GENERAL PROCEDURES
AND
INFORMATION FOR LICENSURE

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COMMONWEALTH OF VIRGINIA

GENERAL PROCEDURES AND INFORMATION FOR LICENSURE

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VIRGINIA DEPARTMENT OF SOCIAL SERVICES
GENERAL PROCEDURES AND INFORMATION FOR LICENSURE
22 VAC 40-80-10 et seq.

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PART I.
INTRODUCTION.

22 VAC 40-80-10. Definitions.

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

"Administrative hearing" means a hearing that is conducted pursuant to § 2.2-4020 of the Administrative Process Act.

"Adult care facility" means a licensed assisted living facility or adult day care center.

"Adverse action" means any case where the department either gives notice of revocation or refuses to issue a license for an assisted living facility, adult day care center or child welfare agency or imposes another administrative sanction pursuant to § 63.2-1709 of the Code of Virginia.

"Aggrieved party" means an applicant or licensee who has requested an appeal in accordance with instructions provided after the department has given written notice of the imposition of an administrative sanction or adverse action for an assisted living facility, adult day care center, or child welfare agency.

"Allowable variance" means permission is granted by the department to a licensee or applicant for licensure to meet the intent of a standard by some means other than as specified by the standard when the applicant or licensee has demonstrated that (i) the implementation of a standard would impose a substantial financial or programmatic hardship and (ii) the variance would not adversely affect the safety and well-being of persons in care.

"Applicant" means the person, corporation, partnership, association, limited liability company, or public agency that has applied for a license to operate or maintain an assisted living facility, adult day care center, or child welfare agency. For a child welfare agency, the "person who operates or maintains a child welfare agency" means any individual; corporation; partnership; association; limited liability company; local government; state agency, including any department, institution, authority, instrumentality, board, or other administrative agency of the Commonwealth; or other legal or commercial entity that operates or maintains a child welfare agency.

"Board" means the State Board of Social Services.

"Child welfare agency" means a child day center, child-placing agency, child caring institution, family day home, family day system, or independent foster home.

"Commissioner" means the Commissioner of the Department of Social Services.

"Complaint" means an accusation that a facility that is subject to licensure is operating without a license or that a licensed facility is not in compliance with licensing standards or law.

"Conditional license" means a license that may be issued to a new facility to operate in order to permit the applicant to demonstrate compliance with specified standards.

22 VAC 40-80-10. Definitions.

"Consent agreement" means an agreement between the licensee and the department that the licensee will perform specific actions for the purpose of correcting violations to come into compliance with standards or statutes.

"Council" means the Child Day-Care Council.

"Day" means a calendar day unless otherwise specified.

"Denial" means the act of refusing to grant a license after receipt of an initial or renewal application.

"Department" means the Department of Social Services.

"Early compliance" means that the licensee has demonstrated full compliance with requirements, allowing the department to replace a provisional or conditional license with a regular license.

"Functional design" means the design features of building and grounds not regulated by the Building Code, necessary for particular activities and operations of a facility subject to licensure by the Department of Social Services.

"Good character and reputation" means findings have been established and knowledgeable, reasonable, and objective people agree that the individual (i) maintains business or professional, family, and community relationships that are characterized by honesty, fairness, truthfulness, and dependability; and (ii) has a history or pattern of behavior that demonstrates the individual is suitable and able to administer a program for the care, supervision, and protection of children or adults. Relatives by blood or marriage and persons who are not knowledgeable of the individual, such as recent acquaintances, may not be considered objective references.

"Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ 2.2-4007 and 2.2-4019 of the Code of Virginia and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 2.2-4009 of the Code of Virginia in connection with the making of regulations or (ii) a similar right of private parties of public agencies as provided in § 2.2-4020 of the Code of Virginia in connection with case decisions.

"Hearing coordinator" means the person designated by the Department of Social Services to perform certain administrative functions involved in setting up and carrying out the hearings concerning adverse action on a license for an assisted living facility, adult day care center or child welfare agency, as set out herein.

"Hearing officer" means an attorney selected from a list maintained by the Executive Secretary of the Supreme Court in accordance with § 2.2-4024 of the Code of Virginia to preside at hearings concerning adverse action on a license for an assisted living facility, adult day care center or child welfare agency.

"Informal conference" means the informal fact-finding procedures available pursuant to §§ 2.2-4019 and 2.2-3021 of the Code of Virginia.

22 VAC 40-80-10. Definitions.

"Licensee" means the person, corporation, partnership, association, limited liability company, or public agency to whom a license is issued and who is legally responsible for compliance with the regulations and statutory requirements related to the operation or maintenance of the assisted living facility, adult day care center, or child welfare agency. For a child welfare agency, the "person who operates or maintains a child welfare agency" means any individual; corporation; partnership; association; limited liability company; local government; state agency, including any department, institution, authority, instrumentality, board, or other administrative agency of the Commonwealth; or other legal or commercial entity that operates or maintains a child welfare agency.

"Probationary status" means placing a licensee on notice that the facility or agency is substantially out of compliance with the terms of its license and the health, safety, and well-being of persons in care are at risk. Probationary status is a precursor to more serious action such as revocation, denial, or injunctive action unless immediate corrective action occurs.

"Provisional license" means a license that may be issued upon expiration of a regular license when the licensee is temporarily unable to substantially comply with the requirements of the law and regulations.

"Recommended findings of fact and recommended decision" means the report prepared by the hearing officer upon evidence presented in the administrative hearing based on the applicable laws and regulations under which the department operates.

"Regular license" means a license that is issued for 12 months or more as provided in Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia to a facility determined to be in substantial compliance with applicable standards and regulations. The actual duration of the licensure period is stated on the license.

"Revocation" means the act of terminating a license during its effective dates because of findings of serious noncompliance.

"Special order" means an order imposing an administrative sanction issued to any party licensed pursuant to Title 63.2 of the Code of Virginia by the commissioner that has a stated duration of not more than 12 months. A special order shall be considered a case decision as defined in § 2.2-4001 of the Code of Virginia. The 12-month period begins 30 days after notification of the issuance of a special order or at the conclusion of all appeal steps.

"Substantial compliance" means that while there may be noncompliance with one or more standards that represents minimal risk, compliance clearly and obviously exists with most of the standards as a whole.

22 VAC 40-80-20. Preplanning.

A. Licensing staff are available throughout the application and licensing processes to answer questions and provide consultation and technical assistance (see 22 VAC 40-80-130).

22 VAC 40-80-20. Preplanning.

B. In order to avoid costly errors, applicants and prospective applicants are urged to present their building plans to the department as early as possible and before entering into contracts in order to assure that the building can be preapproved as meeting the department's regulations (see 22 VAC 40-80-150).

C. The department will make an on-site inspection of the proposed facility and services; investigate the character and reputation of the licensee and, if required, staff and household members; and upon receipt of the initial application will investigate the financial responsibility of the applicant (see 22 VAC 40-80-160).

PART II.
LICENSING REGULATIONS.

22 VAC 40-80-30. Responsibility of the department.

Through the administration of the licensing program, the Department of Social Services assumes responsibility to ensure that licensed facilities and agencies provide children and adults with at least a minimum level of care in accordance with regulations prescribed by the State Board of Social Services and Child Day-Care Council. The department also has the responsibility to investigate allegations of illegal operations and to initiate action to suppress illegal operations. The Virginia Code requires the State Board of Social Services to adopt regulations for the licensure of the following categories of facilities and agencies:

1. Adult day care centers;
2. Assisted living facilities;
3. Private child-placing agencies;
4. Child caring institutions;
5. Independent foster homes;
6. Family day homes; and
7. Family day systems.

