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| **Virginia Board of Education Agenda Item** | **Seal of the Commonwealth of Virginia** |

# Agenda Item: F

## Date: November 18, 2021

### Title: Final Review of the Notice of Intended Regulatory Action (NOIRA) to the *Background Checks for Child Day Programs and Family Day Systems* Regulations (8VAC20-770)

#### Presenter: Ms. Jenna Conway, Deputy Superintendent, Division of Early Childhood Care and Education

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## Purpose of Presentation:

Action required by Board of Education regulation.

**Executive Summary:**   
Chapter [860](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0860) and [861](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0861) of the Acts of Assembly (2020) transferred oversight of child care programs and regulations to the Virginia Board of Education (Board). Initial actions of the Board to adopt, with necessary amendments, this regulation were exempt from Article 2 of the Administrative Process Act (§ 2.2-4006 et seq. of the Code of Virginia). Additional amendments to the regulation are necessary to enable implementation of the programs in accordance with the Act and to incorporate substantive policy changes to align with the *Code of Virginia* and revised program policy and procedures.

The chapter, *Background Checks for Child Day Programs and Family Day Systems* (8VAC20-770), describes background check requirements and procedures to implement and provide standards for ensuring that persons required to have background checks have not been convicted of an offense that prohibits licensure, registration, approval, or employment.

This regulatory action will provide a comprehensive review and update of the chapterto make it consistent with federal laws and the *Code* and to make any other changes the agency deems necessary after comments and review. Input will be received by the Early Childhood Advisory Committee.. Chapter [860](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0860) and [861](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0861) of the Acts of Assembly (2020) established the Early Childhood Advisory Committee to advise the Board on programs, systems, and regulations. This regulatory action provides an opportunity for Committee members to review and make recommendations which will inform the comprehensive review.

The request for the Board to approve the Notice for Intended Regulatory Action (NOIRA) on the *Background Checks for Child Day Programs and Family Day Systems* (8VAC20-770) regulation is time sensitive as the child care sector is currently experiencing a staffing crisis. Across the Commonwealth, child care leaders report being understaffed and have difficulty hiring new staff.

This item supports Priority 1 of the Board’s Comprehensive Plan to provide high-quality learning environments for all students.

## Action Requested: Final review: Action requested at this meeting.

## Superintendent’s Recommendation: The Superintendent of Public Instruction recommends that the Board of Education approve the NOIRA for *Background Checks for Child Day Programs and Family Day Systems* (8VAC20-770).

## Rationale for Action:

## Board action is required to initiate the regulatory process to adopt new standards for *Background Checks for Child Day Programs and Family Day Systems*.

## Previous Review or Action:

No previous review or action.

**Background Information and Statutory Authority:**  
Pursuant to [§ 22.1-289.03 of the *Code of Virginia*](https://law.lis.virginia.gov/vacode/title22.1/chapter14.1/section22.1-289.03/), the Board is responsible for establishing “a statewide unified public-private system for early childhood care and education system in the Commonwealth to ensure that every child has the opportunity to enter kindergarten healthy and ready to learn.” The system will be “implemented by the Board, the Superintendent [of Public Instruction] and the Department [of Education (VDOE)]” effective July 1, 2021. Funding and oversight of early childhood care and education (ECCE) programs and policies—including the Child Care Subsidy Program and child care licensing and monitoring transitioned to VDOE from the Virginia Department of Social Services on July 1, 2021.

Pursuant to Chapters [860](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0860) and [861](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0861) of the 2020 Acts of the General Assembly the regulations governing the implementation and oversight of ECCE programs were transferred from the Board of Social Services to the Board. This regulatory action seeks to amend the Background Checks for Child Day Programs and Family Day Systems regulation in accordance with the authority given to the Board in Chapters 860 and 861.

VDOE will conduct a comprehensive review of this regulation in partnership with the Early Childhood Advisory Committee to identify and recommend multiple changes needed to correct this regulation, including aligning requirements for fingerprint based background checks and out of state child abuse and neglect registry background checks, adding background check portability provisions that will become effective on January 1, 2022, as well as updating Code requirements. Recommendations to the Board will be provided under the authority prescribed in Chapters [860](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0860) and [861](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0861) of the 2020 Acts of the General Assembly.

This regulatory action will repeal the existing chapter and replace it with a new chapter that will incorporate technical corrections and language necessary to ensure consistency with the Code of Virginia and federal requirements.

**Timetable for Further Review/Action:**  
Upon Board approval, VDOE staff will submit this NOIRA to Town Hall pursuant to the requirements of the Administrative Process Act.

## Impact on Fiscal and Human Resources:

There is no fiscal impact of this action. Existing VDOE staff will facilitate the NOIRA process and initiate the process to begin promulgating the new standards for *Background Checks for Child Day Centers and Family Day Systems*.

