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Proposed Regulation Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) Chapter citation(s)	22VAC40-201
VAC Chapter title(s)	Permanency Services-Prevention, Foster Care, Adoption, and Independent Living
Action title	Amend Permanency Regulation 2018
Date this document prepared	June 19, 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 (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

Mandate and Impetus

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, or board decision). 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."

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 to 22VAC40-201 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 is to update this regulation to incorporate the Kinship Guardianship Assistance Program that went into effect 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 ruled out, (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 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 procedure for the filing of 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

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.

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

Agencies, Localities, and Other Entities Particularly Affected

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 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.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, 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. 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:</p> <ul style="list-style-type: none"> 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>There is no additional cost to the state to implement and enforce this regulation. The development of additional regulatory and policy guidance documents and the monitoring of adherence to the regulations is a current responsibility of VDSS staff. There is an increased cost to implement the Kinship Guardianship Assistance Program. These costs were estimated in the fiscal analysis for SB 636 and HB 1333 as an annual cost of \$83,475 (\$21,828 federal funds, \$47,710 general fund, and \$13,937 local match). The funding will come from federal funds, state funds (both CSA funds and state matching funds), and local funds. The expenditures will be ongoing. This additional cost is associated with the very small number of children who might have otherwise exited foster care to a relative without a maintenance payment, who will now receive a maintenance payment. For the majority of children entering the program, the maintenance costs would be paid for them to remain in foster care, as their</p>
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	relatives would not otherwise be able to afford to care for them.
<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.	See above. For children who do not qualify for federal funding, CSA funds will be used to cover the cost of their care in the Kinship Guardianship Assistance Program.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	Proposed changes will bring the regulation into compliance with existing state and federal laws; clarify procedures and requirements so that LDSS can better address the permanency needs of children in foster care; and ensure that LDSS are not engaging in the unlawful practice of law. Continued adherence to federal requirements ensures that federal funding will continue to be available to Virginia to administer foster care and adoption programs.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	These costs were estimated in the fiscal analysis for SB 636 and HB 1333 as an annual cost of \$13,937 to the localities. The expenditures will be ongoing.
Benefits the regulatory change is designed to produce.	Proposed changes will bring the regulation into compliance with existing state and federal laws; clarify procedures and requirements so that LDSS can better address the permanency needs of children in foster care; and ensure that LDSS are not engaging in the unlawful practice of law. Continued adherence to federal requirements ensures that federal funding will continue to be available to Virginia to administer foster care and adoption programs.

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.	This regulation will impact LDSS and children and youth in the custody of these departments.
Agency's best estimate of the number of such entities that will be affected. 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.	120 local departments may be affected. No small businesses will be directly impacted.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:	There will be no additional cost to businesses as a result of this regulation and there are no costs related to the development of real estate, fees, the purchase of equipment or services, or time required to comply with these requirements.

<p>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.</p>	
<p>Benefits the regulatory change is designed to produce.</p>	<p>Proposed changes will bring the regulation into compliance with existing state and federal laws; clarify procedures and requirements so that local departments can better address permanency needs of children in foster care; and ensure that LDSS are not engaging in the unlawful practice of law. Continued adherence to federal requirements ensures that federal funding will continue to be available to Virginia to administer foster care and adoption programs.</p>

Alternatives to Regulation

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.

There are no other alternatives to the proposed regulatory action, as the action is necessary to make the regulation consistent with state law.

Regulatory Flexibility Analysis

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

There are no other regulatory methods that would accomplish the objectives of this regulatory action. The regulatory action is applicable to LDSS in their activities related to implementing the Kinship Guardianship Assistance Program and appropriately filing court petitions and does not have an adverse impact on small businesses.

Periodic Review and Small Business Impact Review Report of Findings

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.

In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (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 applicable law, will minimize the economic impact of regulations on small businesses.

This regulation is essential in the implementation and administration of the Kinship Guardianship Assistance Program. This regulation is consistent with federal and state laws or regulations.

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.

Committer	Comment	Agency response
Nanette Jarratt, UMFS	Recommended a different type of notification for relatives who fall into categories that currently the LDSS can choose not to notify.	Currently 22VAC40-201-40 states: “The local department may determine it is not in the child’s best interest to notify relatives who have a history of domestic violence; have been convicted of barrier crimes as defined in § 63.2-1719 of the Code of Virginia other than those described in subsections E, F, G, and H of § 63.2-1721 of the Code of Virginia; or are listed on the Virginia State Police Sex Offender Registry.” This allows LDSS the option to not notify certain relatives who may pose a threat to the child’s health and safety, if in the child’s best interest. It does not prevent them from sending those relatives notification if in the child’s best interest or sending a notification as described by the comment. It provides the LDSS the ability to assess each case on an individual basis to determine the appropriate course of action.

	<p>Commented that Sections J and K appear to contradict one another - J seems to highlight restoring parental rights while K seems to highlight terminating parental rights.</p> <p>Recommended that the section requiring a petition for termination of parental rights be filed on any child in foster care 15 out of the last 22 months be changed to take into account certain family's circumstances.</p>	<p>The process to terminate parental rights and restore parental rights are two separate processes. Section J details how to pursue restoring the parental rights of the child's parent whose rights have been previously terminated and an adoptive home has not been identified or approved for the child. Section K outlines the requirement to file for termination of parental rights within the specified timeframe.</p> <p>Filing a petition to terminate parental rights when a child has been in care 15 out of the last 22 months is a requirement under § 63.2-910.2 of the Code of Virginia. Additionally, this is a requirement under federal code 42 U.S.C §675. However, in the proposed text, additional information has been added to this section referencing exceptions in accordance with § 63.2-910.2, in response to this comment.</p>
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Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

The Department of Social Service is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Em Parente, 801 East Main Street, 11th Floor, Richmond, Virginia 23219, 804-726-7499, and email em.parente@dss.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

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

Detail of Changes

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. 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. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are

being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
10	n/a	<p>“Foster Child” is defined.</p> <p>There is no definition for “kinship guardian”</p> <p>There is no definition for “kinship guardianship”</p> <p>There is no definition for “Kinship Guardianship Assistance Agreement”</p> <p>There is no definition for “Kinship Guardianship Assistance payment”</p> <p>There is no definition for “Kinship Guardianship Assistance Program”</p>	<p>The definition of “foster child” has been expanded to include youth up to age 21 to include the population participating in the Fostering Futures program. This modification is necessary to comply with federal regulations.</p> <p>The definition of “kinship guardian” 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> <p>The definition of “kinship guardianship” 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> <p>The definition of “Kinship Guardianship Assistance Agreement” 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 “Kinship Guardianship Assistance Agreement” 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 “Kinship Guardianship Assistance Program” 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>

		<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>

If a new VAC Chapter(s) is being promulgated and is not replacing an existing Chapter(s), use Table 2.

Table 2: Promulgating New VAC Chapter(s) without Repeal and Replace

New chapter-section number	New requirements to be added to VAC	Other regulations and laws that apply	Change, intent, rationale, and likely impact of new requirements

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If the regulatory change is replacing an **emergency regulation**, and the proposed regulation is identical to the emergency regulation, complete Table 1 and/or Table 2, as described above.

If the regulatory change is replacing an **emergency regulation**, but changes have been made since the emergency regulation became effective, also complete Table 3 to describe the changes made since the emergency regulation.

Table 3: Changes to the Emergency Regulation

Emergency chapter-section number	New chapter-section number, if applicable	Current <u>emergency</u> requirement	Change, intent, rationale, and likely impact of new or changed requirements since emergency stage