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Periodic Review Report of Findings

Agency name	Virginia Department of Juvenile Justice
Virginia Administrative Code (VAC) citation	6 VAC35-30
Regulation title	Regulation Governing State Reimbursement of Local Juvenile Residential Facility Costs
Date this document prepared	April 11, 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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Acronyms and Definitions

Please define all acronyms used in this Report. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

This report includes the following acronym:

"A/E" means Architectural/Engineering.

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 of Juvenile Justice (the board).

Code of Virginia § 16.1-309.5 directs the Commonwealth of Virginia to reimburse localities for “one-half the cost of construction, enlargement, renovation, purchase or rental of a detention home or other facility the plans and specifications for which were approved by the board and the Governor” in accordance with this statute. Under this statute, the board must promulgate regulations “to include criteria to serve as guidelines in evaluating requests for such reimbursements and to ensure the geographically equitable distribution of state funds provided for such purpose.” Additionally, Code of Virginia § 16.1-309.9 requires the board to approve minimum standards for the construction and equipment of detention homes or other facilities. Finally, pursuant to § 66-10, the board 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.”

Despite these statutory provisions, for several years, the General Assembly has included language in the Appropriation Act (currently set out in Paragraph A of Item 411 of the 2018 Appropriation Act) that prohibits the board from approving funds for state reimbursement of such construction, enlargement, or renovation costs for local detention centers, group homes, and similar facilities. That provision grants an exception, however, that allows the board, together with the Secretary of Public Safety and Homeland Security, to approve state funding for emergency maintenance projects to resolve immediate life safety issues provided the projects comply with the board’s regulations.

Alternatives

Please describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

Pursuant to § 2.2-4007.1 of the Code, the department considered three alternatives for accomplishing the purpose of the regulation: 1) repeal the regulation; 2) retain the regulation as currently written and supplement the regulation with additional guidance including, for example, facility procedures and guidance documents; and 3) amend the regulation.

This regulation seeks to ensure that the department and board have a uniform and equitable process in place for the submission, consideration, and evaluation of reimbursement requests for local juvenile facility construction, renovation, and similar projects. Furthermore, § 16.1-309.5 requires the board to promulgate regulations to serve as guidance for evaluating the reimbursement requests. Repealing this regulation would run counter to the mandates in these statutes and is not a viable alternative.

While the regulation is mandated by statute and necessary to ensure a fairly uniform and equitable process for obtaining the reimbursement mandated by statute, it utilizes vague terminology and contains provisions that are unclear and difficult to understand. Some concepts are not fully developed or adequately defined, while other requirements appear to exceed the scope of the board’s regulatory authority. Retaining the regulation as is, without addressing these issues, would tend to create confusion and inconsistency in the application of the regulation and may result in reduced compliance.

The only remaining viable alternative is to amend the regulation to address the issues raised in the preceding paragraph. Amending the regulation is the least burdensome alternative available for the board to address these concerns while remaining compliant with the statutory requirements in §§ 16.1-309.5, 16.1-309.9, and Item 411 of the Appropriation Act.

Public Comment

Please summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Ensure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency or board. Please indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

A public comment period was open from November 12, 2018, to December 12, 2018. The department did not receive any public comments following the publication of the Notice of Periodic Review for this regulatory chapter. Nor did the department form an informal advisory group to assist in conducting the periodic review. The department has convened a committee consisting of internal and external stakeholders to consider the existing provisions and to determine which provisions require specific amendment. The department hopes recommendations made by this committee of internal and external stakeholders will form the basis for proposed amendments submitted through the standard regulatory process in the near future.

Effectiveness

Pursuant to § 2.2-4017, please indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

This regulation meets some, but not all, of the criteria set out in Executive Order 14, as amended July 16, 2018. The regulation helps to ensure that there is a clear process in place for localities engaging in construction, renovation, or similar projects and that are seeking reimbursement from the state pursuant to § 16.1-309.5 of the Code of Virginia. Various provisions of the regulation ensure that the board and the department have access to the facility construction and renovation plans and can determine whether those plans meet building code, fire code, and other requirements that impact resident and staff safety and facility security. In these ways, the regulation is necessary to protect the public health, safety, and welfare.

The regulation also remains necessary to interpret the law. In enacting §§ 16.1-309.5 and 16.1-309.9, the General Assembly has declared that the governing statute mandating state reimbursement for such juvenile facility projects requires further interpretation and guidance from the board. The board must continue to have regulations in place establishing the criteria for evaluating these reimbursement requests and setting baseline rules for constructing and equipping detention centers and other juvenile residential facilities in order to comply with these statutes.

