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

**FROM: MICHELLE A. L'HOMMEDIEU**  
Assistant Attorney General

**DATE: April 16, 2013**

**SUBJECT: Exempt Regulations for Submission of Financial Information for Licensure;  
22VAC40-120 (3957/6554)**

I am in receipt of the attached regulations reflecting the changes in Virginia statutory law made by Chapters 182 and 545 of the *2013 Acts of the Assembly* regarding the submission of financial information for licensure. You have asked the Office of the Attorney General to review and determine if the State Board of Social Services ("State Board") has the statutory authority to promulgate the proposed regulations and if the proposed regulations comport 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. *2013 Acts of the Assembly*, Chapters 182 and 545, change Virginia Code § 63.2-1702 and 63.2-1707 regarding the submission of financial information for licensure, which statutory went into force upon passage. It is my opinion that the State Board has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act ("APA") and has not exceeded that authority. To date, the Board has not yet acted on these regulations; and the Agency Background Document available on Town Hall reflects the as yet unknown date of Board action.

Based on the foregoing, it is my view that these regulations are exempt from the procedures of Article 2 of the APA pursuant to Virginia Code § 2.2-4006(A)(4)(a) provided the regulations are filed with the Registrar within 90 days of the law's effective date and the

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requirements of Virginia Code § 2.2-4006(B) and (C) are met. If you have any questions or need additional information about these regulations, please contact me at 786-6005.

cc: Kim F. Piner, Esquire

Attachment

**Project 3662 - Final**

**DEPARTMENT OF SOCIAL SERVICES**

**Information for Licensure-Family Day Systems**

**22VAC40-120-10. Introduction.**

A. Legal Base. Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia sets forth the responsibility of the Department of Social Services for licensure of family day-care systems, including the authority and responsibility of the State Board of Social Services for the development of regulations containing minimum standards and requirements.

It is a misdemeanor to operate a family day-care system without a license. (§ 63.1-215 of the Code of Virginia.)

B. Definitions. The following words and terms, when used in this chapter, shall have the following meaning unless the context clearly indicates otherwise:

"Family Day Care System" means any person who approves family day-care homes as members of its system; who refers children to available day-care homes in that system; and who through contractual arrangement may provide central administrative functions including, but not limited to, training of operators of family day-care homes; technical assistance and consultation to operators of family day-care homes; inspection, supervision, monitoring, and evaluation of family day-care homes; and referral of children to available health and social services. (§ 63.1-195 of the Code of Virginia.)

"Family Day-Care System Home" means any private family home, which is an approved member of a family day-care system and receives nine or fewer children for care, protection and guidance during any part of the 24 hour day except children who are related by blood or marriage to the person who maintains the home. (Family day-care homes that are members of a

licensed day-care system and are approved by that system to care for six or more children are not subject to direct licensure by the department.) by law; see § 63.1-196.001B of the Code of Virginia.

"Abused or Neglected Child" (See § 63.1-248.2) of the Code of Virginia) means any child less than 18 years of age whose parents or other persons responsible for his or her care:

- a. Create or inflict, threaten to create or inflict, or allow to be create or inflicted a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, impairment of bodily or mental functions;
- b. Neglect or refuse to provide care necessary for the child's health, unless the child is, in good faith, under treatment solely by spiritual means through prayer, according to the practice of a recognized church or denomination;
- c. Abandon the child;
- d. Commit or allow to be committed any sexual act upon a child in violation of the law.

"Child" means any person less than 18 years of age.

"Commissioner" means the Commissioner of Social Services also known as the Director of the Virginia Department of Social Services. (§ 63.1-2 of the Code of Virginia)

"Complaint" means an accusation received either orally or in writing that:

- a. A licensed family day-care system is not in compliance with one or more of these standards or one or more statutory requirements; or
- b. A family day-care system home is not in compliance with one or more applicable requirements of these standards or one or more requirements as established by the family day-care system; or

c. A child or children in the care of a family day-care home, which is a member of a licensed family day-care system is or are being abused or neglected.

"Day-Care" means care, protection and guidance provided to a child or group of children separated from their parents or guardian for less than 24 hours per day at a location other than the home of the parents or guardian.

"Day-Care Provider" means an individual who, by contract with a family day-care system, provides day-care in his or her home.

"Department" means the Virginia Department of Social Services.

