



Proposed Regulation Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) citation	22 VAC 40 -740
Regulation title	Adult Protective Services
Implement	Implement 2004 APS Legislation
Document preparation date	December 15, 2004

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

These proposed regulatory changes are being made to conform the regulation to recent legislation passed by the 2004 General Assembly that amended the *Code of Virginia*, §§ 63.2-1603 through 1610. Adult protective services in Virginia are provided to any person aged 60 and over and adults aged 18 and over who are incapacitated. The *Code of Virginia*, § 63.2-1603, defines an "incapacitated person" as "any adult who is impaired by reason of mental illness, mental retardation, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate, or carry out responsible decisions concerning his or her well-being."

Programs that demonstrate collaborative, multidisciplinary efforts are most successful in discovering, preventing, and prosecuting adult abuse, neglect, and exploitation. As there are no guiding federal statutes on APS, states vary significantly in how they receive reports of abuse, how perpetrators are handled, and how penalties are imposed. The APS Act attempted to consider the "best of the best" practices in APS across the nation and implement programs that have worked in Virginia.

Early identification of possible abuse, neglect, and exploitation of adults, coupled with the opportunity to protect adults and provide needed services, will improve quality of care and life to vulnerable adults in the Commonwealth. Both nationally and throughout the Commonwealth, a particular area of concern related to the protection and well-being of the elderly and adults who are incapacitated is that of identifying and preventing adult abuse. These are issues that these amendments seek to address.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Federal authority is Title XX of the Social Security Act, Section 2001, number (3). The State statute providing the mandate for this regulation is found in the *Code of Virginia*, §§ 63.2-217 and 63.2-1603 through 1610. The amendments described herein are necessary to conform the regulation to the requirements set forth in Chapter 1011 and Chapter 749, 2004 Acts of the Assembly.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this regulatory amendment is to conform the regulation to the Adult Protective Services (APS) Act that was passed in the 2004 Session of the General Assembly to establish enhanced protections for Virginia's vulnerable adult population and best practices in APS for the Commonwealth. Recommendations are based on those from an APS Advisory Committee that was established to assess Virginia's APS program and a legislative report issued in December 2002 entitled, *Adult Protective Services: Identifying and Preventing Adult Abuse, Neglect, and Exploitation*, which included a comprehensive review of other states' APS programs and suggestions received from interested persons.

The best national estimate of the incidence and reporting of elder abuse and neglect is that only 16 percent of all incidences are reported to APS (National Elder Abuse Incidence Study (NCAIS), 1998). Many adult abuse researchers have indicated that we have just seen the "tip of the iceberg" of adult abuse reported cases. Despite a trend toward an increased emphasis on a quality aging experience and a commitment to improving the lives of the elderly and adults who have a disability, abuse, neglect, and exploitation of the elderly has gone largely unidentified and unnoticed.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

- 1) Clarifying population served and adding that reports of suspected abuse, neglect, or exploitation may be made to the local department of social services (local department) OR the 24-hour, toll-free APS hotline;
- 2) Requiring local departments to initiate an investigation within 24 hours of the report;
- 3) Requiring the local department to refer matters as appropriate to the appropriate licensing, regulatory, or legal authority for administrative action or criminal investigation;
- 4) Defining "collateral;" "disposition;" "documentation;" "notification;" "preponderance of evidence;" "service plan;" and "valid report;"

- 5) Changing the timeframe for reporting of suspected adult abuse, neglect, or exploitation by mandated reporters to "immediately" except reports by nursing facility inspectors employed by the Department of Health in the course of a survey. "Immediately" is defined as "without delay and not later than the conclusion of any review necessary to determine when the suspicion is reasonable;"
- 6) Adding persons to the list of APS mandated reporters, including persons in professions regulated by the Department of Health Professions, emergency medical services personnel, and guardians;
- 7) Noting that the APS Program respects the rights of adults with capacity to make their own decisions, even if they do not appear to reasonably be in the best interest of the adult;
- 8) Requiring mandated reporters to report immediately to the appropriate medical examiner and law-enforcement agency when there is reason to suspect that an adult died as a result of abuse or neglect;
- 9) Updating the entities that can receive APS information when there is legitimate interest in a case and allowing the Commissioner or a local director to add entities as necessary; and
- 10) Authorizing the Commissioner of the Department of Social Services to impose civil money penalties for cases of non-reporting by all mandated reporters except law-enforcement officers (the courts would take these cases), determining how penalties will be determined, and establishing an appeals process.