# Attachment A C:\Users\puv36694\Pictures\townhalllogo609.bmp

**townhall.virginia.gov**

**Notice of Intended Regulatory Action (NOIRA)**

**Agency Background Document**

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| **Agency name** | Virginia Board of Education |
| **Virginia Administrative Code (VAC) Chapter citation(s)** | 8VAC20-771 [new chapter]  8VAC20-770 [repeal] |
| **VAC Chapter title(s)** | *Background Checks for Child Day Programs and Family Day Systems* [new chapter];  *Background Checks for Child Day Programs and Family Day Systems* [Repeal] |
| **Action title** | Action to Adopt New Standards for the *Background Checks for Child Day Programs and Family Day Systems* |
| **Date this document prepared** | November 17, 2021 |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

**Brief Summary**

**[RIS1]**

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation.*

This regulatory action will repeal 8VAC20-770, “Background Checks for Child Day Programs and Family Day Systems,” and establish a comprehensive new regulation, 8VAC20-771.

*Background Checks for Child Day Programs and Family Day Systems* (8VAC20-770) sets forth standards to protect the health, safety, and welfare of children receiving services by ensuring that persons required to have background checks have not been convicted of an offense which prohibits licensure, registration, approval, or employment. The intent of this action is to repeal and replace the current chapter in order to (1) to ensure that the regulations align with federal and state laws and (2) to clarify and update the regulatory requirements. By repealing the current chapter and promulgating a new chapter in its place, the Board anticipates greater flexibility in aligning the regulatory structure to federal and state law, which has changed since the current chapter was drafted. The Board also anticipates changes to format and language.

**[RIS2]**  
**Acronyms and Definitions**

*Define all acronyms or technical definitions used in this form.*

None

**Mandate and Impetus  
[RIS3]**

*Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”*

The Board has determined that significant changes to the chapter are necessary in order (1) to ensure that the regulations align with federal and state laws and (2) to clarify and update the regulatory requirements.

**[RIS4]  
Legal Basis**

*Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.*

The Board’s overall regulatory authority is found in § [22.1-16](https://law.lis.virginia.gov/vacode/title22.1/chapter2/section22.1-16/) of the *Code of Virginia*, which states that “[t]he Board of Education may adopt bylaws for its own government and promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of this title.”

The Board’s regulatory authority over child day programs and family day systems is found in § [22.1-289.046](https://law.lis.virginia.gov/vacode/title22.1/chapter14.1/section22.1-289.046/) of the *Code of Virginia*, which states in part that “[t]he Board shall adopt regulations for the activities, services, and facilities to be employed by persons and agencies required to be licensed under this chapter, which shall be designed to ensure that such activities, services, and facilities are conducive to the welfare of the children under the control of such persons or agencies.”

**Purpose**

*Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.*

The Board must repeal the *Background Checks for Child Day Programs and Family Day Systems* and promulgate a new chapter in its place in (1) to ensure that the regulations align with federal and state laws and (2) to clarify and update the regulatory requirements.

The chapter is essential to protecting the health, safety, and welfare of children receiving services by ensuring that persons required to have background checks have not been convicted of an offense which prohibits licensure, registration, approval, or employment. The regulatory action is essential to the continued health, safety and welfare of children because it will provide critical clarification on background check requirements and will ensure compliance with current federal and state laws.

**Substance**

*Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

This regulatory action will repeal the current chapter and replace it with a new chapter. In the process, the Board will engage in a comprehensive review that aligns the regulatory structure with federal and state laws, considers technical corrections, and clarifies requirements.

**Alternatives to Regulation**

*Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.*

There are no alternatives to regulatory action. The Board considered amending the *Background Checks for Child Day Programs and Family Day Systems* in its current structure and format. The amendments to the Chapter are necessary to conform the regulation to state requirements and align with federal mandates for background checks for individuals required to complete a background check pursuant to § 22.1-289.035 of the Code of Virginia.

Due to the number of updates and revisions required to implement state and federal provisions, the Board has determined that promulgation of a new chapter will be more expedient.

**Periodic Review and**

**Small Business Impact Review Announcement**

**[RIS5]**

This NOIRA is not being used to announce a periodic review or a small business impact review.

**[RIS6]  
Public Participation**

*Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.*

The Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: https://townhall.virginia.gov. Comments may also be submitted by email to Tatanishia Armstrong, Legislative Consultant, Virginia Department of Education, 101 N. 14th St., Richmond, VA 23219, 804-382-5047, [tatanishia.armstrong@doe.virginia.gov](mailto:tatanishia.armstrong@doe.virginia.gov). In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.