"Department Representative" means an employee of the Virginia Department of Social Services, acting as the authorized agent of the Commissioner in carrying out the responsibilities and duties specified in Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia.

"Director" means the licensee or a person designated by the licensee who oversees the day-to-day operation of the system including compliance with all minimum standards for licensed family day-care systems.

"Licensee" means any person, association, partnership or corporation to whom the license is issued.

"Person" means any natural person or any association, partnership or corporation. For the purpose of these standards public agencies are not included in this definition.

"Referral" means any activity by the family day-care system which provides assistance in locating or arranging day-care for children in homes that have been accepted or approved as members of the system, or in locating or arranging for health or social services from other sources based upon identified needs.

"Sponsor" means an individual, association, partnership or corporation having the responsibility for planning and operating a family day-care system subject to licensure. The licensee is the sponsor of a family day-care system. (The sponsor may not, in all cases, be the owner of the physical plant including buildings or real estate, or both, in or on which the family day-care system office is located. In these instances the term "sponsor" as defined here and used in this chapter is considered to be the person, partnership, association or corporation that owns the enterprise rather than the physical plant or real estate, or both,.)

C. The license.

1. A license to operate a family day-care system is issued to a specific person, partnership, association, or corporation for an exact location which will be indicated on the license.
2. The family day-care system shall be operated and conducted in the name of the sponsor or in such name as shall be designated on the application and as indicated on the license.
3. The license expires automatically and is not transferable when there is a change of sponsorship.
4. [Deleted effective February 1, 1984.]
5. The current license shall be posted at all times at a place that is conspicuous to the public in the building housing the system office. If the system has more than one office, copies of the current license shall be posted in a place that is conspicuous to the public in each office.
6. An annual license is one issued to a family day-care system when the activities, services and facilities meet substantially the minimum standards and requirements for a license that are set forth in this chapter and any additional requirements that may be

specified in Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia. The annual license is effective for 12 months unless it is sooner revoked or surrendered.

7. When an annual license expires, a provisional license may be issued for any period not to exceed six months, if the applicant is temporarily unable to comply with all of the requirements; however, no facility may operate under any such provisional license and renewals of that license for a longer period than six successive months.

8. At the discretion of the Commissioner, a conditional license may be issued to operate a new facility in order to permit the applicant to demonstrate compliance with all requirements. A conditional license and any renewable of that shall be for no longer a period than six successive months.

9. Terms of the license.

a. The terms of any license issued include:

(1) The operating name of the family day-care system;

(2) The name of the individual, the partnership, the association, or the corporation to whom the license is issued;

(3) The physical location;

(4) The number of homes that may be under contract to the system;

(5) The period of time for which the license is effective; and

(6) The total number of children who may be referred by the system and be receiving care at any given time in all homes that are members of the system.

b. The terms of the license may include other limitations which the Commissioner may prescribe within the context of this chapter.

c. The provisional license cites the standards with which the licensee is not in compliance.

D. The licensing process.

1. Pre-application consultation. Upon request, the department's representative will provide consultation to any person seeking information about obtaining a license for a family day-care system. The purpose of such consultation is:

- a. To explain standards;
- b. To help the potential applicant to explore the operational demands of a licensed family day-care system;
- c. To provide assistance in locating sources of information and technical assistance;
- d. To alert the potential applicant of the need to determine whether local ordinances will affect the proposed operation (e.g. zoning, business license, etc.)
- e. To provide an on-site visit to a proposed family day-care system office, upon request.

2. The application.

a. The application for a license to operate a family day-care system shall be obtained from the Virginia Department of Social Services.

b. The application, together with all required information, shall be submitted to the Department at least two months in advance of the planned opening date.

This is required in order that a determination of compliance with the provisions of Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia, and with the Standards for Licensed Family Day-Care Systems as set forth here may be made.



Among other things, the information submitted shall be sufficient to enable the department's representative to determine, during the subsequent investigation, the specific services to be offered, the adequacy of staff to provide these services, the financial capability of the applicant, the character and reputation of the applicant, including the officers and agents of any association, partnership or corporation as mandated by § 63.1-198 of the Code of Virginia.

c. The application shall be signed by the individual responsible for the operation of the family day-care system. The application for a family day-care system to be operated by a board shall be signed by an officer of the board, preferably the chairman.

