



COMMONWEALTH of VIRGINIA
Office of the Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

Jason S. Miyares
Attorney General

TO: **KARIN CLARK**
Virginia Department of Social Services

FROM: **SUSAN P. D. WHYTE** *sw*
Assistant Attorney General

DATE: **September 21, 2023**

SUBJECT: **Exempt Regulation – Amend CPS Regulation 2023; 22 VAC 40-705**

I am in receipt of the attached amendments to the Child Protective Services regulation 22 VAC 40-705. You have asked the Office of the Attorney General to determine if the State Board of Social Services (“State Board”) has the statutory authority to promulgate this regulation and if it comports with applicable state law.

Virginia Code § 63.2-217 mandates that the State Board promulgate regulations that are necessary to carry out the provisions of Title 63.2. The proposed amendments to the regulation are necessary to implement the requirements of legislation passed during the 2023 session of the General Assembly. These changes are set out in Chapter 771 (HB 1550), Chapter 170 (HB 1768), and Chapter 568 (SB 1367), of the 2023 Acts of Assembly.

It is my view that the State Board has the authority to promulgate the final regulation and that it is exempt from the provisions of Article 2 of the Administrative Process Act pursuant to Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about this regulation, please contact me at 804-786-3450.

Project 7601 - Final

Department of Social Services

Amend CPS Regulation 2023

22VAC40-705-30. Types of abuse and neglect.

A. Physical abuse occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon a child a physical injury by other than accidental means or creates a substantial risk of death, disfigurement, or impairment of bodily functions, including, but not limited to, a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II controlled substance or (ii) during the unlawful sale of such substance by that child's parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony violation of § 18.2-248 of the Code of Virginia.

B. Physical neglect occurs when there is the failure to provide food, clothing, shelter, necessary medical treatment, or supervision for a child to the extent that the child's health or safety is endangered. This also includes abandonment and situations where the parent's or caretaker's own incapacitating behavior or absence prevents or severely limits the performing of child caring tasks pursuant to § 63.2-100 of the Code of Virginia. This also includes a child under the age of 18 years whose parent or other person responsible for his care knowingly leaves the child alone in the same dwelling as a person, not related by blood or marriage, who has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902 of the Code of Virginia. In situations where the neglect is the result of family poverty and there are no outside resources available to the family, the parent or caretaker shall not be determined to have neglected the child; however, the local department may provide appropriate services to the family.

No child whose parent or other person responsible for his care allows the child to engage in independent activities without adult supervision shall for that reason alone be considered to be an abused or neglected child, provided that (a) such independent activities are appropriate based on the child's age, maturity, and physical and mental abilities and (b) such lack of supervision does not constitute conduct that is so grossly negligent as to endanger the health or safety of the child. Such independent activities include traveling to or from school or nearby locations by bicycle or on foot, playing outdoors, or remaining at home for a reasonable period of time. Nothing in this subdivision shall be construed to limit the provisions of § 16.1-278.4 of the Code of Virginia.

1. Physical neglect may include multiple occurrences or a one-time critical or severe event that results in a threat to health or safety.
2. Physical neglect may include failure to thrive.
 - a. Failure to thrive occurs as a syndrome of infancy and early childhood that is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.
 - b. Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.
3. Physical neglect may include medical neglect.
 - a. Medical neglect occurs when there is the failure by the caretaker to obtain or follow through with a complete regimen of medical, mental, or dental care for a condition that if untreated could result in illness or developmental delays. However, a decision by parents or other persons legally responsible for the child to refuse a

particular medical treatment for a child with a life-threatening condition shall not be deemed a refusal to provide necessary care if (i) such decision is made jointly by the parents or other person legally responsible for the child and the child; (ii) the child has reached 14 years of age and sufficiently mature to have an informed opinion on the subject of his medical treatment; (iii) the parents or other person legally responsible for the child and the child have considered alternative treatment options; and (iv) the parents or other person legally responsible for the child and the child believe in good faith that such decision is in the child's best interest.

b. Medical neglect also includes withholding of medically indicated treatment.

(1) A child who, in good faith, is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not for that reason alone be considered a neglected child in accordance with § 63.2-100 of the Code of Virginia.

(2) For the purposes of this chapter, "withholding of medically indicated treatment" does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when in the treating physician's or physicians' reasonable medical judgment:

(a) The infant is chronically and irreversibly comatose;

(b) The infant has a terminal condition and the provision of such treatment would (i) merely prolong dying; (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; (iii) otherwise be futile in terms of the survival of the infant; or (iv) be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

C. Mental abuse or neglect occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon a child a mental injury by other than accidental means or creates a substantial risk of impairment of mental functions.