The Code of Virginia requires the Child Day-Care Council to adopt regulations for the licensure of child day centers.

22 VAC 40-80-40. Adoption of regulations.

The State Board of Social Services or the Child Day-Care Council has adopted regulations for each category listed above. The definition of each category and requirements for licensure are contained in each regulation.

22 VAC 40-80-50. Regulation development/revision process.

A. In developing or revising regulations for licensed facilities or agencies, the Department of Social Services, acting as agent for the State Board of Social Services and Child Day-Care Council, adheres to the requirements of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) and the public participation process.

B. Input from licensees, associations of licensees, experts in related fields, advocacy organizations, consumers, and the general public is solicited in the development or revision of licensing regulations through informal and formal comment periods and public hearings.

C. Periodic reviews are conducted and, when necessary, comprehensive revisions of each regulation to assure that its standards continue to protect children and adults in out-of-home care while considering the interests of both providers and consumers of care.

PART III.
THE LICENSE.

22 VAC 40-80-60. General.

A. A license to operate a facility or agency is issued to a specific person or organization to provide out-of-home care to children or adults. An organization may be a partnership, association, corporation, limited liability company, or public entity.

B. Pursuant to § 63.2-1712 of the Code of Virginia, any person, officer, or member of a governing board of any association or corporation that operates an assisted living facility, adult day care center, or child welfare agency shall be guilty of a Class 1 misdemeanor if he:

1. Interferes with any representative of the commissioner in the discharge of his licensing duties;

2. Makes to the commissioner or any representative of the commissioner any report or statement with respect to the operation of any assisted living facility, adult day care center, or child welfare agency that is known by such person to be false or untrue;

3. Operates or engages in the conduct of these facilities without first obtaining a license as required or after such license has been revoked or has expired and not been renewed; or

4. Operates or engages in the conduct of one of these facilities serving more persons than the maximum stipulated in the license.

C. When a licensee plans to close or sell a facility, the licensee shall notify the appropriate licensing office at least 60 days prior to the anticipated closure or sale date. When the facility closes or the sale is finalized, the license shall be returned to the appropriate licensing office.

22 VAC 40-80-70. Nontransferability of license.

A license is not transferable when there is a change in the ownership or location of the facility or agency to which the license has been issued.

EXCEPTION: Licenses issued for private child placing agencies and family day systems are transferable when agencies change location.

22 VAC 40-80-80. Conditional license.

The department may issue a conditional license to a new facility or agency in order to permit the applicant to demonstrate compliance with specified standards. A conditional license may be renewed, but the issuance of a conditional license and any renewals thereof shall be for no longer a period than six successive months. When the conditional period is over, the facility or agency must substantially meet the standards or be denied a license. Conditional licenses may be used only for new facilities or agencies.

22 VAC 40-80-90. Regular license.

A regular license is issued when the activities, services, facilities, and applicant's financial responsibility substantially meet the requirements for a license that are set forth by regulations adopted by the State Board of Social Services or the Child Day-Care Council and any additional requirements that may be specified by the Code of Virginia.

22 VAC 40-80-100. Duration of licensure.

Each license and renewal thereof may be issued for a period of up to three successive years. The criteria for determining the periods of licensure are based on the activities, services, management, and compliance history of the facility.

A three-year license may be issued when a facility's activities, services, and management routinely substantially exceed the minimum standards.

A two-year license may be issued when a facility's services and management routinely meet and maintain compliance with minimum standards and may exceed on a sustained basis in some areas.

An annual license may be issued when a facility's activities, services, and management indicate an inconsistent level of compliance but substantial compliance is reached. Some reinforcement and guidance are needed in order for the facility to meet or maintain minimum requirements.

EXCEPTION: A license, other than a conditional or provisional license, issued to a child day center shall have a duration of two years from the date of issuance.

22 VAC 40-80-110. Provisional license.

When a regular license expires and the applicant is temporarily unable to comply with the requirements of the regulations, the department may issue a provisional license for any period not to exceed six months. A provisional license shall not be issued to a facility or agency immediately following a conditional license. At the conclusion of the provisional licensure period, the facility or agency must be in substantial compliance with licensing standards or be denied a license to continue operation.

22 VAC 40-80-120. Terms of the license.

A. A facility or agency shall operate within the terms of its license, which are:

1. The operating name of the facility or agency;

2. The name of the individual, partnership, association, corporation, limited liability company, or public entity sponsoring the facility or agency;

3. The physical location of the facility or agency;

4. The maximum number of children or adults who may be in care at any time;

5. The period of time for which the license is effective;

6. For child care facilities or agencies, the age range of children for whom care may be provided; and

7. Any other limitations that the department may prescribe within the context of the regulations for any facility or agency.

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

C. The conditional license cites the standards with which the licensee must demonstrate compliance when operation begins, and also any standards with which the licensee is not in compliance.

D. Prior to changes in operation that would affect the terms of the license, the licensee shall secure a modification to the terms of the license from the department. (See 22 VAC 40-80-190.)

E. Certain documents related to the terms of the license are required to be posted on the premises of each licensed facility. These are:

1. The most recently issued license. Any provisional license shall be posted at each public entrance of the facility and a notice shall be prominently displayed next to the license that states that a description of specific violations of licensing standards to be corrected and the deadline for completion of such corrections is available for inspection at the facility or on the facility's website, if applicable;

2. The findings of the most recent inspection of the facility;

3. Notice of the commissioner's intent to revoke or deny renewal of the license of an assisted living facility. Such notice will be provided by the department and shall be posted in a

22 VAC 40-80-120. Terms of the license.

prominent place at each public entrance of the facility to advise consumers of serious or persistent violations;

4. A copy of any final order of summary suspension of all or part of an assisted living facility's license shall be prominently displayed by the provider at each public entrance of the facility, or the provider may display a written statement summarizing the terms of the order, printed in clear and legible size and typeface, in a prominent location and indentifying the location within the facility where the final order of summary suspension may be reviewed;

5. Notice of the commissioner's intent to take any of the actions enumerated in subdivisions B 1 through B 6 of § 63.2-1709.2 of the Code of Virginia. Such notice will be provided by the department and a copy of the notice shall be posted in a prominent place at each public entrance of the facility to advise consumers of serious or persistent violations;

6. A copy of any special order issued by the department shall be posted in a prominent place at each public entrance of the licensed premises to advise consumers of serious or persistent violations;

7. Any other documents required by the commissioner.

PART IV.
THE LICENSING PROCESS.

22 VAC 40-80-130. Provider support services.

A. The programmatic regulations require both general and specific training in various subject areas. The department provides preapplication consultation, ongoing technical assistance and consultation, and formal training sessions. The department's licensing representatives will provide assistance to any person seeking information about obtaining a license and information about initial and ongoing training requirements.

B. Applicants for licensure shall complete a prelicensure orientation program that focuses on health and safety standards, and residents' rights where applicable, offered through or approved by the department. The commissioner may, at his discretion, waive the orientation requirement or issue a license conditioned upon the owner's or administrator's completion of the required training.

EXCEPTIONS: The following persons are exempt from the requirements of prelicensure training:

1. An applicant who has previously owned or managed a facility in satisfactory compliance with regulations; and

2. Applicants for adult day care centers and child welfare agencies if notified by the department that such training is unavailable.