### 3. The investigation.

a. Following receipt of the application, the department's representative will make an on-site inspection of the proposed office and an investigation of the proposed services, as well as an investigation of the character, and reputation and financial responsibility of the applicant, and, upon receipt of the initial application, an investigation of the applicant's financial responsibility.

b. "The applicant shall afford representatives of the commissioner required to make the investigation reasonable opportunity to inspect all of the applicant's facilities, books and records, and to interview his or its agents and employees and any child or other person within his or its custody or control." (§ 63.1-198 of the Code of Virginia). The financial records of an initial applicant shall not be subject to inspection if the applicant submits an operating budget and at least one credit reference.

4. Notice to the applicant of commissioner's action. Upon completion of the investigation of the application for a license, the applicant will be notified in writing of the commissioner's decision.

If the license is issued, an accompanying letter will cite any areas of non-compliance with standards. This letter will also include any limitations on the license and may contain recommendations.

If a license is to be denied, the letter will state the reasons for the intent to deny and will set forth the applicant's right to an administrative hearing.

5. Procedures for renewal of annual, provisional or conditional license. In order to renew an annual, provisional or conditional license, the licensee must complete the renewal application and return it, together with any required attachments, to the department. In order to assure timely processing, the renewal application should be completed and returned within 10 days after it is received from the department.

The procedure for investigation and issuance or denial of the license as set forth in subdivisions D 3 and D 4 will be followed.

6. Early compliance (replacement of a provisional or conditional license with an annual license).

a. A provisional or conditional license may be voided and an annual license issued when all of the following conditions exist:

(1) The facility complies with all standards listed on the face of the provisional or conditional license well in advance of the expiration date of the provisional or conditional license, and no additional areas of non-compliance exist;

(2) Compliance has been verified by an on-site observation by the department representative or by written evidence provided by the licensee; and

(3) All other terms of the license remain the same.

b. A request to void a provisional or conditional license and to issue an annual license must be made in writing by the licensee to the regional office of the Virginia Department of Social Services from which the family day-care system's license to operate was issued.

c. If the request is approved by the department, the effective date of the new annual license will be the same as the beginning date of the provisional or conditional license.

7. Situation requiring a new application. A new application must be filed when sponsorship of the family day-care system changes.

8. Modification.

a. The conditions of the license may be modified during the effective dates of the license with respect to increasing or decreasing the number of homes that may be placed under contract, the number of children who may be referred by the system and be receiving care at a given time, changing the name of the system when there is no change in sponsorship, change in location of the system office, or because of other conditions caused by changes in staff, program, or facilities.

b. The licensee shall report to the department any contemplated changes in operation which would affect with either the terms of the license or the continuing eligibility for a license. (This does not mean the department has to approve changes in staff or program unless they affect the terms of the license or continuing eligibility.)

c. This information shall be submitted in writing by the licensee to the regional office of the Virginia Department of Social Services from which the system's license to operate was issued.

- d. The department will then determine whether such changes may be approved and the license modified accordingly or whether a new application must be filed.
9. Determination of continued compliance. In order to determine continued compliance with standards during the effective dates of the license, the department's representative will make announced and unannounced visits to the offices or offices of the system and may make such visits to homes that are members of the system.
10. Complaint investigation.
  - a. The department has the responsibility to investigate any complaints regarding alleged violations of minimum standards for licensed family day-care systems and provisions of Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia, or both.
  - b. The licensee has the responsibility to investigate any complaints regarding any family day-care home which is approved as a member of its system. (See 22VAC40-120-50 C.) At its discretion the department may also investigate complaints against individual homes.
11. Revocation. Any license may be revoked for failure to maintain these standards or for violation of the provisions of Chapter 10 (§ 63.1-195 et seq.) of Title 63.1 of the Code of Virginia.
12. Appeals. The applicant or licensee has the right to request an administrative hearing regarding any denial or revocation of a license, in accordance with the provisions of the Administrative Process Act, Chapter 1.1:1 (§§ 9-6.14:11 through 9-6.14:14) of Title 9 of the Code of Virginia.

Following the receipt of the final order which transmits the department's decision after the administrative hearing, the applicant/licensee has the right to appeal to a court of record in accordance with § 63.1-213 of the Code of Virginia.