1. Mental abuse or neglect includes acts of omission by the caretaker resulting in harm to a child's psychological or emotional health or development.

2. Documentation supporting a nexus between the actions or inactions of the caretaker and the mental dysfunction or threat of dysfunction demonstrated by the child is required in order to make a founded disposition.

3. Mental abuse or neglect may include failure to thrive.

a. Failure to thrive occurs as a syndrome of infancy and early childhood that is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.

b. Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.

D. Sexual abuse occurs when the child's parent, caretaker, or intimate partner of such parent or caretaker commits or allows to be committed any act of sexual exploitation, including sex trafficking as defined in 22VAC40-705-10, or any sexual act upon a child in violation of the law.

22VAC40-705-80. Family assessment and investigation contacts.

A. During the course of the family assessment, the child protective services worker shall document in writing in the state automated system the following contacts and observations. When any of these contacts or observations is not made, the child protective services worker shall document in writing why the specific contact or observation was not made.

1. The child protective services worker shall conduct a face-to-face interview with and observe the alleged victim child within the determined response time. When a victim child is younger than two years of age, this contact shall be within 24 hours of receiving the report.
2. The child protective services worker shall conduct a face-to-face interview with and observe all minor siblings residing in the home.
3. The child protective services worker shall conduct a face-to-face interview with and observe all other children residing in the home with parental permission.
4. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians or any caretaker named in the report.
5. The child protective services worker shall observe the family environment, contact pertinent collaterals, and review pertinent records in consultation with the family.

B. During the course of the investigation, the child protective services worker shall document in writing in the state automated system the following contacts and observations. When any of these contacts or observations is not made, the child protective services worker shall document in writing why the specific contact or observation was not made.

1. The child protective services worker shall conduct a face-to-face interview with and observation of the alleged victim child within the determined response time. When a victim child is younger than two years of age, this contact shall be within 24 hours of receiving the report. If a local multidisciplinary team has determined that an interview of the child by a child advocacy center recognized by the National Children's Alliance is needed and an interview with a recognized child advocacy center within the jurisdiction cannot be completed within 14 days, the local department may facilitate the interview with a recognized child advocacy center located in another jurisdiction. All interviews with alleged victim children must be electronically recorded except when the child protective services worker determines that:

- a. The child's safety may be endangered by electronically recording his statement;
- b. The age or developmental capacity of the child makes electronic recording impractical;
- c. The child refuses to participate in the interview if electronic recording occurs;
- d. In the context of a team investigation with law-enforcement personnel, the team or team leader determines that electronic recording is not appropriate; or
- e. The victim provided new information as part of a family assessment and it would be detrimental to reinterview the victim and the child protective services worker provides a detailed narrative of the interview in the investigation record.

In the case of an interview conducted with a nonverbal child where none of the exceptions in this subdivision apply, it is appropriate to electronically record the questions being asked by the child protective services worker and to describe, either verbally or in writing, the child's responses. A child protective services worker shall document in detail in the record and discuss with supervisory personnel the basis for a decision not to electronically record an interview with the alleged victim child.

A child protective services finding may be based on the written narrative of the child protective services worker in cases where an electronic recording is unavailable due to equipment failure or the exceptions in this subdivision 1.

2. The child protective services worker shall conduct a face-to-face interview with and observe all minor siblings residing in the home.

3. The child protective services worker shall conduct a face-to-face interview with and observe all other children residing in the home with parental permission.

4. The child protective services worker shall conduct a face-to-face interview with the alleged abuser or neglector.

a. The child protective services worker shall inform the alleged abuser or neglector of his right to electronically record any communication pursuant to § 63.2-1516 of the Code of Virginia.

b. If requested by the alleged abuser or neglector, the local department shall provide the necessary equipment in order to electronically record the interview and retain a copy of the electronic recording.

5. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians.

6. The child protective services worker shall observe the environment where the alleged victim child lives. This requirement may be waived in complaints or reports of child abuse and neglect that took place in state licensed and religiously exempted child day centers, regulated and unregulated family day homes, private and public schools, group residential facilities, hospitals, or institutions where the alleged abuser or neglector is an employee or volunteer at such facility.

7. The child protective services worker shall observe the site where the alleged incident took place.

8. The child protective services worker shall conduct interviews with collaterals who have pertinent information relevant to the investigation and the safety of the child.

