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Fast-Track Regulation Agency Background Document

Agency name	Department (Board) of Juvenile Justice
Virginia Administrative Code (VAC) citation(s)	6 VAC35-101-45
Regulation title(s)	Regulation Governing Juvenile Secure Detention Centers
Action title	Fast-Track Amendment of Regulation Governing Juvenile Secure Detention Centers to Address Contracts with Separate Entities
Date this document prepared	September 6, 2018

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*.

Brief Summary

Please 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 Regulation Governing Juvenile Secure Detention Centers (6VAC35-101) establishes the minimum standards to which staff in secure juvenile detention centers must comply. The Department of Juvenile Justice (the Department) does not operate juvenile secure detention centers but has the authority to monitor and certify these facilities based upon the facility's compliance with the regulatory standards in 6VAC35-101. The Department has identified a gap in its oversight and certification authority for programs in which detention centers enter into agreements to house residents that are under the custody of a third party. This regulatory action is intended to amend the Regulation Governing Juvenile Secure Detention Centers to address this gap in authority. The proposed amendment requires juvenile detention centers that agree to house residents under the custody of an outside entity to include in the agreement a provision that subjects the programs to the Department's certification regulations and that authorizes the Department to monitor, audit, and certify these programs in the same manner as existing predispositional and postdispositional programs operated in the detention center for state-assigned residents.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. 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 Board means the State Board of Juvenile Justice
- CPP means community placement program, a program operated in a juvenile detention center pursuant to a Memorandum of Agreement between the Department and a secure juvenile detention center in which the detention center agrees to house eligible juveniles committed to the Department.
- MOA means Memorandum of Agreement.

Statement of Final Agency Action

Please 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.

On September 5, 2018, the Board voted to approve this amendment to the Regulation Governing Juvenile Secure Detention Centers (6VAC35-101) for submission through the fast-track regulatory process.

Mandate and Impetus

Please 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, board decision, etc.). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “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.”

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

On September 5, 2018, at the request of the Department, the Board voted to approve an amendment to the Regulation Governing Juvenile Secure Detention Centers for submission through the fast-track regulatory process. The Department had identified a gap in its oversight authority with respect to detention centers that enter into agreements to house residents who are under the custody of a separate entity. The proposed amendment will require detention centers, when entering into such agreements with outside entities, to include provisions in the agreement that subject these programs to the Department’s regulations and that give the Department express authority to interview residents, review files, and perform all other activities necessary to determine compliance with the Department’s regulations.

The Department is not expecting this rulemaking to be controversial. All juvenile secure detention centers operating in the state of Virginia, including those that have agreements with outside entities to house youth in the outside entity’s custody, currently are subject to the Department’s detention center and certification regulations by virtue of their predispositional or postdispositional programs. As a matter of practice, these facilities already seek to comply with the Regulations Governing Juvenile Secure Detention Centers for all residents, even those who are in separate programs or units in the detention center in accordance with these agreements.

The proposed amendment will give the Department the authority necessary to determine whether all programs operated in detention centers regulated by the Department are complying with state

regulations. This authority will assist the Department in its efforts to ensure the safety, security, and health of the residents placed in these programs.

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.

Pursuant to § 66-10 of the *Code of Virginia*, the Board of Juvenile Justice 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.” Section 16.1-309.9 of the *Code of Virginia* requires the Board to approve “minimum standards for the construction and equipment of detention homes or other facilities and for food, clothing, medical attention, and supervision of juveniles to be housed in these facilities and programs.”

Purpose

Please 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 Regulation Governing Juvenile Secure Detention Centers (6VAC35-101) applies to detention centers, defined as “local, regional, or state, publicly or privately operated secure custody facilities that house individuals who are ordered to be detained pursuant to the Code of Virginia.” Virginia law allows residents to be detained in secure detention centers pending court hearings for allegations of delinquency (predispositional programs) and for up to six months as ordered by a judge (postdispositional programs). In all such cases, the regulation requires detention centers to comply with the Department’s certification regulations, which are set out in 6VAC35-20 (Regulations Governing the Monitoring, Approval, and Certification of Juvenile Justice Programs and Facilities). Currently, neither regulation chapter addresses programs in which secure detention centers enter into agreements to house residents under the custody of an outside entity. This omission prevents the Department from fully carrying out its monitoring, audit, and certification responsibilities with respect to programs that house youth under custody of a separate entity. Under the existing regulations, the Department does not have express authority to interview these residents, nor can the Department review their files or other documentation unless authorization to do so is granted by the outside entity.