22 VAC 40-80-140. The initial application.

A. Upon request, the department will provide an application form for a license to operate a facility or agency. There are a number of licensing offices located throughout the state.

B. The department will consider an application complete when the application fee and all the required information is submitted in the form required by the department. The schedule of fees for licenses is provided in 22 VAC 40-160, Fee Requirements for Processing Applications. If the department finds the application incomplete, the applicant will be notified in writing within 15 days of receipt of the incomplete application. If the applicant does not resubmit a complete application within 30 days from the notification, all materials except the nonrefundable fee will be returned to the applicant.

C. The applicant shall complete and submit the application to the department at least 60 days prior to a planned opening date to allow the department time to act on the application.

D. The applicant may withdraw a request for a license.

22 VAC 40-80-150. Approval of buildings and functional design features.

A valid certificate of occupancy is one prerequisite for licensure. When an application is for licensure of a building that has not previously been used for the type of license or use group being sought, or when renovations are made in the building, the department must approve functional design features of the building in accordance with applicable department regulations. The procedures are as follows:

1. Prior to beginning construction or renovation, the applicant or prospective applicant shall submit to the department floor plans that clearly indicate the use of space and other plans for compliance with all requirements for the building and physical environment contained in the applicable regulations.

(NOTE: Applicants and prospective applicants are urged to present their plans for compliance with departmental regulations to the department as early as possible and before entering into contracts in order to assure that the building can be preapproved as meeting the department's regulations. Architects, contractors, or building officials may not be thoroughly familiar with these functional design requirements, and costly errors can be avoided through early review by the department.)

2. The department will notify the applicant or prospective applicant within 10 working days of receipt if the plans to comply are incomplete, identifying the information still needed before the request can be considered complete.

3. When a complete plan is received, the department will issue within 20 days a Preliminary Approval Statement or a letter indicating disapproval of the plan and the reasons for disapproval.

(NOTE: A Preliminary Approval Statement does not imply that the department will approve the application for licensure since other factors will affect issuance decisions.)

22 VAC 40-80-150. Approval of buildings and functional design features.

4. All Preliminary Approval Statements are conditional upon there being no change in the proposal or the circumstances affecting them and upon approval of all required fire, health, or building officials.

5. The department will forward a copy of the Preliminary Approval Statement to the appropriate building official.

6. After construction or renovation, department staff will make an on-site inspection to evaluate compliance with the functional design requirements of the applicable regulations. Findings of this on-site inspection will be forwarded to the applicant and the local building official.

22 VAC 40-80-160. Investigation.

A. Upon receipt of the application the commissioner shall:

1. Cause an investigation to be made of the activities, services and the facilities of the applicant, and of his character and reputation;

2. If the applicant is an association, partnership, limited liability company, or corporation, cause an investigation of the character and reputation of its officers and agents; and

3. Upon receipt of the initial application, cause an investigation of the applicant's financial responsibility.

B. At the time of the initial application and annually thereafter, the applicant or licensee shall be responsible for obtaining inspection reports from appropriate fire and health agencies to determine compliance with applicable regulations.

EXCEPTION: This subsection does not apply to child placing agencies or family day systems.

1. All buildings shall be inspected and approved by the local building official when required. This approval shall be documented by a Certificate of Use and Occupancy indicating that the building is classified for its proposed licensed purpose.

2. At the time of the initial application and at least annually thereafter, the applicant or licensee shall obtain an inspection report from state or local fire authorities, as applicable, to determine compliance of the building or buildings with the Virginia Statewide Fire Prevention Code.

3. At the time of the initial application and at least annually thereafter, the applicant or licensee shall obtain an inspection report from state or local health authorities that shall include approval of general sanitation and, if applicable, water supply, sewage disposal systems, and food service operations for the building or buildings in which the facility is operated.

C. The department's representative will make an on-site inspection of the proposed facility or agency and an investigation of the proposed services, as well as an investigation of the character, reputation, and financial responsibility of the applicant. Compliance with all standards will be

22 VAC 40-80-160. Investigation.

determined by the Department of Social Services. The licensee is responsible for correcting any areas of noncompliance found during any on-site inspection.

NOTE: See 22 VAC 40-90, 22 VAC 40-190 or 22 VAC 15-50, as applicable.

D. The applicant or licensee shall at all times afford the department's representative reasonable opportunity to inspect all of the facility's or agency's buildings, books and records. Records that contain confidential proprietary information furnished to the department pursuant to this section shall be exempt from disclosure pursuant to subdivision 4 of § 2.2-3705.5 of the Code of Virginia.

At the time of the initial application, the financial records of an applicant shall not be subject to inspection if the applicant submits an operating budget and at least one credit reference.

E. The applicant or licensee shall also allow the department's representative to interview the facility's or agency's agents, employees, residents, participants, and any person under its custody, control, direction, or supervision. Interviews with residents, participants, and any person under the facility's or agency's custody, control, direction, or supervision shall be:

1. Authorized by the person to be interviewed or his legally authorized representative; and

2. Limited to discussion of issues related to the applicant's or licensee's compliance with applicable laws and regulations, including ascertaining if assessments and reassessments of residents' cognitive and physical needs are performed as required under regulations for licensure of the facility or agency.

F. After the on-site inspection the licensing representative will discuss the findings of the investigation with the administrator, licensee or designee. As applicable, the applicant shall submit an acceptable plan for correcting any areas of noncompliance following these discussions.

G. At any time during the investigation, an applicant or licensee may request an allowable variance to any standard that creates a special hardship. (See Part V (22 VAC 40-80-230 et seq.) of this chapter Allowable Variances.)

22 VAC 40-80-170. Notice to the applicant of issuance or denial of a license.

A. When the investigation is completed, the department will notify the applicant of its decision regarding the issuance of a license.

B. When the department intends to deny the license, the department will send a letter stating the reasons for this action and the applicant's right to appeal the decision. (See Part VIII (22 VAC 40-80-330 et seq.) of this chapter.)

22 VAC 40-80-180. Determination of continued compliance (renewal and monitoring inspections).

A. In order to determine continued compliance with standards during the effective dates of the license, the department's licensing representative will make announced and unannounced inspections of the facility or agency during the hours of its operation. The licensee is responsible for correcting any areas of noncompliance found during renewal or monitoring inspections.

B. All licensed child welfare agencies shall be inspected at least twice a year. At least one unannounced inspection of each licensed facility shall be made each year.

C. Adult day care centers issued a license for a period of six months shall be inspected at least two times during the six-month period, and at least one of those inspections shall be unannounced. Adult day care centers issued a license for a period of one year shall be inspected at least three times each year, and at least two of those inspections shall be unannounced. Adult day care centers issued a license for a period of two years shall be inspected at least two times each year, and at least one of those inspections shall be unannounced. Adult day care centers issued a license for a period of three years shall be inspected at least one time each year, and that inspection shall be unannounced.

D. Assisted living facilities issued a license for a period of six months shall be inspected at least two times during the six-month period, and at least one of those inspections shall be unannounced.

E. Assisted living facilities issued a license for a period of one, two, or three years shall be:

1. Inspected at least once each year, and that inspection shall be unannounced; and
2. Inspected as needed based on compliance with applicable laws and regulations.

F. The department's representative may also make such inspections of any homes or facilities that are approved by the licensee for the placement or care of children as one of the licensed services of the agency.

