

Virginia Department of Social Services

Division of Licensing Programs

Enforcement Procedural Manual

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Preface

This Enforcement Manual is intended to serve multiple purposes. The division's compliance and enforcement philosophy is reflected in this manual. It may be used to train new employees in the mechanics of licensing enforcement actions. It will serve as a reference manual for experienced Division of Licensing Program (division) staff. It outlines the myriad enforcement options available. The manual will help ensure consistency in division enforcement actions.

The division's enforcement procedures, from technical assistance and consultation through appeal, are described. This manual, however, should not be the exclusive information resource used by division staff in performing enforcement duties. The manual is the starting point and provides an overview of the division's enforcement philosophy, statutory authority and responsibilities, regulatory framework, standard operating procedures and guidance documents. Staff must consult guidance specific to the enforcement action at hand.

Consultation with other inspectors, administrators, home office enforcement staff and program consultants is encouraged.

This enforcement manual replaces all previously issued manuals and guidance and reflects current procedures, materials, and information. When updates of the manual, forms, or templates occur, home office enforcement staff will notify division staff that the enforcement manual, forms or templates have been updated, and the location of the updated material on the L drive.

Part I. Glossary

Administrative appeal: A broad term used for the appeal process available to an applicant or provider pursuant to the Administrative Process Act (APA), § 2.2-4000 of the Code of Virginia, when a sanction is imposed by the department. The administrative appeal process encompasses informal fact-finding proceedings and formal hearings.

Administrative hearing: A hearing that is conducted pursuant to § 2.2-4020 of the Administrative Process Act. In licensing enforcement cases, an applicant or provider challenging the department's denial, revocation, or summary suspension of a license may request an administrative hearing after an informal conference has been held or mutually waived by the aggrieved party and the department. An order of summary suspension is applicable only to assisted living facilities and children's residential facilities.

Aggrieved party or appellant: For the purpose of challenging the imposition of **intermediate sanctions**, the aggrieved party or appellant is a 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.

For the purpose of challenging the imposition of **ultimate sanctions**, the aggrieved party or appellant is a licensee, applicant, registered or exempt provider 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.

Applicant: The business entity (person, corporation, partnership, association, limited liability company, business trust or public agency) that has applied for a license.

Commissioner: The Commissioner of the Department of Social Services.

Compliance plan: An attachment to a consent agreement detailing corrective actions that an applicant or provider will take to address violations and actions to prevent the recurrence of violations.

Consent Agreement: A written agreement between the applicant or provider and the department that acknowledges the applicant or provider's agreement to perform specific actions to correct violations on which the sanction is based and to remain in compliance with laws or regulations.

Consistency in decision-making: The result of comparing the facts of a specific case to similar previous cases to arrive at the best decision in a particular case. Consistency does not mean uniformity; it means applying regulatory enforcement principles in a similar way in similar cases

DOLPHIN (Division Of Licensing Programs Help and Information Network): The department's data system that serves as a tool for the work of licensing staff to manage information for applicants and providers who are either licensed, registered, or exempt from licensure.

Enforcement database: A tracking system for recording key information and activities associated with enforcement actions, and the appeals of such actions.

Enforcement: Imposition of sanctions or actions by the department against applicants and providers that violate statutes and/or regulations in ways that negatively impact the health, safety, and welfare of children or adults in the care of facilities regulated by the department.

Enforcement Review Committee: Adult and children's committees established by the department to ensure that (1) the findings used to support sanction(s) are defensible, (2) the process used to determine outcome(s) is transparent and fair, and (3) all parties, including the department, are held accountable for protecting vulnerable adults and children in settings other than their homes.

Final Order: A notification to an applicant or provider of the department's final case decision to deny or revoke a license, issued after administrative appeals are foregone or exhausted.

First step review: A first level dispute process available for an applicant or provider to pursue when he has concerns about licensing or registration procedures, interpretation of standards, actions of licensing personnel or he desires to challenge inspection findings or conclusions.

Hearing coordinator: The person designated by the department to coordinate requests for informal conferences and administrative hearings.

Hearing officer: 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 an administrative hearing following an informal conference. The hearing officer prepares findings and makes recommendations to the Commissioner, who renders the final decision in cases involving enforcement action against an applicant or provider.

Informal Conference: Means a fact-finding procedure available pursuant to §§ 2.2-4019 and 2.2-4021 of the Administrative Process Act. It refers to the first step in the appeal of a licensing enforcement action, the purpose of which is to give the aggrieved party an opportunity to challenge the intended sanction or to offer a resolution of the dispute by a consent agreement.

Informal conference chair (the chair): The department-assigned staff member responsible for conducting the informal conference.

Injunction: An injunction is a court order to close a facility.

Inspection: An on-site compliance investigation to gather information and evidence needed to make regulatory decisions related to issuance of a license and continued compliance with the terms of licensure, or complaint resolution. An inspection includes variety of information-gathering techniques, such as interviewing facility personnel, customers, and others knowledgeable of the issues under consideration; observation of services and activities in progress; examination of the physical plant and premises, equipment, supplies; and study of pertinent records and documents.

Intensive Plan of Correction (IPOC): A written plan triggered by noncompliance that cannot be addressed sufficiently through a plan of correction on a violation notice. In the IPOC, the provider identifies systemic roots of violations with law or regulation and develops a strategy for bringing a facility or program into compliance within an established period of time.

Intermediate sanctions: Any enforcement actions the commissioner may take to ensure prompt corrections of violations pursuant to § 63.2-1709 of the Code of Virginia. Available actions include: placing a licensee on probation, reducing licensed capacity or prohibiting new admissions, mandating training, assessing civil penalties, requiring licensees to contact parents, guardians, or other responsible persons in writing regarding health and safety violations, preventing the licensee from receiving public funds and, for any assisted living facility or adult day care center, petitioning the court to appoint a receiver.

Investigation: On site inspections and other activities used to gather information and evidence sufficient to make regulatory decisions related to issuance, continued licensure or certification, and complaint resolution.

Involuntary closure: Closing a facility through use of a denial or revocation of licensure; or in conjunction with a denial or revocation, using an injunction or summary suspension to address a provider's continued operation of a facility without a license, or when a facility is considered likely to endanger individuals in care, if allowed to operate during an administrative appeal.

Key health and safety standards: Minimum regulatory requirements identified as being critical to protecting vulnerable children and adults from exposure to potential or actual harmful conditions in children and adult care settings.

Licensing representative: A licensing specialist (child welfare unit) or a licensing inspector within the operations unit. However, management may assign tasks or under special circumstances and with management approval, licensing representative tasks may be completed by persons in other positions within the division, such as licensing administrators, program specialists, licensing technicians, or home office program staff.

Notice of Intent (NOI): Written notice of the commissioner's intent to take any of the actions enumerated in §§ 63.2-1707, 63.2-1709, 63.2-1709.1, and 63.2-1709.2 of the Code of Virginia.

Problem solving conference: An informal proceeding not governed by the Administrative Process Act, by which an applicant or provider may challenge the department's procedures,

interpretation of standards, or the actions of licensing personnel. A problem-solving conference may also be requested by licensing staff to address certain issues. The proceeding does not involve sworn testimony and is not governed by rules of evidence. See the definitions for “first step review” and “second step review.”

Progressive enforcement: Means an approach by the department that begins with the least punitive action needed to address noncompliance with laws and regulations and progressively increases the severity of the action if noncompliance persists.

Provider: A provider is the business entity (person, corporation, partnership, association, limited liability company, or public agency) that has been issued a license to operate an adult facility or child welfare agency, a certificate of registration or an exemption from licensure to operate a child welfare agency.

Repeat violation: Any violation that has been observed over two or more separate inspections or investigations during the current licensure period of the facility/home.

Sanction: The application of a specific and appealable statutory or regulatory consequence for failing to attain or maintain compliance. See definition for “intermediate sanctions” and “ultimate sanctions.”

Special Order: An order imposing an administrative sanction issued to any party licensed pursuant to § 63.2-1709.2 of the Code of Virginia by the commissioner or his delegate that has a stated duration of not more than 12 months. The commissioner shall not delegate his authority to impose civil penalties in conjunction with the issuance of special orders. A special order shall be considered a case decision as defined in § 2.2-4001 of the Code of Virginia. The duration of the special order is effective 30 days after notification of the issuance of a special order or at the conclusion of all appeal steps.

Second step review: A second level dispute process available for an applicant or provider to pursue when he believes that the statutes, regulations or departmental policies have been applied or interpreted in a manner that was unreasonable, arbitrary or capricious. The second step review is available to those applicants or providers who have completed the first step review, and the review is accomplished through either a desk review or a conference conducted by program supervisory personnel as assigned by the division director (or designee).

