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Periodic Review Report of Findings

Agency name	Virginia Department of Juvenile Justice
Virginia Administrative Code (VAC) citation	6 VAC 35-150
Regulation title	Regulation for Nonresidential Services
Date this document prepared	March 28, 2019

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Acronyms and Definitions

Please define all acronyms used in this Report. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

The following acronyms are used in this report:

"CSU" means court service unit.

"DJJ" means the Department of Juvenile Justice

"dLCV" means the disAbility Law Center of Virginia

"J&DR" means juvenile and domestic relations

"VJCCCA" means the Virginia Juvenile Community Crime Control Act

Legal Basis

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

The promulgating entity is the Board of Juvenile Justice (board).

Code of Virginia § 16.1-233 provides that the board shall “establish minimum standards for court service staffs and related supportive personnel and promulgate regulations pertaining to their appointment and function to the end that uniform services, insofar as is practical, will be available to juvenile and domestic relations district courts throughout the Commonwealth.” Additionally, § 16.1-309.9 requires the board to “develop, promulgate, and approve standards for the development, implementation, operation, and evaluation of the range of community-based programs, services, and facilities authorized by the Virginia Juvenile Community Crime Control Act.”

Finally, pursuant to § 66-10 of the Code of Virginia, the board is granted broad authority to “promulgate such regulations as may be necessary to carry out the provisions of this title and other laws of the Commonwealth.”

Alternatives

Please describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Department of Juvenile Justice (department) considered three alternatives for accomplishing the purposes of the regulation: 1) repeal the regulation in its entirety; 2) retain the regulation as currently written and supplement the regulation with additional guidance, including, for example, procedures and guidance documents; and 3) amend the regulation.

Because the board is mandated by statute to establish minimum standards for court service staffs, to promulgate regulations pertaining to their appointment and function, and to promulgate standards related to the range of community-based programs, services, and facilities authorized by the VJCCCA, repealing the regulation is not a viable alternative.

While the regulation is statutorily mandated, it contains terminology and concepts that are obsolete. It also includes provisions that violate the Virginia Code Commission’s Regulations for Filing and Publishing Agency Regulations. Additionally, several provisions in the regulation are not fully developed or explained and the division of the regulation into various parts, with each part applicable to different programs and services, is confusing. Pursuant to Executive Order 14, as amended July 16, 2018, “regulations shall be clearly written and easily understandable.” Retaining the regulation as is without removing these obsolete terms, striking the sections that violate the Code Commission’s regulations, and clarifying these confusing, inconsistent provisions may result in reduced compliance and may counteract the regulation’s overall objective of ensuring that uniform services are available to J&DR district courts. Furthermore, utilizing guidance documents or procedures would not resolve this issue, as the regulation would continue to have provisions that are in violation of other regulations and are confusing.

The only remaining viable alternative is to amend the regulation to address the issues raised in the preceding paragraph. Amending the regulation is the least burdensome alternative available for achieving the objective of having regulations in place that ensure uniform services are available to J&DR district courts in Virginia and to guarantee that the board is compliant with the statutory mandates in §§ 16.1-233 and 16.1-309.9.

Public Comment

Please summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Ensure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency or board. Please indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
Colleen Miller, Executive Director, disAbility Law Center of Virginia	<p>-dLCV strongly urges DJJ to amend these regulations as follows:</p> <ul style="list-style-type: none"> • Prohibit the use of restraint for purposes of avoiding “extreme destruction of property,” and limit the use of restraint to instances that risk the safety of the resident, others or the public. This would align more closely with DBHDS’s restraint regulations, which is appropriate because the focus of nonresidential services and programs is treatment. • Prohibit the use of prone or other types of restraint that restrict breathing. These types of restraints can cause positional asphyxiation and death and many laws and regulations ban their use. • Align the reporting requirements for documenting restraint use for CSUs in § 210(b) with those for nonresidential services and programs required by § 575(a)(2). 	<p>-The department shared these public comments with the board at the January 9, 2019, board meeting. The board agreed with the department’s recommendation that the regulation should be amended. The department will convene an informal advisory group of stakeholders to conduct a more comprehensive review of the regulation and to recommend amendments. The department will consider these public comments at that time.</p>

Effectiveness

Pursuant to § 2.2-4017, please indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

This regulation meets some, but not all, of the criteria set out in Executive Order 14, as amended July 16, 2018. The regulation helps to ensure that, to the extent practicable, court-involved juveniles receive equitable services. The regulation promotes the consistent, efficient operation of court service units, seeks to ensure that court-involved juveniles receive the services, sanctions, or programs necessary to

become more productive, and protects such juveniles from discriminatory treatment and excessive force by staff in these programs and facilities. As such, the provisions in this chapter are necessary for the protection of public health, safety, and welfare.