C. Pursuant to §§ 63.2-1505 and 63.2-1506 of the Code of Virginia, local departments may obtain and consider statewide criminal history record information from the Central Criminal Records Exchange and shall obtain and consider results of a search of the Central Registry on any individual who is the subject of a child abuse and neglect investigation or family assessment where there is evidence of child abuse or neglect and the local department is evaluating the safety of the home and whether removal is necessary to ensure the child's safety. The local department may also obtain a criminal record check and a Central Registry check on all adult household members residing in the home of the alleged abuser or neglector and where the child visits. Pursuant to § 19.2-389 of the Code of Virginia, local departments are authorized to receive criminal history information on the person who is the subject of the investigation as well as other adult members of the household for the purposes in § 63.2-1505 of the Code of Virginia. The results of the criminal record history search may be admitted into evidence if a child abuse or neglect petition is filed in connection with the child's removal. Local departments are prohibited from dissemination of this information except as authorized by the Code of Virginia.

D. Pursuant to §§ 63.2-1505 and 63.2-1506 of the Code of Virginia, local departments must determine whether the subject of an investigation or family assessment has resided in another state within the last five years, and if he has resided in another state, shall request a search of the child abuse and neglect registry or equivalent registry maintained by such state.

22VAC40-705-190. Appeals.

A. Appeal is the process by which the abuser or neglector may request amendment of the record when the investigation into the complaint has resulted in a founded disposition of child abuse or neglect.

B. If the alleged abuser or neglector is found to have committed abuse or neglect, that alleged abuser or neglector may, within 30 days of being notified of that determination, submit a written request for an amendment of the determination and the local department's related

records, pursuant to § 63.2-1526 A of the Code of Virginia. The local department shall conduct an informal conference in an effort to examine the local department's disposition and reasons for it and consider additional information about the investigation and disposition presented by the alleged abuser or neglecter. The local department shall notify the child abuse and neglect information system that an appeal is pending.

C. Whenever an appeal is requested and a criminal charge or investigation is also filed or commenced against the appellant for the same conduct involving the same victim child as investigated by the local department, the appeal process shall be stayed until the criminal prosecution in the trial court is completed, until the criminal investigation is closed, or in the case of a criminal investigation, 180 days have passed since the appellant's request for an appeal, pursuant to § 63.2-1526 C of the Code of Virginia. During such stay, the appellant's right of access to the records of the local department regarding the matter being appealed shall also be stayed. Once the criminal prosecution in trial court has been completed, the criminal investigation has been completed, or in the case of a criminal investigation, 180 days have passed since the appellant's request for an appeal, the local department shall advise the appellant in writing of his right to resume his appeal within the timeframe provided by law and regulation pursuant to § 63.2-1526 C of the Code of Virginia.

D. The local department shall conduct an informal, local conference and render a decision on the appellant's request to amend the record within 45 days of receiving the request. If the local department either refuses the appellant's request for amendment of the record as a result of the local conference, or if the local department fails to act within 45 days of receiving such request, the appellant may, within 30 days thereafter and in writing, request the commissioner for an administrative hearing pursuant to § 63.2-1526 A of the Code of Virginia.

E. The appellant may request, in writing, an extension of the 45-day requirement for a specified period of time, not to exceed an additional 60 days. When there is an extension period, the 30-day timeframe to request an administrative hearing from the Commissioner of the Department of Social Services shall begin on the termination of the extension period pursuant to § 63.2-1526 A of the Code of Virginia.

F. Upon written request, the local department shall provide the appellant all information used in making its determination. Disclosure of the reporter's name or information that may endanger the well-being of a child shall not be released. The identity of any collateral witness or any other person shall not be released if disclosure may endanger that witness's or person's life or safety. Information prohibited from being disclosed by state or federal law or regulation shall not be released. In case of any information withheld, the appellant shall be advised of the general nature of the information and the reasons, of privacy or otherwise, that it is being withheld, pursuant to § 63.2-1526 A of the Code of Virginia.

G. The director of the local department, or a designee of the director, shall preside over the local conference. With the exception of the director of the local department, no person whose regular duties include substantial involvement with child abuse and neglect cases shall preside over the local conference pursuant to § 63.2-1526 A of the Code of Virginia.

1. The appellant may be represented by counsel pursuant to § 63.2-1526 A of the Code of Virginia.

2. The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof pursuant to § 63.2-1526 A of the Code of Virginia.

3. The director of the local department or a designee of the director shall notify the appellant, in writing, of the results of the local conference within 45 days of receipt of the written request from the appellant unless the timeframe has been extended as described in subsection E of this section. The director of the local department or the designee of

the director shall have the authority to sustain, amend, or reverse the local department's findings. Notification of the results of the local conference shall be mailed, certified with return receipt, to the appellant. The local department shall notify the child abuse and neglect information system of the results of the local conference.

H. If the appellant is unsatisfied with the results of the local conference, the appellant may, within 30 days of receiving notice of the results of the local conference, submit a written request to the commissioner for an administrative hearing pursuant to § 63.2-1526 B of the Code of Virginia.