Systemic: Violations documented by the regulatory authority that demonstrate defects in the overall operation of the facility or one or more of its components.

Ultimate sanctions: Any enforcement actions the commissioner may take to bring about an involuntary closure of the facility pursuant to Chapter 17 of Title 63.2 of the Code of Virginia. The available actions include a denial, revocation, and a petition to enjoin operation. In conjunction with a denial or revocation, and relevant only to assisted living facilities and children’s residential facilities, the department may issue an order of summary suspension. For assisted living facilities, pursuant to § 63.2-1709.C, a summary suspension may suspend a license or restrict or modify one or more operations at the facility. For a children’s residential

facility, pursuant to § 63.2-1737.E, a summary suspension only suspends the license.

Violation: Failure to comply with a requirement established in statute or regulation; sometimes called "non-compliance." Only the department with statutorily-established responsibility for enforcement may cite a violation or require its correction.

Violation Notice: A violation notice is a written notification to a facility that the department has observed or discovered a violation of law or regulation; the purpose is to initiate corrective action that shall bring the facility into compliance. The violation notice includes the "description of violation" which is completed by the division and the "plan of correction" prepared by the applicant or provider to correct the violation or violations.

Part II. Introduction

The department is responsible for monitoring the facilities that it has the statutory authority to license, voluntarily register or certify to be exempt from licensing. The purpose of monitoring is to ensure that these facilities comply with licensing requirements, which were developed to protect the health, safety, and welfare of the individuals that the facilities have in their care.

It is not in the best interest of those in care for non-complying facilities to operate beyond a short period of time, unless the risks inherent in the operation of the program do not jeopardize the protection of the health, safety, or welfare of the persons in care and there is evidence that the facility can timely reach and maintain compliance with licensing requirements. It is not appropriate for licensing staff to provide extensive on-site support to facilities that operate marginally and which are cited for multiple violations or a pattern of violations without implementing progressive enforcement.

Enforcement cannot be approached with a rigid set of rules. However, the department must strive for fair and case-similar outcomes for similar incidents. The facts of each case will be different. Case strategies and decisions must be considerate to case-specific variables.

The department is committed to providing the applicant or provider technical assistance or consultation. For applicants, the department makes available pre-licensure training sessions, conducts pre-licensure on-site inspections and offers technical assistance. For licensed providers, the department holds provider meetings and trainings, conducts on-site training, consultation, inspection monitoring and, if needed, provides extra inspection monitoring and complaint investigations.

One of the primary goals of technical assistance or consultation is to prevent or limit risks to the health, safety, or welfare of persons in care in licensed, voluntarily registered or licensure-exempt facilities. Encouraging the provider's compliance with standards will help ensure that persons needing services can receive services in their communities.

Part III.

The Purpose of Enforcement

The purpose of licensing is to protect individuals in care through risk prevention and reduction. Enforcement is one critical component of licensing. The three basic core principles of licensing include:

1. The defined activity cannot be safely performed by the general public;
2. Certain individuals may safely be entrusted with the responsibility of carrying out the otherwise prohibited activity upon demonstration that they meet pre-determined licensing standards and other applicable statutes; and
3. The department will administer the provisions of licensing requirements, including promulgating regulations, enforcing licensing requirements, and suppressing illegal operations.

The primary focus of licensing is risk prevention and reduction. There are many forms of risk reduction:

1. Developing licensing standards that, if followed, reduce or eliminate risks to individuals in care;
2. Applying those standards timely and consistently;
3. Providing consultation, training and other support services to improve the skills of applicants and licensees;
4. Working collaboratively with other regulatory and service agencies in common interest areas; and
5. Using enforcement appropriately to prevent the initial licensure or continued operation of providers who cannot or will not maintain satisfactory compliance with licensing requirements.

The department's role is to determine objectively whether an applicant or provider meets pre-set criteria defined in applicable statutes and regulations. Licensing, including the exercise of enforcement provisions, is not about punishment. Licensing is the determination that an applicant or provider has adequately met all criteria necessary to perform the otherwise prohibited activity.

In its efforts to protect vulnerable adults and children, the department holds the applicant or provider accountable for demonstrating compliance that is timely and reliable with applicable statutes and regulations. The department achieves this through utilizing many tools, including: (1) technical assistance; (2) consultation; (3) enforcement watch; (4) intensive plans of correction (IPOC); (5) intermediate sanctions; and (6) ultimate sanctions. A consent agreement may be considered at both the intermediate and ultimate sanction phase.

Part IV.

Principles and Guidelines for Case Decision-Making

The department is statutorily responsible for providing regulatory oversight to promote the protection of the health, safety, and welfare of individuals in care. The department's authority must be exercised in a timely and consistent manner. The enforcement laws, regulations, manual, standard operating procedures and other guidance documents will assist division staff in determining the appropriate enforcement action in a specific case.

It is the responsibility of the licensing inspector to weigh all information carefully, and to examine the facts to determine if a preponderance of fact-based evidence exists to support an enforcement action. A "preponderance of evidence" is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it.

The violation notice is a fact-based description of how a facility is noncompliant with the licensing requirements. After the inspector documents fact-based evidence of violations on the violation notice, the inspector must consider whether the violation meets one or more of the following characteristics:

1. The violation is a repeat violation within the current licensing period.
2. The violation is one of several violations that indicate a systemic problem. (For example, the violations indicate a problem with recordkeeping in resident's or children's records and with documentation in other recordkeeping areas).
3. The violation is one that shows a lack of understanding by the applicant or provider of fundamental safeguards to maintain the health, safety or welfare of individuals in care. If the applicant or provider, or their staff, did not recognize the danger of the action or inaction, the individuals in care may face continued risks.
4. The violation shows that harm was inflicted on a person in care, or that the threat of harm to the person in care is inherent.

The licensing inspector is encouraged to ask for assistance from home office consultants at any point in the case decision process in order to write the violation in the most defensible way or to discuss details of the case that would help determine appropriate options.

The licensing inspector also responsible for assigning a risk rating for any violation of a regulatory requirement that has been designated a key health and safety requirement. When the risk rating for one or more violations rises to a B-2 level, meaning harm is likely at a level of serious severity or above, the inspector will complete the form, Assessment for Enforcement Action to determine (1) whether a recommendation for an enforcement action should be made, and (2) if so, what level or type of enforcement action to recommend.

Once the licensing administrator reviews and approves a recommendation for sanction action, a Notice of Intent (NOI) is prepared listing serially standards with a risk rating of B-2 and above for intermediate and ultimate sanctions, including repeat and systemic violations in the

current licensure period. Violations cited during the current licensure period but were also cited in the previous licensure period should not be listed serially in the NOI. However, in order to make it a matter of record that a particular problem is ongoing across licensure periods, reference can be made to violations from the previous licensure period that are repeated in the current licensure period in the summary of the NOI.

Once the NOI prepared, it is then submitted to the enforcement consultant and tech, along with supporting documentation indicated in Part VI below.

The division uses the form, Assessment for Enforcement Action as guidance in determining the best course of action in enforcement cases. This guidance form is just one decision-making tool. The best tool for determining the appropriate enforcement action that the inspector has is a professional fact-based opinion. It may also be helpful to consult with others, such as other inspectors, a licensing administrator, and home office consultants. It is critical to base the enforcement decision solely on the facts of the specific case. No matter how much an inspector may believe that a certain enforcement action is justified, if the facts fail to support a violation, taking an unsupported enforcement action weakens the department's integrity and will likely be unsustainable on appeal.

When examining a situation with documented violations of licensing requirements, it is important to determine whether the applicant or provider is either unable or unwilling to comply with the licensing requirements. Such a determination is key in (1) making an assessment of whether the applicant or provider will be able to come into compliance with the licensing requirements, and (2) what enforcement action will be most helpful in bringing about compliance in the facts of that specific case.

Timeliness in taking enforcement action is critical. Standard Operation Procedure (SOP) 301 provides timelines for inspections. Delay, however, is sometimes unavoidable. In working with other agencies, such as Child Protective Service (CPS) or the judicial system, keep in mind that those agencies are operating under different statutory authority and may evaluate the evidence and make decisions differently.

It is important that division staff timely process enforcement cases and not wait on the final outcome, including final decisions of appealed CPS findings, of a CPS complaint or for the final verdict of a criminal case. Although the outcomes reached by external agencies can provide additional evidence that may support the department's decision in a case, the department is not dependent upon external decisions to drive enforcement decisions.

The applicant or provider is entitled to a prompt and full disclosure of (1) the violations and supporting evidence that the inspector has found, and (2) the enforcement actions that the department may take as a result of those violations.