This gap in oversight prevents the Department from properly exercising its monitoring, audit, and certification authority over the one juvenile detention center that currently has a contract with the federal government to house residents under federal custody. Additionally, it creates ambiguity with respect to certification requirements for programs that are a product of similar contractual arrangements between detention centers and the Department to operate alternative direct care programs such as CPPs and detention reentry programs.

The proposed amendment will give the Department the same oversight authority of these programs and the residents placed in these programs as it currently possesses for predispositional and postdispositional programs by compelling the contracting parties to include certain provisions in their agreements. First, the agreement must subject the program to the Department’s certification regulations. Second, the

agreement must give the Department the same access to these residents for purposes of monitoring, audit, and compliance as the Department has under the certification regulations for all other residents placed in pre- and postdispositional programs operated by the detention centers.

This regulatory change is essential to protect the health, safety, and welfare of residents under the custody of separate entities and placed in detention centers pursuant to these agreements. The Department cannot ensure that the detention centers are supervising and caring for these residents within the parameters of its regulations and in a manner that promotes safety and security if the Department cannot question the residents or access their files or other documents.

Substance

Please 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.

The proposal adds a new section, 6VAC35-101-45 to the Regulations Governing Juvenile Secure Detention Centers. The new section requires juvenile detention centers, when entering into agreements with separate entities to detain a juvenile in the separate entity's custody, to ensure that the agreement subjects the program to the Department's certification regulations and gives the Department the same access to the detained juvenile and his records as to all other residents in the detention center. The purpose of this change is to ensure that the Department will be able to conduct full audits and have full certification authority over all programs operated in the facility. The proposed amendment is intended to apply to all agreements that meet the criteria set out in the proposal, whether written or oral. The text of the proposed amendment, as initially submitted, erroneously limited the application of the proposal to written agreements. The Department has amended the language to correct this error.

As a result of this proposal, the Department will have expanded certification authority over these separately-operated programs to carry out any of the following: (i) through the regulatory authority, seek whatever reports and information necessary to establish compliance with the regulatory requirements; (ii) respond to health, welfare, or safety violations in the facility by withholding funds, removing juveniles from the program or facility, placing the program or facility on probationary certification status or summarily suspending the facility's certificate; (iii) administer periodic, scheduled monitoring visits or monitoring reviews; (iv) perform periodic certification audits; (v) require the program to conduct annual self-audits; (vi) compel the program to develop a corrective action plan for each finding of noncompliance discovered during an audit; or (vii) certify or decertify the facility for a specified period of time in response to a certification audit.

Issues

Please 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 proposal is expected to benefit the public by giving the Department a vehicle to monitor residents in detention center programs who are under the custody of separate entities. The Department will ensure that detention centers are administering these programs in accordance with applicable state regulations and operating them in a manner that protects the safety and security of the residents, staff, and others in these facilities.

The proposal also will benefit other parties to these agreements, including the Department, by providing an additional level of monitoring and oversight that will help to ensure that these programs are operating safely and effectively.

The Department does not expect this amendment to disadvantage the general public or the Commonwealth.

Requirements More Restrictive than Federal

Please 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.

Although the proposed amendment has the potential to impact contracts with federal governmental entities, the amendment contains no requirements that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "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

The Department is not aware of any other state agencies that would be impacted by this proposal.

Localities Particularly Affected

This proposal is anticipated to impact only those localities and commissions that operate detention centers and enter into agreements with outside entities to house residents under that outside entity's custody. The proposal is expected to impact one detention center that has an agreement with the federal government, as well as numerous detention centers that operate CPP programs, detention reentry programs, and other alternative direct care programs pursuant to MOAs with the Department.