Issues

Please identify the issues associated with the proposed regulatory action, 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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

Issues associated with this proposed regulatory action include:

- 1) Developing procedures to foster cooperation between all the regulatory, administrative, and legal authorities that may be involved in an APS investigation or referral, including other health professionals who are regulated by the Board of Health Professions;
- 2) Involving employers of mandated reporters to a greater extent in the efforts to notify mandated reporters of their responsibilities;
- 3) Authorizing the Commissioner of the Department of Social Services to impose civil money penalties for cases of non-reporting by all mandated reporters except law-enforcement officers (the courts would take these cases), determining how penalties will be determined, and developing an appeals process;
- 4) Enhancing the role of law-enforcement departments and medical examiners and other state and local departments, agencies, authorities, and institutions to cooperate with APS in the detection, investigation, and prevention of adult abuse, neglect, and exploitation; and
- 5) Developing a model protocol and procedures for the operation of adult fatality review teams.

The primary advantage of this action is to better protect and serve some of the Commonwealth's most vulnerable citizens by fostering cooperation between agencies and adding new mandated reporters in the community. This action poses no disadvantages to the public or the Commonwealth. Employers of mandated reporters are asked to ensure that their employees who are mandated reporters are notified of their responsibilities; information has been developed by the Department for this purpose and can be added to existing employee orientations.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	In FY 03, just under \$1 million was allocated to the 120 local departments of social services for adult protective services. This includes 80 percent of funding from the General Fund and a 20 percent local match. Funding may be used for either administration of the adult protective services program by the local departments of social services or purchased services for adults.
Projected cost of the regulation on localities	No additional costs are projected.
Description of the individuals, businesses or other entities likely to be affected by the regulation	Persons aged 60 and over and adults aged 18 and over and who have a disability are protected by this regulation. Persons who are mandated to report suspected cases of adult abuse, neglect, or exploitation are also affected. This includes health care providers, social workers, law-enforcement, mental health professionals and others.
Agency's best estimate of the number of such entities that will be affected	In 2000, an estimated 7 million persons lived in Virginia; of those, 1.09 million are 60 or older (Commonwealth Council on Aging, Annual Report to the Governor and the General Assembly, 1999-2000). A reported 300,000 adults reported having a health condition or impairment that limits their daily activities (1995 data).
Projected cost of the regulation for affected individuals, businesses, or other entities	No costs are projected for affected individuals, businesses, or other entities.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

Prior to the submission of the 2004 legislation, an advisory committee representing a wide array of aging and long-term care services providers and advocates, as well as State agency representatives for the Health and Human Resources (HHR) Secretariat, was convened. The committee met several times to suggest changes to the APS section of the Code of Virginia, which had not been updated comprehensively since the late 1970's. After the review of several drafts, the final proposal was submitted to the Secretary of HHR and the Governor. The resulting legislation represented a general consensus of ideas from across disciplines and programs as to how to better protect Virginia's most vulnerable adults.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
Ms. Dana Steger, Va. Assn. of Non-profit Homes for the Aging	Support amendments.	
Ms. Susan Ward, Va. Hospital and Healthcare Assn.	Expressed concerns about mandated reporters having to report immediately; requests that facilities to be able to assess whether abuse, neglect, or exploitation occurred prior to reporting to APS. Asked that “the Department shall impose” be changed to “the Department may impose” with regard to civil money penalties in 22 VAC 740-70.	Have modified the language and defined “immediate.” Changed civil money penalty language from “shall” to “may.”
Ms. Mary Lynn Bailey, Virginia Health Care Association	Expressed concerns about mandated reporters having to report immediately; requests that facilities to be able to assess whether abuse, neglect, or exploitation occurred prior to reporting to APS. Asked that “the Department shall impose” be changed to “the Department may impose” with regard to civil money penalties in 22 VAC 740-70.	Have modified the language and defined “immediate.” Changed civil money penalty language from “shall” to “may.”
Ms. Jan Selbo, Director, Fauquier DSS, and Chair, Va. League of Social Services Executives Adult Services Subcommittee	Support amendments.	
Ms. Barbara Jenkins, VDSS	Technical amendments; edits.	Changes made.
Mr. Thom Butcher, Richmond City DSS	Encouraged clarification of adult with capacity who chooses not to accept services.	Language amended.
Ms. Nancy Hofheimer, Dept. of Health	Expressed concerns about medical facilities inspectors as mandated reporters; use of “medical neglect” determined	Have addressed first two concerns. Under the federal HIPAA law, APS is permitted to receive health-related information about clients.

	by non-health professionals; and using description of medical problems as a violation of the Health Insurance Portability and Accountability Act (HIPAA).	
Mr. David Stasko, VDSS	Technical amendments.	Changes made.
Ms. Odile Saggi, Arlington DSS	Technical amendments.	Changes made.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

Local departments of social services receive and investigate more than 12,000 reports of adult abuse, neglect, and exploitation annually. Adult protective services is the only program authorized by the *Code of Virginia* (§ 63.2-1607) to investigate suspected abuse, neglect, and exploitation across all care settings. Reports alleging that adults are abused, neglected, or exploited, or are at risk of abuse, neglect, or exploitation and are unable to protect their own interests due to vulnerability associated with incapacity or due to a mental or physical disability are investigated. Services are provided to those adults who are found, through an APS investigation, to require protective services.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
22 VAC 40-740-10, Definitions			1) Definitions are amended to conform to legislative changes effective July 1, 2004. 2) "Adult protective services" is redefined per legislative change. 3) Mandated reporters are required to report suspected cases of adult abuse, neglect, or exploitation or risk of such "immediately," which is defined to mean "without delay and no later than the conclusion of any review necessary to determine whether the suspicion is reasonable."