Licensing protocol requires that when violations rise to the level of possibly warranting a sanction, the inspector should give the applicant or provider general information about what it means to be sanctioned, but not specify the specific sanction that will be recommended. The

sanction(s) that is issued is a decision ultimately to be made by the director of the division. It will be communicated to the applicant or provider through the issuance of a formal Notice of Intent (NOI).

Part V.

Review of Key Enforcement Methods Available

The department uses progressive enforcement to address providers with declining or erratic compliance with licensing requirements. Progressive enforcement options may begin with inspector offering technical assistance or consultation to the provider. Following the technical assistance or consultation, the provider may be required to develop and implement a plan of corrective action.

However, when violations place the health, safety, or welfare of individuals in care at serious risk, or harm has occurred, the department will consider more progressive enforcement options. The circumstances and the severity of risks or actual harm that have occurred will drive the department's selection of the appropriate enforcement option to use.

Following technical assistance or consultation, the next progressive enforcement option to consider is to require the provider to develop, submit and implement an IPOC, i.e., an intensive plan of correction. An IPOC is not a sanction, but a tool of progressive enforcement. It is a written proposal triggered by one or more egregious and/or systemic violations that cannot be addressed sufficiently through a plan of correction on a violation notice. It is the last enforcement option to contemplate before the option to sanction is considered. However, depending on the circumstances and the severity of the violations, it may be necessary to bypass an IPOC and go directly to a sanction.

Prior to 1998, the department had the authority only to deny or revoke licenses and certificates of registration for egregious violations. Because a denial or revocation of a license or certificate is the most severe form of enforcement action that can be taken by the department, the department classified this level of enforcement as an “ultimate sanction.”

Since 1998, however, changes to Chapter 17 of Title 63.2 of the Code of Virginia provide statutory authority for the commissioner to issue special orders to providers who are required to be licensed. Special orders, referred to by the department as “intermediate sanctions,” are the next level of enforcement options. Providers who are required only to obtain a certificate of registration or who are given an exemption from licensure are not subject to special orders. The commissioner may issue a special order only as authorized by the Code of Virginia.

Intermediate sanctions may be considered when serious violations continue to present a risk to the health, safety, or welfare to individuals in care, but not to the extent that the program must cease or be denied a license to operate. In the sequence of enforcement options, an intermediate sanction is considered following the failure of an IPOC and before an ultimate sanction is considered. These are the steps in progressive enforcement:

1. Offer technical assistance and consultation.
2. Request an IPOC from the provider.
3. Impose an intermediate sanction.

4. Impose an ultimate sanction.

The sanctions that the department classifies as intermediate and ultimate sanctions are listed in Chapter 17 of Title 63.2 of the Code of Virginia. The terms “intermediate” and “ultimate” sanctions, however, are not found in Code of Virginia. “Intermediate” and “ultimate” sanctions are the department’s terms for categorizing the severity levels of sanctions. However, intermediate and ultimate sanctions cannot be issued concurrently.

Listed below are the two levels of sanctions and the respective adult and children’s facilities that are subject to them as enforcement options:

Intermediate sanctions

Intermediate sanctions are applicable to assisted living facilities (ALF); adult day care centers (ADCC); child day care centers (CDC); short-term child day care centers (ST-CDC); family day homes (FDH); family day systems (FDS); child placing agencies (CPA); children’s residential facilities (CRF); child care institutions (CCI); and independent foster homes (IFH).

As an intermediate sanction, the commissioner may:

1. Place a licensee on probation upon finding that the licensee is substantially out of compliance with the terms of its license and that the health and safety of residents, participants, or children are at risk (§ 63.2-1709.B.1);
2. Reduce licensed capacity or prohibit new admissions when the commissioner concludes that the licensee cannot make the necessary corrections to achieve compliance with the regulations except by a temporary restriction of its scope of service (§ 63.2-1709.B.2);
3. Mandate training for the licensee or licensee’s employees, with any costs to be borne by the licensee, when the commissioner concludes that the lack of such training has led directly to violations of regulations (§ 63.2-1709.B.3);
4. Assess civil penalties as follows:
 - (a) For each day the ALF is or was out of compliance with the terms of its license and the health, safety, and welfare of residents are at risk (§ 63.2-1709.B.4). The aggregate amount of each civil penalty shall not exceed \$10,000 in any 24-month period;
 - (b) Per inspection for CWA or ADCC that is substantially out of compliance with the terms of its license and the health, safety, and welfare of residents, participants, or children are at risk (§ 63.2-1709.B.5). The civil penalty shall not be more than \$500 per inspection;

5. Require licensees to contact parents, guardians, or other responsible persons in writing regarding health and safety violations (§ 63.2-1709.B.6);
6. Prevent licensees who are substantially out of compliance with the licensure terms or in violation of the regulations from receiving public funds (§ 63.2-1709.B.7); and

Ultimate Sanctions

Ultimate sanctions are applicable to assisted living facilities (ALF); adult day care centers (ADCC); child daycare centers (CDC); short-term child day care centers (ST-CDC); family day homes (FDH); family day systems (FDS); child placing agencies (CPA); children's residential facilities (CRF); child care institutions (CCI); and independent foster homes (IFH); voluntary registered family day homes (VR-FDH); certified pre-schools (CPS); and certified church exempt child care centers (CCE).

As an ultimate sanction, the commissioner may:

1. Deny an initial (new) application for any adult or children's facility (§ 63.2-1707);
2. Revoke or deny renewal of a license for any ALF or ADCC (§ 63.2-1709.B);
3. Revoke or deny renewal of the license for any ALF or ADCC for a violation of any of the provisions of §§ 63.1700, 63.2-1800, or 54.1-3408, or any regulation adopted under this subtitle, when that violation adversely affects, or is an imminent and substantial threat to the health, safety or welfare of the person cared for therein, for permitting, aiding or abetting the commission of any illegal act in an ALF or ADCC;
4. Revoke or deny renewal of a certificate for any VR-FDH (§ 63.2-1704);
5. Revoke or deny renewal of a license for any CDC, FDH, FDS, CPA, CRF, CCI, and IFH (§ 63.2-1709.1);
6. Revoke or deny renewal of an exemption for any CCE (§ 63.2-1716); and
7. Revoke or deny renewal of a certificate for any CPS (§ 63.2-1717).

Ultimate Sanctions Specific to a Facility Type (ALF, ADCC, and CRF)

In addition, as an ultimate sanction in an enforcement case involving an ALF or ADCC, the commissioner may:

1. Require an ALF to contract with an individual licensed by the Board of Long Term Care Administrators to administer, manage, or operate the ALF on an interim basis, and to attempt to bring the facility into compliance with all relevant requirements of law,

regulation, or any plan of correction approved by the commissioner (§ 63.2-1709.A);

2. Petition the court to appoint a receiver for any ALF or ADCC (§ 63.2-1709.B).

As an ultimate sanction in an enforcement case involving an ALF, the commissioner may:

1. Issue an order of summary suspension of the license to operate the ALF in conjunction with any other proceeding for revocation, denial, or other action when conditions or practices exist that pose a an imminent and substantial threat to the health, safety or welfare of the residents (§ 63.2-1709.C).
2. In addition to revoking or denying a license, summarily suspend only certain authority of the ALF and may restrict or modify the ALF's authority to provide certain services or perform certain functions that the commissioner determines should be restricted or modified in order to protect the health, safety, and welfare of the residents (§ 63.2-1709.D).

As an ultimate sanction in an enforcement case involving a CRF or children's group home only, the commissioner may:

Issue an order of summary suspension of the license of any group home or residential facility for children in conjunction with any other proceeding for revocation, denial, or other action when conditions or practices exist in the home or facility that pose an imminent and substantial threat to the health, safety or welfare of the children who are residents and the commissioner believes the operation of the home or facility should be suspended during the pendency of such proceeding (§ 63.2-1737.E).

Part VI. Procedures for Intermediate Sanctions

The primary purpose of issuing an intermediate sanction is to protect individuals in care and persons who may be admitted for care to a licensed facility. Intermediate sanctions are issued to encourage applicants and providers to achieve compliance with licensing requirements and interrupt performance practices that are likely to lead to a denial, revocation, or a summary suspension if applicable, of the license.

Intermediate sanctions are corrective rather than punitive in nature. An intermediate sanction may be utilized to (1) alert the facility's management personnel of compliance issues, (2) reduce health or safety risk factors, or (3) encourage management to increase the skill level of staff to meet the needs of persons in care.