G. For any licensed assisted living facility, adult day care center, or child welfare agency, the department may conduct such other announced or unannounced inspections as are considered appropriate.

NOTE: When necessary to respond to excessive workloads or to give priority to higher risk situations, the department may use its discretion to increase or decrease the frequency of announced and unannounced inspections made to licensed facilities during the year.

22 VAC 40-80-190. Modification.

A. The licensee may request a modification of the terms of a license at any time during the period of the license. The request must be submitted in writing to the department's representative.

22 VAC 40-80-190. Modification.

The department will evaluate written information about any planned changes in operation that would affect either the terms of the license or the continuing eligibility for a license. A licensing representative may inspect the facility during the process of evaluating a proposed modification.

Examples of such changes are: changes in the number of children or adults to be served, staff responsibilities, availability and use of the physical plant, and changes in program focus or needs of the population to be served.

B. If a modification can be granted under the standards, the department will issue a modified license reflecting the changes. In the event that a new application is needed or the modification cannot be granted, the licensee will be advised by letter.

22 VAC 40-80-200. Early compliance.

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

1. The facility or agency complies with all standards listed on the face of the provisional or conditional license prior to the mid-point of the licensure period or within 90 days of the expiration date of the provisional or conditional license, whichever comes first, and the facility or agency is in substantial compliance with all other standards.

2. Compliance has been verified by an on-site observation by the department's licensing representative or, when applicable, by written evidence provided by the licensee.

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

B. The licensee shall make a written request to the licensing representative for replacement of a provisional or conditional license with a regular license.

C. When the request is approved by the department, the effective date of the new regular license will be the same as the beginning date of the voided license. When the request is not approved, the reasons for this action will be confirmed to the licensee in writing.

D. Early compliance shall not be considered once the facility or agency has filed a renewal application.

22 VAC 40-80-210. Renewal process.

A. The department will send an application for renewal of the license to the licensee prior to the expiration date of the current license. The licensee shall submit the completed application form, including all attachments and the licensing application fee, in a timely manner to assure adequate time for processing by the department. In order for the application to be considered complete, the licensee must have paid any outstanding civil penalty assessed in a case decision.

22 VAC 40-80-210. Renewal process.

B. The department will not process a renewal application that is not complete or when the current license is being denied or revoked in accordance with the provisions of the Administrative Process Act.

C. Should a current license expire before a new license is issued, the current license shall remain in effect provided that a complete application was filed prior to expiration of the current license and a decision for licensure is pending.

D. The department will follow the procedure for investigation and notice to the applicant previously outlined in 22 VAC 40-80-160, 22 VAC 40-80-170, and 22 VAC 40-80-180.

PART V.
ALLOWABLE VARIANCES.

22 VAC 40-80-220. *(*Repealed.)

22 VAC 40-80-230. Conditions for initiating a request.

A licensee or applicant may request an allowable variance when he believes that the existing standard or requirement poses a substantial financial or programmatic hardship and when he believes that either an alternative method of compliance with the intent of the standard that is causing the hardship, or the actual suspension of all or part of that standard, would neither endanger the safety or well-being of persons in care nor create a violation of statutes or of the requirements of another regulatory agency.

22 VAC 40-80-240. Process.

A. The licensee or applicant shall make a written request for consideration of an allowable variance. The department's licensing representative may provide consultation to the applicant or licensee in the development of the written request and throughout the allowable variance process.

1. The licensee or applicant shall describe the special hardship or hardships to the existing program or to a planned innovative or pilot program that will be caused by the enforcement of the requirement or requirements.

2. The licensee or applicant shall propose alternatives to meet the purpose of the requirement that will ensure the protection and well-being of persons in care.

3. The licensee or applicant shall obtain, when requested by the department, the opinions of professionals in the field or documented research, or both, that the proposed activities, facilities, or equipment are not injurious to persons in care.

4. The department can authorize allowable variances only to its own licensing standards, not to regulations of another agency or to any requirement in federal, state, or local laws.

22 VAC 40-80-240. Process.

B. The department's licensing representative will notify the petitioning applicant or licensee of the department's decision.

C. Approval.

1. The department may attach conditions to the granting of the allowable variance in order to protect persons in care.

2. Allowable variances are conditional upon there being no change in the circumstances that were the basis for the approval. Any allowable variance may be rescinded or modified if needs or conditions change; additional information becomes known that alters the basis for the original decision; the applicant or licensee fails to meet any conditions attached to the allowable variance; or results of the allowable variance jeopardize the safety, comfort, or well-being of persons in care.

3. Allowable variances expire automatically when there is a change in the facility's location or a change in the sponsorship of the facility or agency.

EXCEPTION: Allowable variances issued to private child placing agencies and family day systems are transferable when agencies change location.

4. The department's licensing representative will review each allowable variance at least annually. At minimum, this review shall address the impact of the allowable variance on persons in care, adherence to any conditions attached, and the continuing need for the allowable variance.

D. Denial.

1. When the decision is to deny a request for an allowable variance, the reason or reasons will be provided in writing to the applicant or licensee.

2. When a request for an allowable variance is denied, it may be reconsidered if the applicant or licensee submits another written request and provides new or additional supporting information within 30 days of denial.

NOTE: After the 30-day period, the applicant or licensee may submit a new allowable variance request describing changed conditions.

3. The department will reconsider the new request and the additional information and will notify the applicant or licensee of the decision within 30 days of receipt of the second request. This decision will be considered final and is not appealable.

E. When an allowable variance is denied, expires, or is rescinded, routine enforcement of the standard or portion of the standard shall be resumed.

F. The applicant or licensee may at any time withdraw a request for an allowable variance.

PART VI.

PROBLEM SOLVING CONFERENCES.

22 VAC 40-80-250. Initiating a request for a problem solving conference.

When an applicant or licensee has concerns about licensing procedures, interpretation of standards, or the actions of licensing personnel that cannot be resolved satisfactorily in discussion with the assigned licensing representative, the problem solving steps outlined below are available.

Licensing staff may also initiate a request for problem solving conferences with applicants or licensees when the need arises.

22 VAC 40-80-260. First step review.

A. The applicant or licensee may request either a desk review by, or a meeting with, the assigned licensing representative's immediate supervisor.

B. If the request stems from a desire to contest the findings or conclusions of an inspection, the following procedures shall apply:

1. The applicant or licensee shall make the request within 15 days of receiving the compliance plan.

2. The request shall specify the contested finding or conclusion and shall specify whether a desk review or conference is being requested.

3. The request shall include the applicant's or licensee's reasons or other evidence supporting the request for a review or a conference.

C. The first step informal desk review or conference will be held at the supervisor's office unless the supervisor designates a different location. The following procedures shall apply:

1. The supervisor will report the findings of a desk review in writing within 10 days of receiving the request and supporting materials or will hold the requested conference within 30 days of receipt of such request and materials.

2. When the request is for a conference, the supervisor will, within 10 days following the conference, confirm to the applicant or licensee in writing the results of the conference and any subsequent decisions made by the supervisor.

22 VAC 40-80-270. Second step review.

A. If after the first step review, the applicant or licensee believes that the laws, regulations, or departmental policies have been applied or interpreted in a manner that was unreasonable, arbitrary or capricious, he may request a second step review by program supervisory personnel as assigned by the Director of Licensing Programs according to the provisions of this section.