			<p>4) "Undue influence" is added to the definition of exploitation.</p> <p>5) The new list of mandated reporters is included.</p> <p>6) The definition of "neglect" is expanded per legislative change.</p> <p>7) "Medical neglect" is added to the definition of neglect.</p> <p>8) "Preponderance of evidence" is defined as that is the measure of whether abuse, neglect, or exploitation occurred.</p> <p>9) Definitions are added for "collateral," "disposition," "documentation," and "notification" are added; these are identical definitions to those found in the Child Protective Services (CPS) regulation.</p> <p>10) Language is added to allow APS reports to be made to the local departments of social services or the APS hotline.</p> <p>11) The definition for "emergency" is deleted as APS is to initiate investigations immediately for all reports.</p> <p>12) "Dementia" is added to the list of conditions or situations that would render an adult incapacitated for the purposes of an APS investigation.</p> <p>13) The definition for "legitimate interest" is modified to reflect that of CPS.</p> <p>14) The definition of a "valid report" for APS is included.</p>
22 VAC 40-740-30, Adult protective services investigation	22 VAC 40-740-21		<p>1) Section is moved so that the investigatory process is addressed prior to the provision of services.</p> <p>2) The process for initiating an APS investigation is defined, allowing the social worker to determine if an immediate response is needed to ensure the safety of the alleged victim.</p> <p>3) The process for immediate response is established.</p> <p>4) The investigative process is outlined.</p> <p>5) Handling of reports of suspicious deaths of adults is addressed.</p>
22 VAC 40-740-20, Application for provision of services	22 VAC 40-740-31		<p>Section is moved so that the investigatory process is addressed prior to the provision of services. The process is the same as in the current regulation.</p>

<p>22 VAC 40-740-40, Assessment narrative and disposition</p>			<p>1) Requirements of the APS Assessment Narrative by the APS social worker are set forth. 2) Dispositions are made based on a preponderance of evidence. 3) Notices of completed investigations are to be made in writing within 10 working days of the completion of the investigation. 4) It is noted that APS respects the rights of adults with capacity to consider options offered and refuse services, even if those decisions do not appear to reasonably be in the best interests of the adult.</p>
<p>22 VAC 40-740-50, Disclosure of adult protective services information</p>		<p>Current language limits the exchange of information to certain agencies and organizations; there may be times when additional agencies or organizations may need to be included.</p>	<p>1) Names of certain agencies that have changed have been updated. 2) The Commissioner and local department of social services directors, at their discretion, are authorized to provide information to other agencies or organizations having a legitimate interest in the case. 3) VDSS is authorized to share information to licensing, regulatory, and legal authorities for administrative action or criminal investigations as necessary. 4) Prosecutors are added to the list of entities that can receive confidential information. 5) Specific form numbers are deleted as they may be obsolete (032-01-040/2).</p>
<p>22 VAC 40-740-60, Opening a case for service provision</p>			<p>This section identifies the assessment process to determine an adult's needs and strengths and clarifies when a case will be opened for services.</p>
<p>n/a</p>	<p>22 VAC 40-740-70, Civil penalty for non-reporting</p>	<p>Penalties for non-reporting by a mandated reporter have been included in APS legislation since the 1980's. However, they could only be implemented by the courts. The amendment allows the Commissioner or his designee to assess civil penalties.</p>	<p>Per legislative changes effective July 1, 2004, the process for civil penalties for non-reporting of suspected abuse, neglect, or exploitation by a mandated reporter is established. No changes were made to the amounts of civil money penalties to be imposed.</p>

n/a	22 VAC 40-740-80, Imposition of civil penalty	See above.	Per legislative changes effective July 1, 2004, the process for imposing a civil penalty for non-reporting of suspected abuse, neglect, or exploitation by a mandated reporter is established, including the right of a mandated reporter to appeal the Commissioner's decision to the circuit court, per the Administrative Process Act and the Supreme Court of Virginia. The process for the determination of the amount of the penalty to be imposed is also described in accordance with § 63.2-1606 H of the Code of Virginia.
Entire regulation		The terms "client," "committee," and "local agency" are used.	The term "client" is changed to "adult;" the term "local agency" is changed to "local department;" and the term "committee" is changed to "guardian" to conform the language with that of changes made to the Code of Virginia, §§ 63.2-1603 through 1610.