Intermediate sanctions are not intended to be used for minor violations that neither create nor threaten to create adverse effects. Intermediate sanctions are intended for use when one or more violations are serious and have adverse impacts on the health, safety or welfare of persons in care. Examples of when intermediate sanctions may be appropriate include medication errors; inadequate staff to persons-in-care ratio violations; lapses in health care monitoring or supervision; or presence of poor sanitation or other hazards.

The Assessment of Enforcement Action form should be used to select the appropriate intermediate sanction. Consider which intermediate sanction(s) will: (1) timely reduce the health or safety risks, (2) address the causal condition(s), and (3) be most effective for that facility's circumstances. For example, restricting admission may have little effect if the facility is already at or near capacity and has a history of few vacancies.

The Assessment for Enforcement Action form is not applicable to conditional and provisionally licensed providers. Per General Procedures and Information for Licensure, following the expiration of a conditional or provisional license, the inspector must assess at the renewal for continued licensure whether the provider is in substantial compliance with applicable standards and Codes.

In assessing which sanction is appropriate, the inspector determines the cause of a specific violation. A fine, for example, may primarily act to focus management attention and be most effective when careless or unresponsive management is a major contributing factor in causing the violations or preventing their prompt correction. Another factor to consider in finding the right sanction is to assess which sanction would more likely bring about the desired outcome.

Internal procedures for imposition of intermediate sanctions

When preparing an enforcement package to recommend an intermediate sanction, the requirements of SOP 501 must be followed. Intermediate sanctions are generally based on one

inspection. With the approval of the associate director of enforcement, the violations from more than one inspection or repeat violations may be combined in a NOI.

The associate director will consider whether the violations from the inspections are related and within a close proximity of time. An example of when approval might be granted would be when two separate complaint investigations with related issues were conducted within a 30-day timeframe.

The licensing administrator will review the packet of information and send the packet to the enforcement consultant and tech. The packet for an intermediate sanction includes an electronic copy of each document as indicated below:

1. Sanction Recommendation Cover Sheet (in Office Word)
2. Notice of Intent letter (in Office Word) listing serially all violations with a B-2 risk rating and above
3. Violation Notice(s) with Inspection Summary and Supplemental Information (in PDF or fax)
4. Cumulative History
5. Assessment for Enforcement Action form for each inspection included in the NOI
6. Supporting case documents (in PDF or fax)
7. Copy of the current license (in PDF or fax)
8. For an ALF being recommended a civil penalty, a copy of the Worksheet to Assess Civil Penalties Against Assisted Living Facilities (in Office Word)

The licensing inspector will use the score from the Assessment for Enforcement Action Form and the Risk Assessment Matrix as a guideline in determining the sanction(s) to recommend. The inspector may find that the score will sustain a recommendation for multiple intermediate sanctions to address the violations in the violation notice. In the case of multiple sanctions, the inspector and administrator will prepare one NOI and list all sanctions recommended. Such a NOI might be entitled, for example, "Notice of Intent to Place the Licensee on Probation, Mandate Training, and Assess a Civil Penalty."

The Assessment for Enforcement Action form is designed to be used as a tool in guiding the licensing administrator and inspector to an appropriate decision for a sanction recommendation. The licensing administrator and inspector may make an alternative recommendation to what is indicated by the scoring procedure, and provide written justification of the recommendation on the assessment form.

Division staff preparing enforcement packets for referral to home office must always use the sanction templates found at the following address: L:\Licensing\Enforcement\Templates and Sample Forms. Templates are often updated; be sure you are using the most recent. Examples of sanctions that have been officially issued to applicants and providers can be found at: L:\Licensing\Enforcement\Statewide Enforcement Actions Issued.

While a provider may appeal an intermediate sanction, the appeal delays only the imposition of the sanction, not the corrective actions needed to bring the condition resulting in the violation into compliance. If the violations would warrant placing the provider on enforcement watch, division staff are required to follow SOP 501, Enforcement Actions, which outlines the division's monitoring responsibilities for a provider on enforcement watch.

Protection of individuals in care is always paramount during the course of an enforcement case. When the health, safety, or welfare of individuals in care is at risk, division staff must take immediate action to restore safety. When division staff has reasonable grounds to believe that the causal conditions of the safety concerns are not correctable, then the recommendation should be made to move the case directly toward involuntary closure through the use of an ultimate sanction, and in the event of imminent risk, an injunction.

Part VII.

Procedures for Ultimate Sanctions

All regulated adult and child welfare agencies are subject to ultimate sanctions, which include (1) revocation, (2) denial, and (3) injunction. Upon receipt and verification of information from any source indicating an imminent and substantial risk of harm to individuals in care, the commissioner may issue an ultimate sanction.

The department can seek a revocation or denial to cause the operation of a facility to cease. An applicant or provider can appeal either action pursuant to § 2.2-4000 of the Code of Virginia. An appeal can cause the final case decision to be delayed for an extended period of time. At the formal hearings level of the appeal process, the burden of proof shall be upon the proponent or applicant in accordance with § 2.2-4020 of the Code of Virginia.

The commissioner may petition the court to enjoin the operation of a facility that continues to operate without a license when one is required pursuant to § 63.2-1711 of the Code of Virginia.

For a facility that has already received a notice of intent to revoke the license or to deny renewal of an application for licensure, if there is evidence that a delay in closing a facility would mean that those in care would face imminent and extreme harm, the commissioner may petition the circuit court in the jurisdiction where the facility is located to expedite closure through an injunction or summary suspension order. A summary suspension order can be issued in conjunction with a revocation or denial of the license of an ALF or CRF.

The protection of persons in care is always paramount in the ongoing monitoring of each case. When the health, safety, or welfare of individuals in care are in danger, division staff must take immediate action to restore safety. If division staff perceive imminent jeopardy, at any time, a recommendation must be made to the division director to pursue an injunction or summary suspension order. An injunction request will only be considered if a revocation or denial has been issued. Evidence of harm has to meet legal standards, which are not easily met.

Internal procedures for imposition of ultimate sanctions

After the licensing administrator and inspector have identified serious and/or repeated violations of licensure requirements that may warrant an ultimate sanction, the licensing administrator will submit the same documents to home office enforcement staff as when submitting an intermediate sanction enforcement packet. The procedures in SOP 501 must be followed.

The licensing administrator must submit all violation notices that have been issued to the provider since the provider received their last license or certificate. However, the NOI must serially list all violations with a risk rating of B-2 and higher, and repeat and systemic violations, regardless of the risk rating, that occurred during the licensure period. Repeat or systemic

violations stemming from the previous licensure period should not be listed, but they can be referenced in the summary section of the NOI.

Additionally, the licensing administrator must include the Risk Profile for Supervisor/Inspector Report, also known as the facility's performance report card, generated by the DOLPHIN database.

Steps to take when seeking an injunction or summary suspension

The commissioner is granted the authority by § 63.2-1711 and § 8.01-620 of the Code of Virginia to seek injunctive relief against licensed or certified providers and persons operating without a license in any circuit court that has jurisdiction in the area where the office of any ALF, ADCC, or child welfare agency is located.

When division staff believes that conditions at a facility present imminent jeopardy to the health, safety or welfare of individuals in care, the licensing administrator must, as soon as possible, contact the appropriate associate director. The associate director will discuss the case with the division director.

A template can be found at L:\Licensing\Enforcement\Templates and Sample Forms for submitting an enforcement action for an injunction pursuant to § 8.01-620 or § 63.2-1711 of the Code of Virginia, or a summary suspension pursuant to § 63.2-1709 (ALF) or § 63.2-1737 (group home or CRF). The appropriate memorandum must be submitted with the NOI, as well as all supporting documentation.

The licensing administrator will complete the template for Recommendation for Injunctive Relief or Recommendation for Summary Suspension, and the Request for Approval of Injunctive Relief or Request for Approval of Summary Suspension.

General Procedures and Information for Licensure, Hearing Procedures, describes the proceedings once the injunction or summary suspension has been approved by the commissioner. The recommendation memorandum is then forwarded to the Attorney General's Office.

Part VIII.

Enforcement Case Review Process

Achieving fair and consistent decision-making is challenging in the regulation of human care services because of the many variables. The primary method most regulatory agencies use is called institutional decision-making. Institutional decision-making means establishing processes for serial and concurrent reviews by peers and supervisors to bring a wider span of expertise, perspective, and experience to improve the quality and consistency of decisions.

The division has established the adult and children's enforcement review committees to review enforcement actions that recommend either an intermediate or ultimate sanction. Typically, the enforcement committee reviews a case only after the provider has had the opportunity to ask for a first and second step review. If the provider requests the review, the case submission will be delayed until after the process has been completed. However, in accordance with General Procedures, the department has the 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 department's judgment, 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.