1. The commissioner shall designate a member of his staff to conduct the proceeding pursuant to § 63.2-1526 B of the Code of Virginia.

2. A hearing officer shall schedule a hearing date within 45 days of the receipt of the appeal request unless there are delays due to subpoena requests, depositions, or scheduling problems.

3. After a party's written motion and showing good cause, the hearing officer may issue subpoenas for the production of documents or to compel the attendance of witnesses at the hearing. The victim child and that child's siblings shall not be subpoenaed, deposed, or required to testify, pursuant to § 63.2-1526 B of the Code of Virginia.

4. Upon petition, the juvenile and domestic relations district court shall have the power to enforce any subpoena that is not complied with or to review any refusal to issue a subpoena. Such decisions may not be further appealed except as part of a final decision that is subject to judicial review pursuant to § 63.2-1526 B of the Code of Virginia.

5. Upon providing reasonable notice to the other party and the hearing officer, a party may, at his own expense, depose a nonparty and submit that deposition at, or prior to, the hearing. The victim child and the child's siblings shall not be deposed. The hearing officer is authorized to determine the number of depositions that will be allowed pursuant to § 63.2-1526 B of the Code of Virginia.

6. The local department shall provide the hearing officer a copy of the investigation record prior to the administrative hearing. By making a written request to the local department, the appellant may obtain a copy of the investigation record. The appellant shall be informed of the procedure by which information will be made available or withheld from him.

In any case of information withheld, the appellant shall be advised of the general nature of the information and the reasons that it is being withheld pursuant to § 63.2-1526 B of the Code of Virginia.

7. The appellant and the local department may be represented by counsel at the administrative hearing.

8. The hearing officer shall administer an oath or affirmation to all parties and witnesses planning to testify at the hearing pursuant to § 63.2-1526 B of the Code of Virginia.

9. The local department shall have the burden to show that the preponderance of the evidence supports the founded disposition. The local department shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof.

10. The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof.

11. The hearing officer may allow either party to submit new or additional evidence at the administrative hearing if it is relevant to the matter being appealed.

12. The hearing officer shall not be bound by the strict rules of evidence. However, the hearing officer shall only consider that evidence, presented by either party, which is substantially credible or reliable.

13. The hearing officer may allow the record to remain open for a specified period of time, not to exceed 14 days, to allow either party to submit additional evidence unavailable for the administrative hearing.

14. In the event that new or additional evidence is presented at the administrative hearing, the hearing officer may remand the case to the local department for reconsideration of the findings. If the local department fails to act within 14 days or fails to amend the findings to the satisfaction of the appellant, then the hearing officer shall render a decision, pursuant to § 63.2-1526 B of the Code of Virginia.

I. Within 60 days of the close of receiving evidence, the hearing officer shall render a written decision. The hearing officer shall have the authority to sustain, amend, or reverse the local department's findings. The written decision of the hearing officer shall state the findings of fact, conclusions based on regulation and policy, and the final disposition. The decision will be sent to the appellant by certified mail, return receipt requested. Copies of the decision shall be mailed to the appellant's counsel, the local department and the local department's counsel. The hearing officer shall notify the child abuse and neglect information system of the hearing decision. The local department shall notify all other prior recipients of the record of the findings of the hearing officer's decision.

J. The hearing officer shall notify the appellant of the appellant's further right of review in circuit court in the event that the appellant is not satisfied with the written decision of the hearing officer. Appeals are governed by Part 2A of the Rules of the Supreme Court of Virginia, unless otherwise provided by Virginia Code § 63.2-1526. The local department shall have no further right of review pursuant to § 63.2-1526 B of the Code of Virginia.

~~K.~~ In the event that the hearing officer's decision is appealed to circuit court pursuant to Part 2A of the Rules of the Supreme Court of Virginia, the department shall prepare a transcript for that proceeding. That transcript or narrative of the evidence shall be provided to the circuit court along with the complete hearing record. If a court reporter was hired by the appellant, the court reporter shall prepare the transcript and provide the court with a transcript.

K. Should the person aggrieved by the hearing officer's decision be a teacher licensed by the Board of Education or through an alternative pathway and employed by a local school board, the aggrieved person may petition the circuit court for a trial de novo, by judge or jury. Such petition shall be filed within 30 days of the aggrieved person's receipt of the hearing officer's decision in the circuit court in the jurisdiction where the applicable local department is located. Such aggrieved person is barred from filing any action for judicial review of the agency action or the hearing officer's decision under the Administrative Processes Act (§ 2.2-4025 et seq.).