22 VAC 40-80-270. Second step review.

B. A second step review shall not be requested to challenge the content of an established law, regulation, or policy. However, the application of a law, regulation, or policy may be challenged.

C. When a second step review is requested, the request must be in writing.

D. The second step review request shall:

1. Be made within 15 days of the date of the first step response;

2. Specify the reason for requesting the second step informal review and include such information, explanation, or additional materials as necessary to support the applicant's or licensee's belief that the decision reached at the first step was unreasonable, arbitrary, or capricious; and

3. Include a copy of relevant materials and correspondence developed at the first step of the informal appeal process.

E. Within 30 days of receipt of this request, the director's office will respond in writing with the results of the desk review or schedule a conference.

22 VAC 40-80-280. Enforcement of disputed regulation.

Nothing in this part shall prohibit the department from exercising its responsibility and authority to enforce the disputed regulation during the problem solving process, including proceeding directly to imposition of administrative sanctions, or recommending petitions for injunction when, in the judgement of the Director, Division of Licensing Programs, there is sufficient risk to persons in care to do so whether or not the steps available in the problem solving process have been exhausted.

PART VII.
COMPLAINT INVESTIGATION.

22 VAC 40-80-290. Receipt of complaints.

Complaints may be received in written or oral form and may be anonymous. The department maintains a toll-free telephone line to receive complaints on all licensed facilities.

22 VAC 40-80-300. Investigation of complaints.

The department has the responsibility to investigate any complaints regarding alleged violations of the standards or statutes and complaints of the abuse and neglect of persons in care.

NOTE: In an investigation involving suspected adult or child abuse, neglect, or exploitation in a licensed facility, the investigation will be conducted jointly with the local department of social services whenever possible in accordance with departmental policy.

22 VAC 40-80-310. Notification of findings.

When the investigation is completed, the licensee will be notified of the findings of the investigation. Any necessary corrective action will be identified.

22 VAC 40-80-320. Licensee's responsibility.

The licensee is responsible for correcting any areas of noncompliance found during a complaint investigation.

PART VIII.
SANCTIONS.

22 VAC 40-80-330. Violation of standards or statutes.

A. The Commissioner of the Department of Social Services may impose such sanctions or take such actions as are appropriate for violation of any of the standards or statutes or for abuse or neglect of persons in care.

B. The following reasons may be considered by the department for the imposition of administrative sanctions:

1. Failure to demonstrate or maintain compliance with applicable standards or for violations of the provisions of the Code of Virginia;

2. Permitting, aiding or abetting the commission of any illegal act in the licensed facility or agency;

3. Engaging in conduct or practices that are in violation of statutes and standards relating to abuse, neglect, or exploitation of children or adults; or

4. Deviating significantly from the program or services for which a license was issued without obtaining prior written approval from the department, or failure to correct such deviations within a specified time.

22 VAC 40-80-340. Administrative sanctions.

The commissioner may impose administrative sanctions or initiate court proceedings, severally or jointly, when appropriate in order to ensure prompt correction of violations involving noncompliance with state law or regulation in assisted living facilities, adult day care centers, and child welfare agencies as discovered through any inspection or investigation conducted by the Department of Social Services, the Virginia Department of Health, the Virginia Department of Behavioral Health and Developmental Services, or by state and local building or fire prevention officials. These administrative sanctions include:

22 VAC 40-80-340. Administrative sanctions.

1. Petitioning the court to appoint a receiver for any assisted living facility or adult day care center;

2. Revoking or denying renewal of a license for any assisted living facility or adult day care center that fails to comply with the limitations and standards set forth in its license for violation that adversely affects, or is an imminent and substantial threat to, the health, safety, or welfare of residents, or for permitting, aiding, or abetting the commission of any illegal act in an adult care facility;

3. Revoking or denying renewal of a license for any child welfare agency that fails to comply with the limitations and standards set forth in its license;

4. Requiring an assisted living facility to contract with an individual licensed by the Board of Long-Term Care Administrators to administer, manage, or operate the facility on an interim basis if the commissioner receives information from any source indicating imminent and substantial risk of harm to residents. This action shall be an attempt to bring the facility into compliance with all relevant requirements of law, regulation, or any plan of correction approved by the commissioner. The contract shall be negotiated in accordance with the provisions of § 63.2-1709 of the Code of Virginia;

5. Issuing a summary order of suspension of the license to operate an assisted living facility pursuant to proceedings set forth in § 63.2-1709 C of the Code of Virginia in conjunction with any proceedings for revocation, denial, or other action when conditions or practices exist that pose an imminent and substantial threat to the health, safety, and welfare of residents; and

6. Imposing administrative sanctions through the issuance of a special order as provided in § 63.2-1709.2 of the Code of Virginia. These include:

a. Placing a licensee on probation upon finding that the licensee is substantially out of compliance with the terms of the license and that the health and safety of residents, participants, or children are at risk;

b. Reducing the licensed capacity or prohibiting new admissions when the commissioner has determined that the licensee cannot make necessary corrections to achieve compliance with the regulations except by a temporary restriction of its scope of service;

c. Mandating training for the licensee or licensee's employees, with any costs to be borne by the licensee, when the commissioner has determined that the lack of such training has led directly to violations of regulations;

d. Assessing civil penalties of not more than $500 per inspection upon finding that the licensee of an adult day care center or child welfare agency is substantially out of compliance with the terms of its license and the health and safety of residents, participants, or children are at risk;

e. Assessing a civil penalty for each day an assisted living facility is or was out of compliance with the terms of its license and the health, safety, and welfare of residents are at risk. The aggregate amount of such civil penalties shall not exceed $10,000 in any 12-month period. Criteria for imposition of civil penalties and amounts, expressed in ranges, are developed by the

22 VAC 40-80-340. Administrative sanctions.

board, and are to be based upon the severity, pervasiveness, duration, and degree of risk to the health, safety, or welfare of residents. Such civil penalties shall be applied by the commissioner in a consistent manner;

f. Requiring licensees to contact parents, guardians, or other responsible persons in writing regarding health and safety violations; and

g. Preventing licensees who are substantially out of compliance with the licensure terms or in violation of the regulations from receiving public funds.

22 VAC 40-80-345. Summary suspension procedures.

A. In conjunction with any proceeding for revocation, denial, or other action when conditions or practices exist that pose an imminent and substantial threat to the health, safety and welfare of the residents, the commissioner may issue a summary suspension of the license to operate an assisted living facility or of certain authority of the licensee to provide certain services or perform certain functions.

B. Upon determining that summary suspension is appropriate, the hearing coordinator will select a hearing officer from a list prepared by the Executive Secretary of the Supreme Court of Virginia and will schedule the time, date, and location of the hearing to determine whether the suspension is appropriate as required by § 63.2-1709 C.

C. Simultaneously with the issuance of a notice of revocation, denial or other action, the commissioner will issue to the licensee a notice of summary order of suspension setting forth the following:

1. The procedures for the summary order of suspension;

2. The hearing and appeal rights as set forth below;

3. Facts and evidence that formed the basis for which the summary order of suspension is sought; and

4. The time, date, and location of the hearing.

D. Notice of the summary order of suspension will be served on the licensee or his designee by personal service or by certified mail, return receipt requested, to the address of record of the licensee as soon as practicable after issuance thereof.

E. The hearing shall take place in the locality where the assisted living facility operates unless the licensee or his designee expressly waives this venue provision.