The enforcement review committees discuss the cases and make recommendations to the director. The diversity in professional knowledge and experiences that each member brings to the committee greatly benefits the decision-making process.

Composition

Each committee is comprised of a chair, core members, and ex-officio members. Typically the chair of the committee is the enforcement consultant, who is also a core member. Any core member may serve as the chair.

The adult enforcement committee is comprised of two adult program consultants from the home office and two adult licensing inspectors from the field licensing offices, who rotate on a quarterly basis, and the adult enforcement consultant. The children's enforcement committee is comprised of three children's program consultants from the home office and three children's licensing inspectors from the field licensing offices, and the children's enforcement consultant. The children's licensing inspectors rotate on a quarterly basis.

The ex-officio members serving on the adult enforcement review committee include the associate director for adult services, the associate director for operations, a licensing administrator who rotates on a quarterly basis, and a licensing program specialist. The ex-officio members for the children's committee include the associate director for children's services, the associate director for operations, a licensing administrator who rotates on a quarterly basis, and a licensing program specialist.

The licensing administrator and inspector who submit the enforcement case are encouraged to observe the committee’s discussion of the case. If the licensing administrator and inspector participate, the committee members may ask the licensing administrator and inspector questions regarding the case. In no event may an inspector or licensing administrator serving on either the adult or children’s enforcement committees vote on a sanction recommendation that they submitted or helped to prepare.

A voting quorum is at least three core members, with one being a licensing inspector. When a voting quorum is not met, the licensing administrator or program specialist may vote, provided that they were not directly involved in initiating the sanction and will not chair the informal conference in the case.

Meeting Schedule of Children’s and Adult Enforcement Committees

The children’s enforcement committee meets on the 2nd and 4th Tuesday’s of each month, from 9:00 a.m. to 11:30 a.m.

The adult enforcement committee meets on the 2nd and 4th Thursday of each month, from 9:00 a.m. to 12:00 noon.

Orientation of Members to Perform Committee Duties

All inspectors and administrators are expected to review certain information prior to beginning their rotation on an enforcement committee. The orientation begins with thorough familiarity with two Standard Operating Procedures: Chapter 3, The Inspection Process and Chapter 5, Enforcement Actions.

<u>Chapter 3</u>	<u>The Inspection Process</u>	<u>Number</u>
	The Use of Cameras in Conducting Inspections	AB-8
	Conducting an Inspection	SOP-301
	Risk Assessment	SOP-303
	Violation Notices and Inspection Summaries	SOP-304
	Corrective Action Notices and Plans	SOP-305
	Enforcement Watch	SOP-306
	Problem Solving Conferences	SOP-307
<u>Chapter 5</u>	<u>Enforcement Actions</u>	
	Enforcement Actions	SOP-501
	Appeals of Enforcement Actions	SOP-502

Attendance of New Members on Committee as Observers

Licensing administrators will coordinate with the appropriate associate director of operations and the respective enforcement consultant to allow new licensing inspectors to observe at least one case discussion by the committee prior to their serving as a member of the committee. New licensing inspectors will receive copies of pertinent case documents at the same time regular members receive the documents.

New inspectors who have a case for review by the committee may be asked to be available to answer questions from committee members. Should the committee request the attendance of the inspector, the enforcement consultant will inform the inspector as soon as possible.

The licensing administrator will coordinate with the appropriate associate director and the enforcement consultant to assign the oriented staff to a rotation on the committee as a voting member as soon as possible.

Considerations Before Submitting Recommendation to Sanction

Adhere to timeframes established for problem solving conferences. Ensure that the applicant or provider is given the allowable 15 days to request a first step review in accordance with General Procedures and Information for Licensure before submitting the sanction recommendation. However, if the violations are believed to have actually caused or present imminent risk of serious to extreme harm, e.g., hospitalization for serious injury or death, then waiting the 15 days is not required. The sanction recommendation should be submitted as soon as possible.

Establish professional and managerial culpability of the provider in order to sanction. Evidence must be factual and substantial that the provider's failure to not carry out some duty or responsibility, as applicable to self and/or employees or volunteers, resulted in potential or actual harm to one or more persons in care.

Intermediate sanction with a license. Only an intermediate sanction can be issued with a license, and the only license type that can be issued along with an intermediate sanction is a provisional license. The decision to issue a provisional license takes into consideration substantial violations demonstrated over the entire licensure period and can be justified with or without including sanctionable violations that occur at the time a license is up for renewal. In other words, if the only violations that can support a provisional license are found at or near renewal, then the licensure options include: (1) deny the renewal, (2) issue a provisional license, or (3) issue no more than a 1-year license, if a 1-year license can be justified. A provisional license and a sanction cannot be issued based on the same violations.

Multiple sanctions. The issuance of multiple sanctions may be a viable option for specific issues. For example, in addition to issuing a civil penalty to get the attention and motivate a provider to comply, the NOI may include mandated training to address knowledge and skills deficits of staff and prohibit new admissions to help ensure that the provider does not

exceed his staffing and logistical resources to meet the needs of persons in care. Multiple sanctions must not be used for the sake of increasing the severity of the enforcement response. All sanctions must be able to be justified based on the specific circumstances that drive the issuance of multiple sanctions in an attempt to tailor the sanctions to what is needed.

Intermediate sanction following an ultimate sanction. An intermediate sanction cannot be issued with an ultimate sanction. However, based on violations found in a subsequent inspection or investigation conducted after an ultimate sanction has been issued, an intermediate sanction may be issued if it can be demonstrated how it will make a difference in leveraging needed increased protection for the individuals in care. For instance, a sanction to prohibit new admissions or to reduce capacity could be issued following an ultimate sanction if it was found that since the issuance of an ultimate sanction, inadequate staffing contributed to a number of individuals not getting their medications or a person wandering away from a facility due to the lack of supervision.

Sanction based on violations from a previous licensure period. Whether to issue a sanction based on violations from a previous licensure period will depend on the circumstances that resulted in the delay of the issuance. Generally, if during the current licensure period the licensing administrator and inspector became aware of one or more sanctionable violations that occurred in a previous licensure period, then enforcement action can be considered in the current licensure period. Also, if a complaint investigation was initiated by licensing or another agency but was not completed before a new license was issued and, subsequently, during the current licensure period the previous complaint investigation revealed sanctionable violations, then enforcement action can be considered in the current licensure period.

Documents Required for Preliminary Case Review

Upon receiving the case file from the enforcement tech, the enforcement consultant will ensure that the following documents are submitted and properly prepared before distributing the case materials to committee members. If any document needs correction, the enforcement consultant will determine whether the correction(s) is significant enough to delay staffing the case while the licensing office makes the needed changes.

The following documents are the minimally required information needed by the committee to review the case:

1. Sanction Recommendation Memorandum (provides facility demographics, enforcement history, and synopsis of why case is being submitted);
2. Notice of Intent (specifies violations of greatest concern, the type of sanction and justification);
3. Violation Notices (provides description and evidence of noncompliance with risk rating of each violation recorded on the supplemental sheet);
4. Copy of civil penalty worksheet for ALFs only (shows how the civil penalty was calculated based on individual risk factors);
5. Copy of assessment for enforcement action worksheet (shows the procedure of how one or more enforcement options were considered);

6. Cumulative History (shows the monitoring and enforcement history of the facility);
7. Copy of current license (shows the terms for the authority being given to operate a certain adult or child care program);
8. Copy of IPOC (if one has been issued related to the violations in the NOI), provides the comprehensive plan to correct serious and/or systemic violations, and the results of follow-up monitoring inspections); and
9. Other supporting documents (examples are copies of staffing schedules, ISP, UAI, incident reports, statements by staff, medical documents, pictures, drawings etc.).

Once the enforcement consultant has determined that the case is ready for review by the committee, she will send it out to the committee soon as possible, but not less than three days before the enforcement committee meeting. Based on the complexity and number of cases submitted, the enforcement consultant will determine how many cases will be reviewed by the committee.

Case Review Process

The enforcement consultant will preside over the meeting and will summarize the information contained in the required documents. It is expected that all committee members will have reviewed the required documents and any responses to questions/concerns submitted by the licensing office prior to the scheduled meeting.

The committee will discuss and reach a decision based on, but not limited to, the following information provided by the licensing office to support the sanction recommendation:

1. Timeliness of inspections and/or complaint investigations. Only inspection findings submitted within the current licensure period will be considered in determining the enforcement action.

Exceptions: If an investigation was initiated by the division or another agency in a previous licensure period, but valid findings were not determined until after a new license had been issued, then the committee can consider those findings. The committee can also consider the findings when an IPOC was required to address violations in the previous licensure period and it remains in effect according to the requirements of SOP 305 or a decision made by home office management.