**22VAC40-120-20. Organization and Administration.**

A. Sponsorship.

1. A family day-care system may be sponsored by a single individual, a partnership, association or a corporation.
2. A corporation sponsoring a family day-care system shall maintain its corporation sponsoring a family day-care system shall maintain its corporate status in accordance with Virginia law.
3. Such corporation shall be organized and empowered for the purpose of operating and maintaining a family day-care system. Corporations not organized and empowered solely to operate a family day-care system shall provide for such operations in their charters.
4. A family day-care sponsored by an association or corporation shall be controlled by a governing board that shall fulfill the duties of the licensee.
5. If a family day-care system is sponsored by an individual or a partnership, the individual or partnership shall be the licensee and shall comply with the responsibilities specified for the governing board. (See subdivision B 3 of this section.)

B. Governing board.

1. Composition of the Governing Board.
  - a. The membership of the governing board shall be based on the size and purpose of the family day-care system as well as the services to be offered by the system.

b. It shall be large enough and of a composition to:

(1) Be representative of the variety of interests served by the system;

(2) Contain experience appropriate to the services offered by the system; and

(3) Be representative of the geographical area served by the system.

c. At minimum, the governing board shall be composed of three members unless there are fewer than three shareholders, at which time the number of members can equal the number of shareholders. This membership shall include a president, secretary-treasurer and member-at-large. When there are fewer than three members, this membership shall consist of a president and secretary-treasurer.

d. The method of selecting board members shall be made known to the department's representative and shall be consistent with the by-laws.

2. Meetings of the governing board.

a. The governing board shall meet not less than quarterly.

b. Minutes of all meetings shall be recorded and retained in a permanent file at the office of the family day-care system.

c. Copies of minutes shall be made available to the department's representative upon request.

3. The responsibilities of the governing board shall include, but shall not be limited to:

a. Establishing written by-laws for the association or corporation; (not applicable to an individual or partnership);

b. Establishing written goals and policies under which the family day-care system is to operate (See subsection C of this section);

- c. Ensuring the family day-care system functions according to its defined purpose and within the scope of services to be offered;
- d. Ensuring that compliance with minimum standards for licensed family day-care systems;
- e. Maintaining a budgetary and financial system which assures that a sound financial structure is maintained;
- f. Appointing a qualified director to whom it delegates, in writing, the authority and responsibility for administrative direction and management of the family day-care system in accordance with established policies (optional for an individual or partnership);
- g. Establishing written policies which govern the board's or licensee's relationship to the director to include, at minimum:
  - (1) Evaluation of the performance of the director not less than annually;
  - (2) Provision for the director to meet with the board periodically to review the services being provided, the personnel needs and the fiscal management of the family day-care system.
- h. Providing a written organizational chart which indicates the organizational elements of the system the personnel positions within each organizational element and the lines of authority and communication within the family day-care system. This chart shall be kept current.
- i. Reviewing, at least annually, the program of the family day-care system. This review shall include an examination of:

- (1) The number, size, capabilities and quality of service offered by homes that are members of the system;
- (2) The needs of homes that are members of the system and the services offered to these homes by the system;
- (3) The needs of children and families served by the system and the services offered to them;
- (4) Problems encountered in the operation of the system;
- (5) Consistency of services provided within the framework of the stated purpose and objectives of the system;
- (6) Changes required in the focus of the system's program;
- (7) The adequacy of the record keeping system.

j. Determining, based on the annual review required by subdivision B 3 i of this section, the following:

- (1) Requirements for additional staff training;
- (2) Requirements for changes in staffing;
- (3) Requirements for changes in the focus of the program and services offered by the system.

k. Developing and implementing plans to respond to the needs identified in subdivision B 3 j of this section.

l. Maintaining accurate and appropriate inventories regarding all real property and equipment belonging to the system.



m. Ensuring that member homes comply with local child care ordinances where such ordinances exist. (NOTE: A note of approval from the administrator of the local ordinances will constitute evidence of compliance.)

C. Goals, policies and procedures.

1. Goals.

- a. Written goals shall be developed for the family day-care system.
- b. These goals shall clearly describe the philosophy and objectives of the system.
- c. At minimum, they shall address:
  - (1) The purpose of the family day-care system;
  - (2) The population to be served;
  - (3) The recruitment of homes;
  - (4) The program to be offered by the system in terms of:
    - (a) Services to be provided to the homes that are members of the system;
    - (b) Services to be provided to families and children who use the system.