1. The hearing shall be held no later than 15 business days after service of notice on the licensee - The hearing officer may grant a continuance upon written request and for good cause shown. In no event shall any continuance exceed 10 business days after the initial hearing date.

2. The hearing coordinator will forward a copy of the relevant licensing standards to the hearing officer.

22 VAC 40-80-345. Summary suspension procedures.

3. The hearing will be conducted in accordance with the procedures set forth in 22 VAC 40-80-480 through 22 VAC 40-80-500.

4. The department may be represented either by counsel or by agency staff authorized by § 2.2-509 of the Code of Virginia.

F. Within 10 days of the conclusion of the hearing, the hearing officer shall provide to the commissioner written findings and conclusions, together with a recommendation as to whether the license should be summarily suspended. The department shall have the burden of proof in any summary suspension hearing. The decision of the hearing officer shall be based on the preponderance of the evidence presented by the record and relevant to the basic law under which the agency is operating.

G. Within 10 days of receipt of the hearing officer's report and recommendation, the commissioner shall either (i) adopt the hearing officer's recommendation; or (ii) reject the hearing officer's recommendation if it would be an error of law or department policy to accept it.

H. The commissioner shall issue and shall serve on the licensee or his designee by personal service or by certified mail, return receipt requested either:

1. A final order of summary suspension including (i) a detailed statement of the basis for rejecting the hearing officer's recommendation, if applicable, and (ii) notice that the licensee may appeal the commissioner's decision to the appropriate circuit court no later than 10 days following service of the order; or

2. A final order that summary suspension is not warranted by the facts and circumstances presented.

I. A copy of any final order of suspension shall be prominently displayed at each public entrance of the facility as required in 22 VAC 40-80-120.

J. The signed, original case decision shall remain in the custody of the agency as a public record, subject to the agency's records retention policy.

22 VAC 40-80-350. (Repealed.)

22 VAC 40-80-360. (Repealed.)

22 VAC 40-80-370. Appeal process.

A. The applicant or licensee will receive a notice of the department's intent to impose an administrative sanction. This notice will describe the sanction or sanctions and the reasons for the imposition. Service of the notice of adverse action is achieved by certified mailing of the notice to the applicant or licensee, unless service is made by other means and acknowledged by the applicant or licensee. If the applicant or licensee wishes to appeal the notice of adverse action, he shall have 15 days after receipt of the notice to note his appeal.

22 VAC 40-80-370. Appeal process.

B. Upon receipt of the notice to impose an administrative sanction, the applicant or licensee has the right to appeal the decision in accordance with the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). The procedures for filing an appeal will be outlined in the notice. The applicant or licensee shall submit any appeal of imposition of an administrative sanction in writing within 15 days of receipt of the notice.

C. If the applicant or licensee fails to appeal the notice of adverse action within 15 days of receipt of the notice, the final order will be entered. The decision will take effect 30 days after receipt of the notice.

D. The appeal process available is governed by law. Where the sanction is imposed by means of a special order as provided in § 63.2-1709 of the Code of Virginia, the case decision is issued by the commissioner following findings and conclusions resulting from the informal conference. **22**

Other sanctions include a provision for an administrative hearing, which is described in § 2.2-4020 of the Code of Virginia, prior to the issuance of the case decision.

For ease of reference, the process steps are displayed in the following chart:

List of Sanctions with Appeal Provisions

	Informal Conference	Administrative Hearing	Circuit Court Review of Case Decision
ADMINISTRATIVE SANCTION			
Place licensee on probation	X		X
Reduce licensed capacity	X		X
Restrict admissions	X		X
Mandate training for licensee or staff	X		X
Assess civil penalty	X		X
Require written contact with responsible persons	X		X
Prevent receipt of public funds	X		X
Deny application for new or renewal license	X	X	X
Revoke license	X	X	X
File petition for appointment of a receiver			X

22 VAC 40-80-375. Failure to pay civil penalty.

A. If an outstanding civil penalty assessed after a case decision is not paid as required, the commissioner shall have the authority to:

1. Assess a late fee if the civil penalty payment is 60 days overdue, provided the total of the civil penalty and late fee do not exceed the penalty set forth in § 63.2-1709 of the Code of Virginia;

2. Reduce the duration of the licensure period if the civil penalty payment is 60 days overdue; and

3. Deny renewal or revoke the license if the civil penalty payment is 90 days overdue.

B. The department will also institute legal collection procedures to collect unpaid penalties.

C. If a licensee appeals the imposition of a civil penalty, the provisions of this section shall not apply until the appeal is complete.

22 VAC 40-80-380. (Repealed.)

PART IX.
HEARINGS PROCEDURES.

22 VAC 40-80-390. Scope.

The appeal process as set forth in this part shall apply whenever the Department of Social Services takes adverse action on a license for an assisted living facility, adult day care center or child welfare agency. Therefore, whenever the department either revokes or refuses to issue or renew a license or imposes any other sanction for an assisted living facility, adult day care center, or child welfare agency, the procedures specified in this part to produce a case decision shall be initiated.

22 VAC 40-80-400. Statutory basis for appeal process.

The Department of Social Services is mandated by statute to enforce the standards adopted by the State Board of Social Services or the Child Day Care Council pursuant to § 63.2-1734 of the Code of Virginia, regarding facilities required to be licensed under Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia. As part of this enforcement duty, §§ 63.2-1709 D and 63.2-1710 of the Code of Virginia require that the procedures under the Administrative Process Act (§ 2.2-4000 et seq., of the Code of Virginia) shall apply whenever the department takes adverse action.

22 VAC 40-80-410. Duties of the hearing coordinator.

The hearing coordinator is the person designated by the Department of Social Services to perform certain administrative functions involved in setting up and carrying out the appeal process. The hearing coordinator's duties include, but are not limited to, the following:

1. Making a request to the Supreme Court for a hearing officer upon timely request for a formal administrative hearing.

2. Scheduling the date, time and location for the hearing.

3. Ensuring that a court reporter has been hired to record the hearing.

4. Preparing appropriate material for distribution to all participants. This includes the appointment of the hearing officer, preparing the notice of the hearing, and preparing the forms for the hearing officer to subpoena witnesses. It also includes submission of documents in the record, appropriate standards and any other pertinent information to all participants.

5. Monitoring the status of proceedings and the observance of timeframes throughout the appeal process.

22 VAC 40-80-420. Informal conference.

A. Section 2.2-4019 of the Code of Virginia provides the aggrieved party the right to request an informal conference. In the case of administrative sanctions that include a provision for an administrative hearing, the named party and the agency may consent to waive such a conference to go directly to the hearing.

B. The informal conference is a fact-finding process. The purpose of an informal conference is to give the aggrieved party an opportunity to present information or evidence he believes indicates that the intended sanction was based on factual error or on misinterpretation of facts, or to determine if the dispute may be resolved by consent. The department will decide if the conference will be open to the public.

C. If the aggrieved party presents exhibits or other documents that contain facts previously unknown to the conference chair, the conference chair may determine that the new information requires verification. Upon making such a determination, the conference chair shall notify the aggrieved party that the information needs to be verified. The report on the informal conference shall be held open for 14 days to allow for the verification of the exhibits or other documents. The conference chair has the option to require the aggrieved party to provide such verification.

D. If the aggrieved party believes the matter can be resolved by consent, a written proposal must be submitted to the department-appointed chair of the conference no later than five work days prior to the conference unless different arrangements are agreed upon with the chair. In no case may a proposed consent agreement be submitted later than the day of the conference.