Relevancy and timeliness of violation notices to support an intermediate sanction versus an ultimate sanction. Violation notices for all inspections and complaint investigations conducted from the beginning date of the current licensure period to the date in which the last inspection was done are appropriate for submission to support an ultimate sanction. For an intermediate sanction, only the most recent violation notice should be submitted. Specifically, the number of days between the date the NOI for an intermediate sanction is submitted by the licensing office to the date received by the enforcement consultant should not be greater than 30 days. If the

number of days exceeds 30, an explanation for the delay must be provided.

For both an intermediate and ultimate sanction, all violation notices submitted to support either sanction should be submitted only after allowing the applicant or provider 15 days to appeal the violations through a problem-solving conference. However, the director has the authority to proceed with enforcement action, even though the applicant or provider has not had the opportunity to appeal the violations, if the director has determined that there is sufficient risk to adults or children in care.

2. Appropriateness of cited standards. Ensure that the violation notice does not reflect “piling on,” which is citing multiple standards with identical descriptions of the violations and that address the same aspect of health, safety, and welfare. Ensure that a general or “catch all” standard is only used when there is not a standard more specifically suited to address the issues or problems identified. When there is both a regulatory and statutory provision that could be cited, only the regulatory standard should be cited.
3. Writing violation descriptions. The written description of violations should be factual, clear and concise, as required by the inspection protocol.
4. Risk Ratings. Risk assessment ratings should be appropriate to key health and safety standards.
5. Proactive measures. Proactive measures already in place prior to an incident to reduce or eliminate risk of harm or injury.
6. Action taken immediately following a violation that either caused harm or injury or placed individuals at risk for harm or injury.
7. Civil Penalty Cover Sheet. For ALFs only, when recommending a civil penalty, submitting a civil penalty worksheet.
8. Appropriateness of the recommended sanction based on all submitted documents and the degree to which it follows procedures in Appendix A of SOP-501.

By a majority vote, the committee will approve the assessment and recommendation as submitted and/or will recommend to the director changes to the NOI, violation notice, and/or one or more risk ratings.

If the committee recommends a change to the NOI (e.g. adding or removing a sanction recommended by the licensing office), violation notice, and/or one or more risk ratings, the enforcement consultant will prepare an email to the director to explain what and why a change was recommended by the committee. If approved by the director, the enforcement consultant will prepare an email to go to the licensing administrator and inspector to explain the decision by the director to change the NOI, violation notice, and/or one or more risk ratings.

1. With approval of the director, for any violation notice and risk rating that have been

issued, the following are changes that can be made, but will prompt the action indicated below:

- Correcting a reference number for a standard or Code of Virginia incorrectly cited by licensing staff. This will require the re-issuance of the violation notice and a new 15-day period for the applicant or provider to request a desk review or problem solving conference with the licensing supervisor and the director (or designee).
 - Correcting typos, grammar, punctuation, or deleting any violations determined to be inappropriately cited by licensing staff. These corrections should only be made when they have been determined to be essential to defending the validity of the violation cited. This will require the re-issuance of the violation notice, but a new 15-day period for the applicant or provider to request a desk review or problem-solving conference is not warranted.
 - Increasing the risk rating of a violation to a C-3 (meaning that harm is either imminent or has occurred, and the severity level is assessed as extreme.) This will require written notification to the applicant or provider informing them that the original risk rating cited for one or more violations in the violation notice was increased to a C-3. The applicant or provider will have 15 days to request a desk review or problem solving conference with the licensing supervisor and the director.
 - Decreasing a risk rating from a C-3. This will require written notification to the applicant or provider informing them that the original risk rating cited for one or more violations in the violation notice was decreased. A new 15-day period for the applicant or provider to request a desk review or problem-solving conference is not warranted.
2. The following are situations in which a violation notice cannot be changed after it has been issued to an applicant or provider:
- Changing the violation description or evidence.
 - Adding a violation.
3. If a change to the violation notice or a risk rating must be made, the licensing administrator and inspector must notify the applicant or provider as soon as possible. An explanation must be sent to the applicant or provider to explain all changes, and to state whether or not a desk review or problem-solving conference can be requested based on the situations stated #1.
4. The licensing administrator or inspector must submit the applicant or provider's signed copy of the re-issued violation notice to the enforcement consultant and tech, and must inform the enforcement consultant whether the 15 days, if appropriate, for the applicant or provider to request a desk review or problem-solving conference for either a change

in the violation notice and/or risk rating have elapsed.

5. If there are no changes made to the NOI, violation notice, and/or risk ratings, and the licensing administrator and inspector did not call in for the conference, the enforcement consultant will email the committee's decisions to the licensing administrator and inspector within 5 work days of the case review.
6. The enforcement consultant will edit the NOI as necessary and put a one-sided copy of the violation notice and summary page in the file. The file will be given to the enforcement tech for finalizing, i.e., formatting and proofing the NOI.

In preparing the NOI and VN for issuance, all confidential information will be removed from the VN.

7. Upon the enforcement tech finalizing the NOI, the tech will attach the violation notice to the NOI and deliver to the director for review and approval.

The licensing administrator and inspector may consult with home office to have a NOI that has already been issued to an applicant or provider amended due to additional egregious violations occurring 30 days or less since the issuance of the original NOI. The additional violations will not be reviewed by the enforcement review committee; rather the violation notice must be submitted to the enforcement consultant for review.

1. The enforcement consultant will forward the violation notice to the director and the appropriate associate director with a recommendation to approve or reject amending the original NOI.

Violations submitted to amend the original NOI, that are within the 15 days allowed for the applicant or provider to request a problem-solving conference, must be determined to represent sufficient risk of harm or injury to adults or children in care in order to bypass the problem-solving conference.

If requested by the applicant or provider, the problem-solving conference can still take place with the licensing administrator, but it must take place before the informal conference is conducted, if the original NOI has been appealed.

2. If the director approves amending the NOI, it will be returned to the enforcement consultant who will prepare a letter to the applicant or provider notifying them that the original NOI has been amended to include the attached violation notice. The enforcement consultant will also inform the applicant or provider that the new violations can be appealed at the informal conference.

The enforcement consultant will ensure that a copy of the letter that is sent to the applicant or provider is sent to the person scheduled to conduct the informal conference.

Part IX.

Special Orders, Final Orders, Appeal & Noncompliance

Appeal of an enforcement action is governed by the Administrative Process Act (APA), § 2.2-4000 et seq. of the Code of Virginia. The APA process includes an informal fact-finding conference, administrative hearing, and circuit court appeal. The department's final case decision is communicated to the applicant or licensed provider in special or final order. When the case involves registered or exempt providers, those providers receive a final order.

Special Orders

Special orders are issued as the final case decision for intermediate sanctions, including (1) placing the licensee on probation, (2) reducing licensed capacity, (3) prohibiting new admissions, (4) mandating training, (5) assessing civil penalties, (6) requiring written contact to parents, guardians or other responsible persons regarding health and safety violations, and (7) preventing receipt of federal funding. If the commissioner petitions a court to appoint a receiver for an ALF or ADCC or requires an ALF to contract with an individual licensed by the Board of Long Term care Administrators to administer, manage or operate the ALF, that a special order will be issued.

Section 63.2-100 of the Code of Virginia limits the stated duration of the special order to not more than 12 months.

If monitoring indicates compliance with licensing requirements and sustained compliance sufficient to warrant lifting the sanction before the special order expires, staff should send a recommendation to lift the sanction and the supporting rationale to the division director in the form of a draft letter to the provider.

Final Orders

Final Orders are signed by the commissioner and are issued for ultimate sanctions including (1) denial, (2) revocation, (3) injunction, and (4) summary suspension.

Appeal

If an applicant or provider appeals the department's decision in a case, the appeal must be made within the timeframes specified in the NOI. If the applicant or provider fails to appeal the NOI within the specified timeframe, the right to appeal is lost. If there is no timely appeal made by the applicant or provider, the sanction becomes effective 30 days from the date the applicant or provider received the NOI.

An appeal of an intermediate sanction is heard in an informal fact-finding conference (IC) chaired by a designated division staff person, usually a program specialist. After the IC, the chair writes and submits a formal report with recommendations to the associate director. The

associate director will review the report and make recommendations to the division director. The division director will review the report and recommendations of the chair and the associate director of enforcement and make a recommendation to the commissioner. The commissioner will make the final case decision through the issuance of a special order. Special orders are appealable to circuit court. Intermediate sanctions are not applicable to (1) applicants, (2) registered, and (3) exempt providers.