Other Entities Particularly Affected

This proposal is anticipated to impact outside entities that enter into contracts to allow juvenile detention centers to house residents under that outside entity's custody. The Department and the federal Office of Refugee Resettlement currently have written agreements with various juvenile detention centers in Virginia.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, please 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. Please keep in mind that this is 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 c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>Because of this regulatory change, the Department will have express authority to expand the certification unit's monitoring visits and certification audits to include residents placed in these separate programs. As of September 6, 2018, the Department placed 122 direct care residents in detention centers pursuant to MOAs with detention centers. This is in addition to the 22 federal migrant children detained in one juvenile detention center in Virginia. The Department's certification unit will have more responsibilities and may incur additional costs due to the expansion of their certification programs to include a sample of these cases. The Department expects to absorb these initial added costs and responsibilities with existing resources, but may require one new full time staff in the future if these programs multiply. Moreover, the Department may need to utilize a contractor to provide interpreter services when conducting interviews with youth under federal custody.</p>
<p><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.</p>	<p>The Department does not expect this proposal to impact other state agencies.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The proposal is intended to add another level of protection for residents in juvenile secure detention centers by providing the Department with access to juveniles and their case records. The Department will be better equipped to monitor these programs and ensure that they are fully compliant with the Department's regulations and are not engaging in any practices that threaten the life, health, or welfare of the residents in the facility.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>The Department does not expect this proposal to result in any new or additional direct costs, savings, fees, or revenues for localities. The proposal will impact localities only to the extent that they operate or are a part of a regional compact that operates a juvenile detention center and that enters into an agreement with an outside entity to house residents under that entity's custody. The proposal may prevent detention centers from entering into future contracts with</p>
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	outside entities that refuse to comply with the Department’s regulations or are not willing to allow the Department access to these juveniles and their case files.
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Benefits the regulatory change is designed to produce.	The proposal is intended to add another layer of protection for residents in juvenile secure detention centers. The proposed amendment will benefit juvenile secure detention centers by ensuring that the facilities and all programs operating within the facilities are fully compliant with the Department’s regulations and are not engaging in any practices that threaten the life, health, or welfare of the residents in the facility.
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Impact on Other Entities

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.	In addition to juvenile secure detention centers, this proposal is expected to impact entities that enter into contractual arrangements with secure juvenile detention centers to house residents under the detention center’s custody. Affected parties to the contract may include the Department and the federal government’s Office of Refugee Resettlement.
Agency’s best estimate of the number of such entities that will be affected. Please 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.	The Department does not expect this proposal to impact any small businesses.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please 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.	The Department does not expect to incur additional costs in its capacity as a party to the detention center contracts. This proposal may result in nominal additional costs for the Office of Refugee Resettlement to the extent that the program is subject to additional recordkeeping responsibilities because of this proposal.
Benefits the regulatory change is designed to produce.	The proposal is intended to add an additional layer of protection for residents placed in these facilities. The proposal will enhance monitoring for these programs and ensure the programs are operating in a manner that protects the safety and health of the residents and staff who are part of the program.

Alternatives

Please 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 Department considered a number of alternatives to the proposed regulatory measure. One alternative involved simply requesting access to this information and to these residents from the detention centers or the parties with whom they contract. This approach would be less burdensome on both the contracting parties and would likely be more efficient as it would not involve the complicated and lengthy process associated with amending an existing regulation. Nevertheless, the Department believes amending the regulation is the most effective way to ensure that contractual arrangements between the detention centers and outside entities for whom the detention center agrees to house residents contain enforceable provisions giving the Department access to information to demonstrate compliance with the regulation. The Department was unable to identify less intrusive or costly alternatives.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please 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.

The proposed regulation is not expected to impact small businesses.

Public Participation

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.

Detail of Changes

Please 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.

If the regulatory change will be a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory change. Delete inapplicable tables.

If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.

If a new regulation is being promulgated, that is not replacing an existing regulation, please use this chart:

New chapter-section number	New requirements	Other regulations and law that apply	Intent and likely impact of new requirements
6VAC35-101-45	When a detention center contracts with a separate entity to house residents under custody of the separate entity, the agreement must require the program to comply with the Department’s certification regulations in 6VAC35-20.	<p><i>16.1-309.10</i> – Provides that juvenile detention centers are subject to visitation, inspection, and regulation by the Board or its agents.</p> <p><i>6VAC35-20</i>—Provides authority for the Department to certify juvenile residential facilities, including juvenile secure detention centers, and to monitor and audit these facilities.</p> <p><i>6VAC35-101</i> – Establishes the minimum standards with which juvenile detention centers must comply regarding training, behavior management, facility safety and security, health care, and resident’s rights.</p>	This amendment seeks to ensure that the Department has full certification authority, including access to the resident and his or her files and other information, for residents who are under the custody of an outside entity but are residing in juvenile detention centers pursuant to contractual agreements between the detention center and the outside entity.