The regulation is also structured to achieve its intended objectives efficiently and economically. In its introductory statement, the current regulation declares its primary goal of having the department and localities work collaboratively through the project planning, construction, and program implementation phases to ensure that the “optimum number of children are provided high quality services at a minimum cost to the locality and to the Commonwealth.” The current regulation contains numerous provisions for accomplishing this objective, including requiring most localities seeking reimbursement to complete a needs assessment and planning study, both of which must be approved by the Governor and board prior to construction. Additionally, the current regulation requires the board to consider the facility’s operating costs and economy of construction costs in making its recommendation for funding. Throughout the process, localities are required to submit various preliminary design and construction documents to the department for comment and approval. These provisions ensure collaboration with the department or board throughout all stages of the process, alert localities to any concerns regarding facility design or

construction that may violate federal or state laws or regulations, and help to cultivate efficiency and economy in the construction and operation of these facilities.

While the majority of the regulation is clearly written, it contains a rather confusing funding formula that may be difficult for individuals who are not in the architectural, construction, or contracting professions to understand and may run counter to the goals and philosophies recently adopted by many juvenile residential facilities across the country. Additionally, some terms and concepts addressed in the regulation are not adequately explained and should be clarified.

Decision

Please explain the basis for the rulemaking entity's decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

As part of its mandate pursuant to Code of Virginia § 2.2-4007.1 to conduct a periodic review of each regulation every four years, the department considered whether the regulation should be amended, repealed, or retained as is. The department asserts that amending the regulation is the best strategy for promoting consistency in the application of its provisions and ensuring compliance.

Repealing the regulation would violate the statutory mandates in §§ 16.1-309.5 and 16.1-309.9 requiring the board to promulgate regulations establishing criteria for evaluating requests for reimbursements and establishing minimum standards for the construction of detention and other local juvenile facilities. Furthermore, it would fail to provide a clear process for those localities seeking reimbursement for emergency maintenance projects or for future renovation or construction projects, should reimbursement funding for non-emergencies become available in the future.

Retaining the regulation as is, without making changes, would fail to address many of the concerns outlined in this report. Terms used frequently in the chapter but not defined would continue to be subject to interpretation, thus resulting in confusion and inconsistency in applying the regulation. The regulation would continue to omit a clear process for obtaining reimbursement for emergency maintenance projects, as mandated in the Appropriation Act language and would maintain a funding formula that is outdated and confusing for many entities under the purview of this chapter.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (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 the stated objectives of applicable law, will minimize the economic impact of regulations on small businesses.

This regulation continues to be necessary to satisfy the statutory mandates in §§ 16.1-309.5 and 16.1-309.9, as well as the requirements set out in Paragraph A of Item 411 of the 2018 Appropriation Act. The department did not receive any comments or complaints regarding the existing regulations.

Although generally, the regulation is not complex, it fails to define terms used frequently throughout the regulation that would provide additional clarification and tend to make the regulation less confusing. In addition, the regulation requires that localities determine construction costs based on a fairly complicated and outdated formula that arguably should be simplified or restructured.

This regulation does not overlap or conflict with federal or state law or regulation. The regulation seeks to comply with the mandates set out in state law and in the Appropriation Act. To the extent construction guidance is provided, it is consistent with the Uniform Statewide Building Code and other applicable statutes and regulations. The regulation is duplicative only to the extent necessary to implement the applicable statutory mandates.

The regulation has not been amended since 2011. Since that time, a number of juvenile residential facilities across the country have undergone a shift in philosophy moving from a more punitive-based approach to a more treatment-centered approach to addressing juvenile crimes. It is anticipated that this shift in philosophy will impact plans and designs for juvenile facility construction, renovation, and similar projects in the future.

The current regulations impact all localities seeking to engage in applicable construction, renovation, enlargement, or similar projects, as well as the A/E firms and contractors that provide the architectural and construction services. Amending these regulations may impact small businesses or localities to the extent they are engaging in construction, renovation, enlargement, or similar projects for local juvenile facilities within that locality. The extent of any economic impact to these entities cannot be determined at this time as it would depend upon the specific provisions adopted and the actions of the localities seeking reimbursement. However, amendments that clarify unclear concepts and terms may enhance compliance and ensure consistency, thereby benefitting any affected businesses and localities.