22 VAC 40-80-420. Informal conference.

E. Following the informal conference, the chair will prepare a written report and recommended decision to the department that will include statutory authority or legal basis for the remaining steps in the administrative appeals process; a summary of the conference; the previous disposition as set out in the notice of adverse action, i.e., those issues on appeal; the findings of fact; the description of evidence; and the recommended decision or options. Within 90 days from the date of the informal conference, or from a later date agreed to by the aggrieved party and the agency, the department will issue its official decision in writing to the aggrieved party, including information concerning the named party's right to continue his appeal. The written report prepared by the chair will be attached to the letter and will be incorporated by reference.

F. When an informal conference is conducted following notification of an intent to issue a special order, the issuance of the special order shall be considered a case decision as defined in § 2.2-4001 of the Code of Virginia. Service of the decision following the informal conference shall be achieved by mailing the decision to the licensee, unless service is made by other means and acknowledged in writing by the licensee. If the licensee wishes to appeal the decision, he shall have 30 days after service of the notice to make such a request. If service is accomplished by mail, three days shall be added to the 30-day period. Any appeal following an informal conference related to special orders shall be made to the circuit court. All other appeals shall follow procedures set forth in the Administrative Process Act.

22 VAC 40-80-430. Consent agreements.

A. A consent agreement may be proposed by a licensee in lieu of adverse action. The proposed consent agreement shall be submitted no later than five work days prior to the conference unless different arrangements are agreed upon with the chair. In no case may a proposed consent agreement be submitted later than the day of the informal conference.

B. An acceptable consent agreement shall contain the following specific elements:

1. Dates of key actions, such as letter of sanction, timely appeal, the informal conference (if already held), and the names of the parties;

2. The assertion that all violations detailed in the letter of denial or revocation have been corrected or will be corrected by a time specified in the proposed agreement;

3. A description in detail of the case-specific systemic solution proposed that addresses the causes of the past history of violations, including the methods the licensee has in place to prevent violations and to monitor results;

4. A stipulation by the licensee to the validity of the violations enumerated in the specified correspondence and waiver of right to hearing under the Administrative Process Act (§ 2.2-4000 et.seq. of the Code of Virginia) solely with respect to those violations.

5. The duration of the consent agreement, including the information that the period begins when the division director signs;

22 VAC 40-80-430. Consent agreements.

6. A statement that when the division director signs the agreement, signifying final acceptance, the division director is also agreeing to rescind the outstanding adverse action and that the licensee is agreeing to withdraw all appeals to that action; and

7. A statement outlining conditions for termination of the final agreement for cause and the nature of the licensee's appeal rights in that event.

C. Throughout the duration of the consent agreement, licensing staff will make frequent inspections to determine whether the terms of the consent agreement are being implemented and whether its intended results are being achieved.

22 VAC 40-80-440. Acknowledgment of request for an administrative hearing.

Upon receipt of the written request from the aggrieved party for an administrative hearing pursuant to §§ 2.2-4020 and 2.2-4021 of the Code of Virginia, a hearing will be scheduled in the locality where the aggrieved party operates unless he expressly waives this venue provision (§ 8.01-261 of the Code of Virginia). The hearing coordinator will request appointment of a hearing officer from the list of qualified attorneys kept by the Supreme Court of Virginia. After a hearing officer is appointed and duly designated by the commissioner, a notice of hearing will be sent to the aggrieved party with a copy to the agency representative for the case. The department may be represented either by counsel or by agency staff authorized by § 2.2-509 of the Code of Virginia. After the hearing officer is appointed, the hearing coordinator will forward a copy of the relevant licensing standards and appeal procedures to the hearing officer. The hearing coordinator will not be directly involved in any investigation or litigation function in connection with the case.

22 VAC 40-80-450. Continuances.

A request for continuance shall be made to the hearing officer at least five days prior to the time designated for the hearing, except in cases of emergency. No continuance of an administrative hearing shall be granted except at the discretion of the hearing officer, for good cause shown and with due consideration of the potential risks to residents, participants or children in the facility from extended exposure to conditions detailed in the agency's revocation or denial letter. All parties involved in a hearing shall avoid delay caused by unnecessary postponements or continuances so that a decision can be made expeditiously.

22 VAC 40-80-460. Recesses and postponements.

The hearing officer has authority to grant recesses and postponements where necessary for the convenience and comfort of the parties, witnesses, and the court reporter.

22 VAC 40-80-470. Prehearing conferences.

The hearing officer has the statutory power to hold conferences for the settlement or simplification of issues by the parties. The hearing officer may hold a prehearing conference for the stipulation of certain facts or for any other purposes that might be accomplished by such a preliminary process. It may be useful for the hearing officer to direct the parties to submit to him and exchange in advance of the conference: proposed statements of issues, proposed stipulations, requests for information, statements of position, proposed procedural data, and the exchange of exhibits. The notice for such a prehearing conference must be established by the hearing officer as to the date, time and place for such conference. It will not be necessary to provide a verbatim reporting of the prehearing conference. A report summarizing the results of this conference must be prepared, consisting of a list of appearances, agreements reached, the hearing officer's rulings, and other matters decided. A copy of this report shall be provided to all persons who entered appearances, which shall become part of the agency record.

22 VAC 40-80-480. Conduct of hearing.

A. To initiate the proceedings, the hearing officer will call the hearing to order and make a brief statement giving the name of the proceeding, its case number, the names of all persons present and involved in the proceeding, and other appropriate introductory remarks such as the general rules of decorum and conduct. The parties shall be entitled to be accompanied by and represented by counsel. Before the formal presentation of evidence begins, the parties should be given an opportunity to bring up any preliminary matters or motions. If a hearing officer has questions or issues regarding the procedures in the hearing or his role in conducting the hearing, these questions shall be directed to the hearing coordinator. The parties at administrative hearings have the right to conduct cross-examination to obtain full and fair disclosure of the facts. The hearing officer will decide if the hearing will be open to the public.

B. The following shall be the order of proceedings at all hearings, subject to modification by the hearing officer before such hearing is commenced, for good cause:

1. Presentation, argument, and disposition of all preliminary matters and motions.

2. Presentation of opening statements. Such statements are not subject to cross-examination or an opportunity to present argumentative testimony.

3. Agency representative presents the case, calling witnesses in such order as is seen fit. Each witness should be subject to direct, cross, and redirect examination. Both the counsel for the adverse party and the hearing officer may direct questions to the witness.

4. The aggrieved party should present its case, using the same guidelines as established in subdivision 3 of this subsection.

5. Rebuttal evidence by the agency representative should be permitted.

22 VAC 40-80-480. Conduct of hearing.

6. At the close of the presentation of evidence, the parties may exercise their rights pursuant to §§ 2.2-4020 and 2.2-4021 of the Code of Virginia. The parties, on request, shall be given the opportunity for closing argument and may submit for the record, in writing, proposed findings and conclusions.

22 VAC 40-80-490. Rules of evidence.

A. The burden of proof shall be upon the proponent. Therefore, if this is a situation where the department has revoked a license or imposed another administrative sanction subject to appeal by administrative hearing, the department is the proponent and has the burden of proof.

However, in cases where the department has refused to grant an initial or renewal license, the proponent is the applicant and has the burden of proving that it should be granted a license.