2. Policies and procedures. Written policies and procedures shall be prepared for the operation of the family day-care system. These policies and procedures shall relate to:

- a. Personnel policies (see VAC40-120-30 B)
- b. Services to member homes including:
  - (1) Criteria for approving family day-care homes as members of system.
  - (2) Training of home operators;
  - (3) Technical assistance and consultation to home operators; and

(4) Inspection, supervision, monitoring and evaluation system homes.

c. Services to children and their families including:

(1) Referral of children to homes that are members of the system; and

(2) Referral of children to available health and social services.

3. A copy of the goals and all policies and procedures shall be made available to the department representative upon request.

#### D. Finances.

1. Fiscal accountability.

a. The family day-care system shall have a plan of financing which assures sufficient funds to operate in accordance with its stated purpose, objectives and the services to be provided.

~~b. The department, at any time, may request an audit of the financial records of the system by a certified public accountant. When requested, systems shall obtain such an audit and the cost of the audit report shall be borne by the system. (This does not mean that the department will routinely require such a report as part of the process of application for licensure.)~~

~~c. A new system shall as part of its initial application for licensure:~~

~~(1) Submit a plan of financing (working budget) for the first year of operation;~~

~~(2) Document funds or credit available for the first year of operation;~~

~~(3) Provide a financial report reflecting the current fiscal condition of the facility. This report shall be in the form of a current balance sheet showing a statement of assets and liabilities;~~

~~(4) Submit fee and payment schedules as required by subdivision D 3 of this section.~~

~~d. The application for license renewal shall include evidence of financial responsibility. At minimum, this evidence shall consist of:~~

~~(1) A current balance sheet showing a statement of current assets and current liabilities;~~

~~(2) A budget for the next year of operation;~~

~~(3) A copy of the current audit report required by subdivision D 1 b of this section if such a report is requested by the department;~~

~~(4) Current fee and payment schedules as required by subdivision D 3 of this section.~~

## 2. Internal financial procedures.

a. There shall be a system of financial record keeping that is consistent with generally accepted accounting principles, showing separation of the system's accounts from all other records.

b. There shall be a written policy for the collection and disbursement of funds.

c. Those members of the governing board or body and staff who have been granted authorized responsibility for funds of the system shall be bonded.

## 3. Fee and payment schedules.

a. The family day-care system shall maintain a current written schedule of fees charged for the services provided. The applicable schedule or schedules shall be made available to families who seek or use the services of the system, to home that apply for membership in the system and to the department as part of the application for licensure.

b. The family day-care system shall establish and maintain a current written schedule of payments to be made to homes that are members of the system. This schedule shall specify the amount of payment, conditions of payment and frequency of payment. It shall be provided to all homes that are members of the system and also to the department as part of the application for licensure. When applicable, this schedule shall also be made available to families who seek or use the services of the system.

E. Relationship to the licensing authority.

1. The family day-care system shall submit to the department such reasonable reports and information as it may require. (See § 63.1-203 of the Code of Virginia)
2. The system's books and records shall be made available for inspection by the department's representative, upon request. (See § 63.1-198 of the Code of Virginia)
3. The licensee, governing board or its official representative shall notify the department when any major change is anticipated in the program, services provided or administrative structure. When such a change occurs, which was not anticipate, this notification shall be provided no later than 10 days following the change. The department shall also be notified within five working days whenever a new director is employed by the family day-care system.

F. Family day-care system setting.

1. The family day-care system shall have an office which shall serve as the headquarters of the system.
2. This office shall have:
  - a. Sufficient space for administration of the system, including all clerical functions;

b. Sufficient space to maintain privacy and confidentiality for conferences with parents who seek or use the services of the system and family day-care home operators who are members of the system; and

c. At least one working telephone, other than a pay phone, with a listed number which is available for system business. An emergency phone number shall be provided for the use of the homes in the system during any hours that children are in care if the system's telephone is not manned during those hours.

G. Determination of the number of homes that may be under contract to the system. In order to ensure timely and adequate service delivery, the maximum number of homes that may be under contract of the system shall be based on the following factors:

1. The number of system's office staff (NOTE: Persons who are approved as day-care providers and their assistants are not considered to be system's office staff.);
2. The geographical dispersion of homes with relation to the system office;
3. The type or types and needs of children served by the system;
4. The financial capabilities of the system; and
5. They types of program or programs and services offered by the system.