An appeal of an ultimate sanction is heard in an IC chaired by a designated division staff person, usually a program specialist. After the IC, the chair writes and submits a formal report with recommendations to the associate director. Following the review and recommendation by the associate director, the report is forwarded to the division director, who then issues the final decision letter for the department.

The decision letter for an ultimate sanction is appealed to an administrative hearing. If the applicant or provider appeals his case to an administrative hearing, the appeal will be presided over by a hearing officer selected from a prepared list by the Executive Secretary of the Supreme Court of Virginia. The hearing officer will hear the case and submit a formal report of findings and recommendations to the commissioner. A final case decision is issued in the form of a final order by the commissioner. Final orders are appealable to circuit court.

The sanction in a final order is effective on the date it is signed by the commissioner. The sanction will go into effect on the date specified in the commissioner's final order, even if the final order is appealed. Upon the request of the applicant or provider, the court may direct the department to stay the order, or the department may agree to suspend the order pending court review.

A quick reference guide for tracking the stages of appeals and orders is provided on the next page. Timelines for appeals are contained in the section of the NOI titled Right to Appeal. Staff are encouraged to go to licensing's "L" shared drive to obtain the current formats for each step in these processes.

Intermediate Sanctions	Days to Appeal Upon Receipt of Action	Ultimate sanctions	Days to Appeal Upon Receipt of Action
NOI Issued/Appealed to IC	15 days	NOI Issued/Appealed to IC	15 days
IC Held/Report Prepared	(Within 90 days)	IC Held/Report Prepared	(Within 90 days)
Special Order Issued/ Appealed to Circuit Court	30 days	Decision Letter Issued/ Appealed to Admin Hearing	30 days
Order of Circuit Court	No Further Appeals	Admin Hearing Report/ Commissioner’s Final Order	(Within 90 days)
		Final Order issued/ Appealed to Circuit Court	30 days
		Order of Circuit Court	No Further Appeals

Noncompliance with Final Orders

Noncompliance with a final order to revoke or deny a license that is not appealed will likely result in the department petitioning the court for injunctive relief.

The licensing office is responsible for closely monitoring compliance with the final order, as well as general compliance with the licensing requirements. The licensing administrator will report monitoring results to the associate director of operations and division director as necessary and at specified intervals until the case is resolved by attaining compliance or is involuntarily closed.

Since no intermediate sanction will be in effect for more than 12 months, monitoring inspections are normally required a month after imposition and quarterly thereafter until expiration of the intermediate sanction. An intermediate sanction may extend into another licensure period. Reports of each monitoring inspection, including any additional inspections made for cause, are expected to be filed with the associate director of operations and division director within two weeks.

If performance problems persist or worsen, either during or following the period in which the intermediate sanction is in force, staff should immediately consider the need to revoke or deny the license, certification, or exemption, or seek an injunction to achieve protection of vulnerable children or adults in care.

If findings from inspections show improved and sustained compliance sufficient to warrant a consideration of lifting a particular sanction, e.g., prohibiting new admissions, the licensing administrator can send a recommendation with rationale to the associate director of operations who will discuss with the division director.

Part X. Chairing Informal Conferences

The informal conference (IC) is the first step appeal of a sanction for an applicant, licensee, registered, or exempt provider. The IC is a forum for the appellant or his attorney to discuss their reasons for disputing the sanction, violations, and/or to present their proposed consent agreement and compliance plan.

The IC is an objective reconsideration of past actions, and the chair will consider new information offered by the appellant. The chair will review and reconsider information and decisions that the inspector, licensing administrator, associate directors, enforcement committee, and the division director made in the case. The chair may determine that the department misjudged facts or erred in its findings.

The chair should always be cognizant that enforcement issues may present a continued risk to children and adults in care. According to the individual circumstances, the chair may need to expedite the submission of the IC report.

Prior to the Informal Conference

The hearings coordinator will send the licensing administrator a copy of the appeal letter and the associate director will assign a chair for the IC and forward the appeal letter to the chair. Once the chair verifies that the licensee or the licensee's attorney made the appeal, the chair will set the date for the IC.

The chair will send the original scheduling letter, by certified mail, to the appellant. The letter will contain instructions for the submission of a consent agreement and how to obtain a copy of the consent agreement and compliance plan templates. The chair will email a copy of the scheduling letter to the enforcement tech, fiscal tech, enforcement consultant, associate directors, the licensing administrator and inspector, the assistant attorneys general, and if the sanction is a civil penalty, a copy of the letter will be sent to the fiscal technician.

The chair will keep the associate director, enforcement consultant, licensing administrator, and inspector apprised of progress of the case, or of any significant problems, throughout the IC process.

The chair will prepare for the IC by reviewing the violations listed in the NOI and discussing the case with the licensing administrator and assigned licensing inspector. The chair will review the complete case record, and if applicable, any consent agreement submitted by the appellant.

Room Preparations

Prior to beginning the IC, the chair will alert personnel in the office where the IC will be held; test the tape recorder and ensure that extra tapes and batteries are available; arrange seating to keep participants separate from observers; and set out two sign-in sheets, one for participants and one for observers. The respective sheet for participants and observers must allow for each to indicate who they are representing or their interest in the IC and, if applicable, their job title.

Rescheduling

The IC may be rescheduled once at the request of the appellant if the request is made in advance. Rescheduling is in the chair's discretion, taking in to account factors such as emergencies. If the appellant twice fails to attend an IC, then the appellant may be considered to have abandoned the appeal. In cases of "no shows," the chair will submit an IC report which should cite any previous failure to attend an IC and state any known reasons for the appellant's failure to attend. If the chair is uncertain as to whether the circumstances justify rescheduling an IC, the chair may confer with the division director or associate director.

All of the parties who receive a copy of the scheduling letter will be copied on a rescheduling letter. The reschedule letter may be sent electronically if the chair receives a verification of receipt from the appellant.

Subpoenaing Witnesses

The appellant may subpoena witnesses to the IC. A list naming each witness must be submitted to the IC chair prior to the IC. All costs for the subpoena, including serving the subpoena, will be borne by the appellant. (See § 2.2-4022 of the Code of Virginia, http://townhall.virginia.gov/um/dpb_apa.htm#_Hlk159316215)

The Informal Conference

The chair will ensure that everyone present at the IC sign the attendance sheets as either a participant or an observer. No one under the age of eighteen will be allowed to attend the IC, unless approved by the chair prior to the day of the IC. The chair will read the Preliminary Statement explaining the purpose and guidelines for the IC.

The chair will ensure that all IC participants and observers adhere to general rules of decorum. The chair shall deal with disruptive behavior, such as abusive or harassing language, or disrespectful conduct, in a firm, yet diplomatic manner. The chair will ask anyone exhibiting disruptive behavior to either comply with the standards of respectful behavior or leave the IC.

The appellant may choose to have the conference audio or video taped for their use, or have a court reporter present, but the appellant must make all arrangements for such taping and bear all costs associated with the taping. Taping may not interfere with the IC.

The chair will begin taping the IC with the reading of the introduction statement. The chair will then have each participant and observer state their name and their job title on the recording, indicating who they are representing or their interest in the IC.

During the IC, the appellant will present their case. If the appellant presents a consent agreement, the provisions in the consent agreement and compliance plan will be discussed. The chair will comment on the consent agreement and compliance plan to provide general guidance and suggestions. The goal of the discussion is to assist the appellant in creating a realistic, workable compliance plan.

The chair shall not make rulings or recommendations during the IC. The chair may ask questions, seek clarification, or provide general information. The chair should never give the appearance of presenting argument or justification for actions taken by the department.

The appellant may dispute violations cited in the NOI. If the chair is uncertain as to whether one or more violations should be included in the NOI, the chair shall consult the associate director or division director. After a decision has been made to uphold or rescind one or more disputed violations, the chair will inform the appellant. The appellant will then have to decide whether they wish to proceed with negotiating the consent agreement that will include any disputed violations upheld by the division director.

The IC is the appellant's forum to present information. Both the licensing administrator and inspector are present to listen for new information for later evaluation.

After the Informal Conference

The chair shall prepare an IC report for all scheduled ICs. If the provider fails to attend the IC, the report should provide any pertinent information, if known, to explain why the appellant failed to attend. The IC report must briefly summarize the basic facts, beginning with the date of the IC, location, participants, observers, and the following:

1. State the enforcement action pursued by the department.
2. List the points related to the violations in the NOI that the appellant presented as disputed findings or conclusions. A recommendation to support or rescind one or more violations will be included in the IC report.
3. State a brief summary of what the appellant presented by way of evidence, explanation or documentation for each point of the appellant's presentation, with the chair's conclusions in terms of whether the presented evidence suggested an error or misjudgment by the department.
4. Verify that the IC information provided by the appellant attesting to actions taken to correct deficiencies. The chair shall ask the licensing inspector, with the licensing administrator's knowledge and permission, to verify that the compliance plan has been implemented and that the violations listed in the NOI were corrected.
5. State whether a consent agreement was proposed and, if so, the chair's

recommendations, with rationale, to either accept the consent agreement for part or all of the intended action.