B. The formal rules of evidence shall not apply. The hearing officer shall receive any probative evidence, and should strike, on objection or own motion, evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive, as required by §§ 2.2-4020 and 2.2-4021 of the Code of Virginia. If a question or answer at hearing is irrelevant, improper, or excludable, the hearing officer may strike it without waiting for an objection.

C. A party to the hearing may conduct examinations or cross examinations without rigid adherence to formal rules of evidence, provided the examination or cross examination does not become abusive or constitute harassment of the witness, and the examination can be shown to be necessary to result in full and fair disclosure of the facts bearing upon matters in issue. The hearing officer may examine all or any of the witnesses at the hearing.

22 VAC 40-80-500. The record at hearing.

All testimony in the administrative hearing must be recorded either stenographically or by mechanical means. All documents or other evidence received are also part of the record and must be maintained. In addition, a record must be maintained of all evidence offered but excluded. See Rule 2A: 3 (c) of the Rules of the Supreme Court of Virginia. As a matter of practice, it would be appropriate for the hearing officer to conditionally receive evidence and thereafter, if it is excludable, to avoid considering it in making the decision. In this way, if it is determined on judicial review that the hearing officer erroneously decided that the evidence was excludable, the case can be remanded for reconsideration of the evidence submitted but rejected as exhibits.

22 VAC 40-80-510. Recommendations of the hearing officer.

A. By statute, the hearing officer shall recommend findings of fact and a decision upon the preponderance of the evidence presented by the record and relevant to the basic law under which the agency is operating (§§ 2.2-4020 and 2.2-4021 of the Code of Virginia.). The recommended

22 VAC 40-80-510. Recommendations of the hearing officer.

decision of the hearing officer shall be made upon consideration and review of the record as a whole or such portions of the record as may be cited by any party to the proceedings. The findings of fact shall be based exclusively on admissible evidence or matters that are officially noticed. The recommendation shall be in writing and shall include specific findings on all the major facts in issue.

B. The hearing officer shall provide a recommendation within 90 days from the date the agency record is closed (that is, the date of the final hearing or the date by which the hearing officer prescribes that all evidence shall be submitted) or from a later date if agreed to by the aggrieved party and the agency (§ 2.2-4024 of the Code of Virginia). If the hearing officer does not render a recommended decision within 90 days, the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no recommended decision is made by the hearing officer within 30 days from receipt of the notice, then the Executive Secretary of the Supreme Court, pursuant to § 2.2-4024 of the Code of Virginia, shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause can be shown for the delay.

C. The available remedies offered by the hearing officer shall be to (i) uphold the decision of the department; (ii) recommend reversing the decision; or (iii) recommend issuance of a different sanction as provided in § 63.2-1709.2 B of the Code of Virginia.

D. The findings, conclusions and recommended decision shall be provided to the parties and thereafter either party has 10 days to submit any exceptions in writing to the hearing coordinator for review by the commissioner regarding the recommended decision of the hearing officer. The hearing officer may incorporate the procedure for making exceptions to his recommended decision within the text of his report and recommendation.

E. The hearing officer shall forward the agency record, including the recommendation; all documents submitted by the parties; a listing of all exhibits presented, received and rejected; and the transcript of the hearing to the hearing coordinator.

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A. The commissioner, after review of the findings of fact and recommended decision of the hearing officer, shall make a case decision and issue an order in the case within 30 days from the date that the commissioner receives the hearing officer's recommendation (§§ 2.2-4020 and 2.2-4021 of the Code of Virginia). The commissioner shall provide notification to the aggrieved party of the decision within 30 days of receipt of the hearing officer's recommendation. If the commissioner does not render a decision within 30 days, the aggrieved party to the case decision may provide a written notice to the commissioner that a decision is due. If no decision is made within 30 days from the commissioner's receipt of the notice, the decision is deemed to be in favor of the aggrieved party. Service of the notice of the commissioner's decision is achieved by mailing the notice of the case decision to the licensee, unless service is made by other means and acknowledged in writing by the licensee. If service is accomplished by mail, three days shall be

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added to the 30-day period. If the licensee wishes to appeal the decision, he shall have 30 days after service of the notice of case decision to make such request.

B. The signed original case decision shall remain in the custody of the agency as a public record, subject to the agency's records retention policy. The signed originals or facsimiles thereof, together with the full record or file of the case, shall be made available for public inspection or copying except as the agency may, in its discretion under § 2.2-4023 of the Code of Virginia, decide to withhold part or all of the records.

C. The provisions for appealing the commissioner's order in accordance with the Administrative Process Act are found at §§ 2.2-4025 through 2.2-4030 of the Code of Virginia.22 VAC 40-80-520. Case decision.

D. When issuance or renewal of a license as an adult care facility has been refused by the commissioner, the applicant shall not thereafter for a period of one year apply again for such license. When issuance or renewal of a license for a child welfare agency has been refused by the commissioner, the applicant shall not thereafter for a period of six months apply again for such license.

EXCEPTION: An adult care facility or a child welfare agency may apply again for such license before the end of the applicable specified period if the commissioner in his sole discretion believes that there has been such a change in the conditions on account of which he refused the prior application as to justify considering the new application.

SCHEDULE OF FEES
22 VAC 40-160

These fees are adopted under the sole authority of the State Board of Social Services (Section 63.2-1700 of the Code of Virginia). The fee schedule was revised under the authority of the Board, effective July 1, 1992.

The regulation, entitled *Fee Requirements for Processing Applications*, follows:

By Act of the General Assembly and effective February 1, 1984, the Department of Social Services is authorized to charge fees for processing applications for licenses (Section 63.2-1700 of the Code of Virginia).

Such fees are to be used for the development and delivery of training for operators and staff of facilities or agencies for adults or children subject to licensure solely by the Department of Social Services.

Each license or renewal of it may be issued for a period of up to three successive years. The required fee for each licensed facility or agency will be based upon its licensed capacity and the length of the total licensure period. However, the fee will be collected annually and licensees will be billed each year by the Department of Social Services for the appropriate portion of the fee. (Example: A facility with a capacity of 55 participants is issued a license for a period of 24 months. The fee for that facility for the two-year period would be $210. The facility will be charged $105 at the beginning of the licensure period and billed again for $105 at the beginning of the second year of licensure.) No fee will be charged directly following the issuance of a conditional license.

Some programs such as, but not limited to, parks and recreation programs and summer camps, which operate for less than four months in a 12-month period, will pay a reduced fee as indicated in the fee schedule below (short-term programs).

Applicants shall use the following schedule of fees to determine the correct fee to pay for processing all applications.

Schedule of Fees

Capacity	1 year	2 years	3 years
1-12	$14	$28	$42
13-25	$35	$70	$105
26-50	$70	$140	$210
51-75	$105	$210	$315
76-200	$140	$280	$420
201 & up	$200	$400	$600

Short Term Programs

Capacity	1 year	2 years	3 years
1-50	$25	$50	$75
51 & up	$50	$100	$150

Flat Fees

Family Day Care Systems	$70	$140	$210
Child Placing Agencies	$70	$140	$210

The fee shall be paid by personal check, money order, or certified check, made payable to "Treasurer of Virginia."

A fee that is incorrect in amount or is made payable other than to the Treasurer of Virginia will be returned to the applicant. Otherwise, no fee will be returned or refunded for any reason.

Failure to submit the appropriate fee within the time frame specified by the Department of Social Services may result in negative action against a facility's or agency's license.

A $15 fee will be charged for checks which must be returned to the applicant because of insufficient funds.