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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) citation	22VAC40-201
Regulation title	Permanency Services – Prevention, Foster Care, Adoption and Independent Living
Action title	Fair Hearings for Foster Care Emergency Regulation
Date this document prepared	October 17, 2013

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006.

- 1) Please explain why this is an emergency situation as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The federal Administration for Children and Families, Children's Bureau determined that in order to continue to receive federal Title IV-E funding for its Foster Care program, Virginia must establish a fair hearings process for individuals eligible for benefits under that program. Chapter 437 of the 2013 Acts of Assembly requires the State Board of Social Services to promulgate regulations to implement the requirements of HB 2045 and requires that the regulations be effective within 280 days of the bill's enactment.

Key provisions of the regulation are: who has a right to appeal to the Commissioner of Social Services; what decisions or benefits may not be appealed; who shall be notified of the right to an appeal and what is included in the notice; the ability of the Commissioner to delegate the duty and authority to duly qualified officers; information about the decision; and, the appellant's right to judicial review.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority. Please cite the authority you are using to promulgate an emergency regulation.

45 CFR 1355.30 (k), 205.10 and 1392.11, and Sections 63.2-217 and 63.2-915 of the Code of Virginia.

In addition, Section 2.2-4011 of the Code of Virginia states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

This regulatory action establishes a hearing process for individuals who may receive a payment or service that is provided under § 63.2-905 of the Code of Virginia. This action provides that those individuals may appeal to the Commissioner when they believe a benefit has been denied or unreasonably delayed.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

This regulatory action is essential to protect the health, safety or welfare of citizens in that it provides an appeal process related to benefits and services for children in the Commonwealth's foster care system. This helps ensure that these children, their birth parents when reunification is a goal, and in some cases, foster parents, receive needed services and payments. In addition, it provides an appeal process for independent living services for youth who are in or have been in the foster care system and for individuals who are eligible for prevention services under § 63.2-905 of the Code of Virginia.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, and likely impact of proposed requirements
10	115	New section	<p>Adds a definition of “claim for benefit” to clarify that maintenance and certain services may be appealed.</p> <p>Adds a definition of “denied” as meaning the refusal to provide a claim for benefits.</p> <p>This section creates an appeal process for individuals whose claim for benefits is denied or not acted upon with reasonable promptness.</p> <p>Substantive requirements include:</p> <p>The appeal is to the Commissioner and may be heard by designated appeals officers.</p> <p>Decisions made by local departments of social services, the family assessment and planning team or other multi-disciplinary team may be appealed to the Commissioner.</p> <p>Local departments or if the local department is not involved, the family assessment and planning team or other multi-disciplinary team, must provide written information regarding the right to appeal to applicants. This could include birth parents, caretakers, guardians ad litem, and foster parents.</p> <p>The written notice is provided at the time a child enters care, or when a decision is made to discontinue, change or suspend a benefit.</p> <p>Timely notice must be given when a decision discontinues, changes or suspends a benefit. Timely notice means the notice is mailed at least 10 days before the date the action becomes effective.</p> <p>An individual has 30 days after local department action to request a hearing and</p>

			<p>the hearing must be conducted within 90 days of the request.</p> <p>The Commissioner may provide that a request for a hearing made within 10 days following the action shall result in reinstatement of the benefit pending the hearing except under certain circumstances.</p> <p>The Commissioner or designated hearing officer may deny or dismiss a request for a hearing if it is withdrawn or abandoned.</p> <p>The individual appealing has the right to a representative, to bring witnesses, examine information on which the local department, family assessment and planning team or other multi-disciplinary team relied in making its decision, and to question or refute witnesses.</p> <p>Decisions by the hearing officer shall be based exclusively on the evidence and materials introduced at the hearing</p> <p>The individual appealing shall be notified of the decision in writing.</p> <p>When the hearing decision is in favor of the individual, the local department shall promptly begin the process to provide the service or make corrective payments.</p> <p>The decision of the Commissioner shall be binding and considered a final agency action for purposes of judicial review.</p>
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Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

No alternatives have been considered. The Administration for Children and Families, Children’s Bureau, informed VDSS that failure to have an appeal process in place for payments and services benefiting children in foster care would mean that VDSS would place its ability to draw down funding under Title IV-E of the Social Security Act at risk. In addition, Chapter 437 of the 2013 Acts of Assembly requires the State Board of Social Services to promulgate regulations to implement the requirements of HB 2045 and requires that the regulations be effective within 280 days of the bill’s enactment

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

Please also indicate, pursuant to your Public Participation Guidelines, whether a panel has been used in the development of the emergency regulation and whether it will also be used in the development of the proposed regulation.

The agency is seeking comments on the regulation that will permanently replace this emergency regulation, including but not limited to 1) ideas to be considered in the development of the permanent replacement regulation, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) the probable effect of the regulation on affected small businesses, and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to **Phyl Parrish, Virginia Department of Social Services, 801 East Main Street, Richmond, Virginia 23219, 804-726-7926, Fax: 804-726-7895, or phyl.parrish@dss.virginia.gov**. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.

A panel was not used in the development of this regulation. An ad hoc regulatory workgroup provided input during the development of this emergency regulation. It is anticipated that a standing workgroup, the Permanency Advisory Committee, will provide input on the regulation that will permanently replace this emergency regulation. The members of the ad hoc regulatory workgroup represent local departments of social services, advocacy groups, licensed child placing agencies and VDSS. The members include: Denise Dickerson, VDSS, ICPC; Kim McGaughey, VDSS, Family Services; Michael Gasper, Executive Director, Extra Special Parents; Rebecca Morgan, DSS Director, Middlesex County; Joni Baldwin, VDSS, Licensing; Robin Ely, VDSS, Licensing; Christie Marra, Attorney, Virginia Poverty Law Center; Jo Ann Wilson-Harfst, DSS Director, Mathews County; Amy Woolard, Voices for Virginia's Children; Tamara Temoney, Assistant Director, Hanover County; Kamonya Omatete, Program Manager Foster Care and Adoption, Fairfax County Department of Services; Jeanette Troyer, Foster Parent; and Cynthia Bauer, VDSS, foster care policy.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

While this regulatory action does not impact the rights and authority of parents, marital commitment, or family income, it does have the potential for indirect impact on the family. Creation of an appeals process could impact birth parents or caretakers in situations where there is a goal of reunification with those parents or caretakers. Those individuals would be able to appeal if they were denied or delayed in receiving, a service or benefit that could help them accomplish some of what is needed in order to have their child returned home. The action can also impact the family if services to prevent a child from coming into foster care are denied or delayed by providing for an appeal of the benefit or service that is denied or not acted upon in a timely manner.