The regulation, as currently drafted, also remains necessary to interpret the law. In enacting both §§ 16.1-233 and 16.1-309.9, the General Assembly has declared that the governing CSU and VJCCCA statutes require further interpretation and guidance from the board. The board must continue to have provisions in place that regulate CSU staff and that address the implementation, operation, and evaluation of VJCCCA community-based systems in order to comply with these statutory mandates.

The provisions in the regulation are designed to achieve the intended purpose of ensuring that uniform services are available to J&DR district courts in Virginia and that VJCCCA programs and services are developed and operated in a manner to improve outcomes for court-involved youth.

Although generally the regulation is written clearly, some of its provisions lack sufficient detail and require clarification. Terms used throughout the regulation are not defined or include a definition but are utilized to refer to concepts not contemplated within the definition. The regulation is divided into several parts with provisions that sometimes are not aligned, with no clear reason for the distinct treatment.

Decision

Please explain the basis for the rulemaking entity’s decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

As part of the statutory mandate set out in Code of Virginia § 2.2-4007.1, the department considered whether this regulation should be amended, repealed, or retained as is. The department concluded that amending the regulation is the best means of promoting consistency in its application and encouraging compliance.

Repealing the chapter in its entirety is not a viable option as it would conflict with the board’s statutory mandate to promulgate regulations governing CSU staff and VJCCCA programs, facilities, and services.

Similarly, retaining the regulation as is will not be preferable. Since the department last reviewed the regulation, the agency has undergone significant changes in its philosophies and operations. Among these changes, the department has embarked on transformation efforts to safely reduce the use of the large, aging juvenile correctional facilities and to replace several of the department’s shuttered juvenile correctional facilities with smaller regional and treatment-oriented facilities and a statewide continuum of local alternative placements and services. Because of this transformation, some of the concepts, terminology, and rules contained in this regulation are now obsolete. As an example, the Reception and Diagnostic Center, referenced throughout the regulation, is one of the correctional centers that closed.

Recent legislative enactments and amendments to other regulations that impact this chapter also should be reflected here. The current regulation incorporates by reference at least one of the department’s own documents in violation of an explicit prohibition added to the Virginia Code Commission’s regulations in 2016. Also, the General Assembly has enacted legislation in recent years to allow for an expansion of the use of diversion for truancy offenses and to increase the scope of eligibility for VJCCCA programming to include non-court-involved juveniles. This chapter makes only a passing reference to the requirements regarding diversions for juveniles alleged truant and does not address how these changes are to be interpreted. Finally, the department has proposed a number of changes to its residential regulations, including one to place additional restrictions on the use of mechanical restraints in facilities. Sections of these regulations guide the operations of CSUs and may require amendment to conform to these changes.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with the stated objectives of applicable law, will minimize the economic impact of regulations on small businesses.

This regulation continues to be necessary to satisfy the statutory mandates in §§16.1-233 and 16.1-309.9. The regulation establishes minimum requirements for the operation of locally and state-operated CSUs and for non-residential programs available to the juvenile and domestic relations district court, including those established and funded through the VJCCCA. The provisions for CSUs include guidance for processing delinquency petitions at intake, making decisions on whether to detain alleged delinquent juveniles, and supervising probationers and parolees. Additionally, the regulation establishes standards for the development, implementation, operation, and evaluation of the VJCCCA programs and services.

The department received one comment from the dLCV urging the board to make amendments to the provisions regarding restraints to prohibit the use of prone restraints and restraints to address extreme destruction of property and to align the requirements applicable to CSUs regarding documentation of restraint use with the requirements for VJCCCA programs.

Although the regulation is not complex, the use of obsolete terms, concepts, and rules may create confusion and result in inconsistent application of its provisions.

The regulation does not duplicate, overlap, or conflict with federal or state law.

The department has not conducted a periodic review or amended this regulation since 2011. Since that time, the department has undergone significant changes in its philosophy, closed several of its juvenile correctional centers, and proposed several changes to additional regulatory chapters that guide this regulation. Additional amendments to this chapter may be necessary to ensure the chapter aligns with these changes.

Amending the regulation to address these concerns is not expected to have a significant economic impact on small businesses. The amendments will clarify various regulatory provisions, which will benefit CSUs and VJCCCA programs and services by promoting consistency and increasing compliance.