




# COMMONWEALTH *of* VIRGINIA

*Office of the Attorney General*

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**TO:** **DUKE STOREN, Commissioner**  
Virginia Department of Social Services

**FROM:** **ELLEN FULMER MALENKE**   
Assistant Attorney General

**DATE:** **July 7, 2020**

**SUBJECT:** **Exempt Regulation Section - 22VAC40-665 (Amend Child Care Ratios to Comply with Code)**

I am in receipt of the attached regulation. You have asked the Office of the Attorney General to review and determine if the State Board of the Virginia Department of Social Services has the statutory authority to promulgate the proposed regulation and if the proposed regulation comports with applicable state and federal law.

This regulatory action is necessary to bring state Child Care Subsidy Program requirements into compliance with § 63.2-1716. Changes to this regulation amend the staff ratios for religious-exempt child day centers participating in the Subsidy Program. When a group of children receiving care includes children from different age brackets, the staff to child ratio applicable to the youngest child in the group applies to the entire group of children.

It is my opinion that the State Board of DSS has the authority to promulgate this regulation, subject to compliance with the provisions of Article 2 of the Administrative Process Act ("APA") and has not exceeded that authority.

Further, it is my view that this regulation is exempt from the procedures of Article 2 of the APA pursuant to Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about these regulations, please contact me at 786-4856.

cc: Kim F. Piner, Esquire

Attachment

**DEPARTMENT OF SOCIAL SERVICES**

**Amend Child Care Ratios to Comply with Code**

**22VAC40-665-650. Supervision, ratio, and group size requirements.**

A. The vendor, except those exempt from licensure operated by or under the auspices of a religious institution, shall ensure that the following ratio requirements are maintained:

1. For children from birth to the age of 16 months: one staff member for every four children;
2. For children 16 months to two years: one staff member for every five children;
3. For two-year-old children: one staff member for every eight children;
4. For children from three years to the age of eligibility to attend public school, five years by September 30: one staff member for every 10 children;
5. For children from age of eligibility to attend public school through eight years: one staff member for every 18 children; and
6. For children from nine years through 12 years of age: one staff member for every 20 children.

B. Except during meals or snacks, the designated rest period, evening and overnight sleep time, outdoor play, field trips, special group activities, or during the first and last hour of operation when the vendor operates more than six hours per day, the vendor, except those exempt from licensure operated by or under the auspices of a religious institution, shall ensure that the following group size requirements are maintained at all times:

1. For children from birth to the age of 16 months: the maximum group size is 12 children;
2. For children 16 months to two years: the maximum group size is 15 children;
3. For two-year-old children: the maximum group size is 24 children; and
4. For children from three years to the age of eligibility to attend public school, five years by September 30: the maximum group size is 30 children.

Group size requirements in this section do not apply to children school age eligible through 12 years of age or when a variance has been granted by the Division of Licensing Programs.

C. Facilities operated by, or under the auspices of, a religious institution and exempt from licensure shall employ supervisory personnel as set forth in § 63.2-1716 of the Code of Virginia and shall ensure the following ratio requirements are maintained:

1. One staff member to four children from ages zero to 16 months;
2. One staff member to five children from ages 16 months to 24 months;
3. One staff member to eight children from ages 24 months to 36 months;
4. One staff member to 10 children from ages 36 months to five years;
5. One staff member to 20 children from ages five years to nine years; and
6. One staff member to 25 children from ages nine years to 12 years.

When a group of children receiving care includes children from different age brackets, the age of the youngest child in the group shall be used to determine the staff-to-children ratio that applies to that group.

D. With the exception of when meals or snacks are served, the designated rest period, evening and overnight sleep time, outdoor play, and field trips, special group activities, or during the first and last hour of operation when the vendor operates more than six hours per day,

facilities operated by, or under the auspices, of a religious institution and are exempt from licensure shall ensure the following group size requirements are maintained at all times:

1. For children from birth to two years of age: the maximum group size is 12 children;
2. For children from two years to six years of age: the maximum group size is 30 children; and
3. For children who are six years up to 12 years of age: group size requirements in this section do not apply.

~~Vendors operated by, or under the auspices, of a religious institution must have a staff member present for each age group of children as defined in § 63.2-1716 of the Code of Virginia. Example: one staff must be present for any of the children age birth to 24 months, an additional staff member must be present if any of the children are ages two to six years, and a third staff member must be present if any children are ages six to 12 years.~~

E. The vendor shall develop and implement a written policy and procedure that describes how the vendor will ensure that each group of children receives care by consistent staff or team of staff members.

F. Staff shall be counted in the required staff-to-children ratios only when they are directly supervising children.

G. When children are in ongoing mixed age groups, the staff-to-children ratio and group size applicable to the youngest child in the group shall apply to the entire group.

H. Children less than 10 years of age shall always be within actual sight and sound supervision of staff, except that staff need only be able to hear a child who is using the restroom provided that:

1. There is a system to ensure that individuals who are not staff members or persons allowed to pick up a child in care do not enter the restroom area while in use by children; and

2. Staff checks on a child who has not returned from the restroom after five minutes. Depending on the location and layout of the restroom, staff may need to provide intermittent sight supervision of the children in the restroom area during this five-minute period to assure the safety of children and to provide assistance to children as needed.

I. Children 10 years of age and older shall be within actual sight and sound supervision of staff except when the following requirements are met:

1. Staff can hear or see the children (video equipment, intercom systems, or other technological devices shall not substitute for staff being able to directly see or hear children);

2. Staff are nearby so that they can provide immediate intervention if needed;

3. There is a system to ensure that staff know where the children are and what they are doing;

4. There is a system to ensure that individuals who are not staff members or persons allowed to pick up children in care do not enter the areas where children are not under sight supervision; and

5. Staff provides sight and sound supervision of the children at variable and unpredictable intervals not to exceed 15 minutes.

J. When the outdoor activity area is not adjacent to the center, there shall be at least two staff members in the outdoor activity area whenever one or more children are present.

K. Staff shall not allow a child to leave the center unsupervised.

L. For vendors operated by, or under the auspices of, a religious institution and exempt from licensure, during designated rest periods and the designated sleep period of evening and overnight care programs, the ratio of staff to children over 16 months of age may be double the number of children to each staff required by subsection C of this section if:

1. The staff person shall be present in the same space as sleeping children;
2. Staff counted in the overall rest period ratio are on the same floor as the sleeping or resting children and available in case of emergency; and
3. An additional person is present to help.

Once at least half of the children in the resting room or area are awake and off their mats or cots, the staff-to-child ratio shall meet the ratios as required in subsection C of this section.

M. For vendors not operated by, or under the auspices of, a religious institution, during designated rest periods and the designated sleep period of evening and overnight care programs, the ratio of staff to children over 16 months of age may be double the number of children to each staff required by subsection A of this section if:

1. The staff person shall be present in the same space as sleeping children;
2. Staff counted in the overall rest period ratio are on the same floor as the sleeping or resting children and available in case of emergency; and
3. An additional person is present to help.

Once at least half of the children in the resting room or area are awake and off their mats or cots, the staff-to-child ratio shall meet the ratios as required in subsection A of this section.