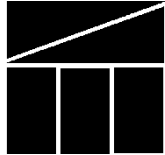


Adverse impact notification sent to Joint Commission on Administrative Rules, House Committee on Appropriations, and Senate Committee on Finance (COV § 2.2-4007.04.C): Yes¹ Not Needed

If/when this economic impact analysis (EIA) is published in the *Virginia Register of Regulations*, notification will be sent to each member of the General Assembly (COV § 2.2-4007.04.B).



Virginia Department of Planning and Budget Economic Impact Analysis

22 VAC 40-677 State Response When A Local Department of Social Services Fails To Provide Services

Department of Social Services

Town Hall Action/Stage: 5045 / 8557

August 2, 2019

Summary of the Proposed Amendments to Regulation

The State Board of Social Services (Board) proposes to establish regulatory authority for the Commissioner of the Department of Social Services (Commissioner) to direct and oversee public assistance and social service programs in a county or city (locality), in the event the local department fails, refuses, or is unable to provide such services. This action would establish a permanent replacement regulation for an emergency regulation that became effective December 17, 2018.²

Background

Section 63.2-408 of the *Code of Virginia* allows the Board to authorize the Commissioner, under regulations, to “provide for the payment of public assistance or the furnishing of social services” if a locality “fails or refuses” to provide public assistance and social services.

¹ Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

² <https://townhall.virginia.gov/l/ViewStage.cfm?stageid=8269>

In response to the provision specifically requiring such action to take place “under regulations,” the Board adopted an emergency regulation that became effective December 17, 2018.

Estimated Benefits and Costs

The proposed regulation appears to authorize the Commissioner to undertake two distinct activities, under different circumstances. First, the Commissioner is authorized to *intervene* by directing and overseeing specified programs if a locality “fails, refuses, or is unable to provide” these services. Second, the Commissioner is authorized to *withhold* some or all of the “reimbursement for administrative expenditures” if a locality either “fails to operate” these programs in accordance with state laws and regulations, or “fails to provide” the necessary staff. These activities can only occur after “appropriate proceedings by the Board.” Potentially included in these services are programs such as Medicaid, Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families, child protective services, adoption assistance, and adult services.³

As written, the permanent regulation appears to confer certain benefits. In cases where services are not provided, because a locality “fails, refuses, or is unable” to do so, the Commissioner would have the authority to intervene. Therefore, to the degree that the possibility of direct state intervention affects the behavior of localities, this potential would incentivize local departments to provide the services in situations where they otherwise may be reluctant to do so. Under the more narrow set of conditions where a locality “fails to provide” a service as required by law or regulation, or “fails to provide the necessary staff,” the possibility of withholding an administrative reimbursement may incentivize efforts to operate the programs appropriately. Under either set of conditions, exercise of such authority would allow the Commissioner to ensure that these services are appropriately provided and these programs are appropriately operated for the benefit and assistance of recipients. As noted by DSS, “the safety and well-being of those in need are seriously jeopardized.”

³ Although the regulation does not specifically address this, according to DSS this regulation would not apply to foster care programs because Chapter 446 of the 2019 *Acts of Assembly* established a separate procedure for the Commissioner to intervene when foster care programs are not being administered appropriately.

Certain costs also appear likely, but the magnitude of the state and/or local fiscal costs would depend on the number, extent, and manner of state interventions or withholdings, which is not known at this time.

It appears that an intervention could affect staff at both the local department and state DSS, depending upon what form the intervention takes, and whether the Commissioner intercedes on behalf of one or more programs, or for an entire local department. According to DSS, direct intervention usually means that a group of DSS experts assumes responsibility for managing local department staff in lieu of local managers and/or the local director.⁴ However, DSS does not rule out the possibility that non-managerial staff could also be affected. The regulatory text does not indicate, and DSS staff did not clarify, how local staff could be affected, such as reassignments to other roles, suspension, layoff, or some other outcome. In addition to the effect on local staff, it is presumed that DSS employees who are assigned to intervention duties would no longer be performing their other job duties. Sending state employees to a local department may therefore require overtime pay for those state employees, expenditures to temporarily fill the affected state employee positions, or non-performance of their state duties while they are in the affected locality.

