p>While this proposed regulation comports with the statutory requirements and is in line with federal and state laws and policies providing for relative guardianship as an allowable--and important--permanency goal for a child in foster care, because many local departments do not prioritize such guardianship as a permanency option, thus choosing not to take advantage of provisions to immediately place children with relatives as foster placements prior to final approval. Virginia’s extensive “barrier crimes” list also limits placement with relatives, though not as much as local practices.</p> <p>The notification of an appeals process for denial of kinship guardianship is somewhat meaningless without an additional notification of a meaningful appeals process for denial of application to become the foster home for the child at the time the child is removed from her original family home--which Virginia does not have</p> <p>Virginia and its children will only realize the advantages of this regulation outlining the process for the Kinship Guardian Assistance Program when more children are placed with relatives in foster care.</p>	
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Detail of Changes Made Since the Previous Stage

List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. ** Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
				No changes were made to this regulatory action since the proposed stage. The actual regulation text has been updated to reflect other regulatory actions that became finalized in the interim. Most notable are the changes to the underlying regulation as a result of the exempt regulatory action that became effective on October 13, 2021 (RIS Project #6763).

Detail of All Changes Proposed in this Regulatory Action

List all changes proposed in this action and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. ** Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of updated requirements
*10		There is no definition for "Kinship Guardianship Assistance payment"	The definition of "Kinship Guardianship Assistance payment" has been added to be consistent with the Code of Virginia and to provide clarification for terms used in section 165, a new section detailing the Kinship Guardianship Assistance Program.

		<p>“Nonrecurring expenses” is defined.</p> <p>There is no definition for “voluntary placement”</p> <p>“Youth” is defined.</p>	<p>The definition of “nonrecurring expenses” has been modified to include expenses for kinship guardians in obtaining legal custody of the child.</p> <p>The definition of “voluntary placement” has been added to provide clarification for terms used in section 165, a new section detailing the Kinship Guardianship Assistance Program.</p> <p>The definition of “youth” is modified to also include youth older than 16 years of age who are the subject of a kinship guardianship assistance agreement.</p>
*110		<p>For all court hearings, local departments shall file petitions in accordance with the type of hearing.</p> <p>If a child has been in foster care 15 out of the past 22 months, the local department shall file a petition to terminate parental rights.</p> <p>Non-attorney agency employee’s ability to file certain petitions is not addressed.</p>	<p>The language has been changed to include a reference to a new subsection, outlining the types of petitions non-attorney employees of the LDSS can file.</p> <p>The requirement to file a petition to terminate parental rights, if a parent has been convicted of certain offenses, has been added. The exceptions to these requirements to file a petition to terminate parental rights have also been added.</p> <p>A new subsection has been added to outline the types of petitions that non-attorney LDSS employees can file.</p>
	*165		<p>The Kinship Guardianship Assistance Program has been added. The section outlines the criteria for the child in foster care and the kinship guardian to be eligible for the program. The program facilitates placements with relatives and ensures permanency for children for whom adoption or reunification are not appropriate permanency options. This program provides a much needed alternative permanency option for these children.</p>