The regulation does not clearly indicate how the costs associated with an intervention would be funded. Although Virginia Code § 63.2-408 provides for provision of services “out of funds appropriated for the purpose,” the regulatory text does not address or establish the source of funds. Moreover, the statute allows the appropriated funds to be used when a locality “fails or refuses” to provide the services, but does not contemplate the additional situation added to the regulation when a locality is “unable” to provide services. In contrast, both the statute and the regulation stipulate that in the more narrow instance, when a locality fails to operate programs appropriately, then the administrative reimbursement can be withheld.

State DSS staff indicate they may choose to not pass on the costs of state staff to the locality. However, the agency background document (ABD) notes, “the cost could be absorbed [by DSS] using existing resources and federal/state funds until the agency is reimbursed by the locality for all disbursements, including administrative expenditures made for and on behalf of

⁴ It is likely that these experts would be state employees, but they may be outside contractors, or employees of a neighboring local department.

the locality by the agency.” DSS also stated that the regulation would allow DSS to use all funding sources to offset the State’s costs, both the “base budget” provided to all localities and the “pass through” amounts (where the locality pays the entire non-federal share of funds to draw down the federal share).⁵ However, because the regulation does not appear to allow the Commissioner to withhold funds in cases where a locality fails, refuses, or is unable to “provide” services, then a locality may not be responsible for state costs incurred during an intervention; it is not clear, however, what source of funds DSS would use to address these expenses. In contrast, the regulation allows the Commissioner to withhold funds if a locality provides services, but “fails to operate” them in accordance with laws and regulations. In this situation, a locality may not have sufficient funds to pay for local staff and expenses. Moreover, the regulation does not indicate if the withholding is temporary or permanent, or the conditions under which such a distinction may be made.

Additional direct costs may result from this regulation, but an assessment is hindered by the brevity and lack of specificity of the regulation, the case-specific nature of any potential interventions or withholds, and the variation in funding sources across programs and local departments. This regulation may also create unmeasurable indirect costs due to the lack of clarity. For example, the proposed text does not define critical terms, such as what constitutes failure, refusal or inability to provide services; how those three terms differ from each other; or how failure to provide differs from failure to operate. The regulation also does not define what constitutes “appropriate proceedings” by the Board. Moreover, although the proposed text refers to development of a “transition plan” under which responsibility is transferred back to the locality, the text does not address how an intervention would initially occur. DSS staff state that an agency dashboard has been developed to track various local department performance metrics, and that DSS is developing procedures to implement an intervention, but the lack of any reference in the regulatory text to these criteria and processes hinders a full assessment of impact.

⁵ According to the ABD, “if the local department reports costs through the Staff & Operations Base funds, the match rate of 15.5% local funds and 84.5% federal/state funds would apply. If this were the case, there would be no additional impact on the locality.” In contrast, “if the local department reports costs through Staff & Operations Pass-Thru, the match rate of 65% local funds and 35% federal funds would apply. If this were case, there would be higher costs to the locality. This would typically occur when the locality’s base budget is insufficient to cover all of its staff and operations costs.”

Businesses and Other Entities Affected

This regulation would apply to all 120 local departments of social services.

Localities⁶ Affected⁷

The proposed regulation affects all local departments of social services in terms of the potential costs, which are driven in part by the duration and manner of such an intervention. In addition, a local department may have to continue to pay for its personnel costs in addition to the cost of the state personnel or outside contractors replacing them.

Projected Impact on Employment

The potential impact is unclear, owing to the variety of potential situations and the lack of clarity and specificity in the regulation. However, the potential exists for some impact upon employment if local staff are suspended, laid off, or potentially terminated

Effects on the Use and Value of Private Property

The proposed regulation does not affect the use and value of private property or real estate development costs.

Adverse Effect on Small Businesses⁸:

The proposed regulation does not adversely affect small businesses.

Legal Mandates

General: The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

Adverse impacts: Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and

⁶ “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

⁷ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

⁸ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.