6. Weigh the appellant's facts, evidence and arguments in making a recommendation.

7. Summarize the presentation and findings, and recommend one of the following to the division director:

- a. rescind the imposition of sanction as unwarranted or unnecessary;
- b. accept all or portion of a facility-submitted consent agreement;
- c. reduce the proposed terms or stringency of the sanction;
- d. rescind the original sanction and impose a lesser sanction or;
- e. proceed with imposition of the sanction.

8. Conclude the report with the chair's overall findings and recommendation to support or reject the enforcement action recommended or to recommend a different enforcement action. If the chair recommends a different enforcement action, a brief rationale must be provided to explain the basis for the change. For instance, if the chair believes there was an error or misjudgment of facts in terms of the original decision to impose an intermediate sanction or to revoke/deny, and the chair recommends a lesser sanction, then there must be a clear statement to explain the decision to recommend the lesser sanction. **(Note: If a consent agreement incorporates a lesser sanction and the appellant subsequently fails to comply with the consent agreement, the department can only enforce the latter sanction and not the original sanction recommended.)**

9. Prepare a draft of the decision letter for the director's signature or special order for the commissioner's signature.

10. Submit the following applicable documents to the associate director and enforcement tech within 45 days of the conference:

- a. Home Office Memo (PDF)
- b. Informal Conference Report (Word)
- c. Consent agreement (Word and Pouch) and compliance plan (PDF and Pouch)
- d. Decision Letter (Word)
- e. Special Order (Word)
- f. IC sign in sheets for participants and observers (PDF)
- g. Letter to appellant regarding the IC date (PDF)
- h. Letter to appellant regarding a rescheduled IC date (PDF)
- i. Certified mail return receipt, original green card (PDF)
- j. Copies of emails referenced in the IC report (PDF)
- k. Inspection reports following the IC (PDF)
- l. Additional correspondences and documents, e.g., appellant or attorney, license, certificate of occupancy, floor plan and space calculations (PDF and Pouch)
- m. Audio tapes of IC (Pouch)

If after 45 days the negotiation of the consent agreement and compliance plan are not completed, the chair will contact the division director or associate director to inform them of the status and to make a recommendation as to the next step.

The chair will submit an electronic draft of the IC report and other required documents (e.g. consent agreement, compliance plan, special order, etc) to the associate director for review. Following the review by the associate director, he will make a recommendation to the division director to accept or modify the chair's recommendation. After approving, the associate director will request the chair to send documents electronically (in Word or PDF format) and/or pouched, as indicated #10 a-m above, to the enforcement tech.

Following the decision of the division director, within 90 days from the date of the IC, or from a later date agreed to by the department and the appellant, the department will issue its official decision, in accordance with General Procedures and Licensure for Information.

Depending on the type of sanction, the case decision will be given in writing to the appellant as a decision letter from the division director (for denials and revocations) or in a special order from the commissioner (for intermediate sanctions). The decision letter or special order will also include information concerning the appellant's right to continue the appeal.

Part XI.

Procedures and Guidelines for Consent Agreements

The purpose of a consent agreement is to allow the appellant the opportunity to forego a sanction – or receive a lesser sanction – by committing to a plan that will bring the facility into compliance with regulatory requirements.

The chair takes the lead for the department in negotiating consent agreements. The division director, associate directors, enforcement consultant, licensing administrators and inspectors may be consulted, as necessary, to produce a sound consent agreement. The chair acts as an intermediary and facilitator during the negotiation of the consent agreement. The chair must refrain from making comments related to the acceptance or rejection of the agreement. The division director shall make the final decision to accept or reject a consent agreement.

The appellant will provide the consent agreement to the chair of the IC. The chair should receive the consent agreement no later than five work days before the IC, to allow the chair ample time to review it. It is within the chair's discretion whether to accept a consent agreement first presented at the IC.

The consent agreement is essentially two documents. The consent agreement is a written agreement between the appellant and the department. The appellant agrees to perform specific actions to correct violations and come into compliance with licensing requirements. The appellant's plan should show a system of monitoring and reviews that support maintaining compliance. The regulatory provisions pertaining to consent agreements are contained in General Procedures and Information for Licensure. The consent agreement is signed by the appellant and the division director.

The compliance plan is an attachment to a consent agreement. It details how violations listed in the NOI will be corrected and the specific actions that will be taken by the appellant to prevent recurrence of those violations. The compliance plan is signed by the appellant. The appellant may include attachments to the compliance plan in order to demonstrate how they will maintain compliance, such as check lists for the contents of a first aid kit or a spreadsheet with employee data.

The chair will only accept a consent agreement and compliance plan that states that (1) all violations identified in the NOI will be corrected; (2) all causes for the violations identified in the NOI will be corrected to prevent recurrence; and (3) provides a realistic plan for full and continued compliance with licensing requirements or terms of registration to assure the health, safety and welfare of all individuals in the appellant's care will be protected.

The chair may recommend that the consent agreement be rejected if the chair determines that:

1. The appellant has knowingly committed; contributed to; condoned or concealed

- abuse, neglect, exploitation or serious escalation of risk to individuals; or is involved in illegal activities; or
2. The appellant has been untruthful or evasive concerning circumstances at the facility; or
 3. The appellant failed to make a serious effort to carry out reasonable terms and conditions attached to any previous intensive plans of correction negotiated with the responsible licensing unit; or
 4. The risk to the individuals in care is so high that a request for an injunction has been made; or
 5. The department lacks the authority to resolve the issue because another agency has statutory oversight; or
 6. Inspection by the department has determined that the appellant has failed to take immediate action to resolve health or safety issues identified in the NOI and has not demonstrated a reduced risk to the individuals in care; or
 7. The compliance inspection revealed repeat violations.

While a consent agreement might be the preferred resolution to an enforcement action, the appellant may request an IC to appeal the action but not accept the validity of the cited violations. If the appellant and the department reach an impasse, the appellant may choose to move forward with the appeal process. If the appellant moves forward with an appeal of an ultimate sanction, the appeal proceeds to an administrative hearing. If the appeal is for an intermediate sanction, the appeal moves to the circuit court of jurisdiction.

Role of the Chair in Negotiating a Consent Agreement

The chair will provide general assistance to the appellant or his representative in framing the issues and explaining the consent agreement and compliance plan process and format. The chair may make suggestions to the appellant. When the chair contacts the appellant or his representative to schedule the IC, the chair will inform such person that a template for a consent agreement is available to be sent if a consent agreement is being considered by the appellant. Upon request, the chair will provide the templates for the consent agreement and compliance plan and will answer questions regarding the preparation of the consent agreement and compliance plan. The chair will also advise the appellant of regulatory requirements pertaining to the consent agreement and compliance plan contained in General Procedures and Information for Licensure.

The appellant drafts the consent agreement and compliance plan, or may employ another person to write the consent agreement and compliance plan on his behalf. Regardless, the appellant must fully understand the consent agreement and compliance plan. The chair determines if the appellant is willing and able to implement every provision in the compliance plan, or the compliance plan will not be accepted.

Negotiation of the Consent Agreement

In the IC template scheduling letter to the appellant, the appellant is advised that the consent agreement and compliance plan templates are available by request. Licensing staff can access the consent agreement and compliance plan templates on the L drive in the Enforcement Folder. The scheduling letter states that the consent agreement and compliance plan are due five work days prior to the conference, as required by General Procedures and Information for Licensure. Emphasis is placed on obtaining the consent agreement and compliance plan in advance of the conference to allow the chair time to thoroughly review both and obtain comments from the licensing administrator and inspector prior to the IC.

By entering into the consent agreement, the appellant stipulates to the validity of all of the violations cited in the NOI. As stated earlier, if an appellant disputes one or more violations, and the chair is uncertain as to whether to rescind or uphold the violations, the chair shall consult the division director or associate director. If the decision is made to uphold the violations, the chair will inform the appellant that the consent agreement will not be approved without the disputed violations being addressed in the compliance plan.

The compliance plan must show a (1) commitment by the appellant to correct the violations, and (2) provide evidence of a review and monitoring system to minimize the possibility of recurrence of the violations. The plan should be realistic, with a system of checks and balances to alert the appellant to potential violations. The plan should address real issues, not the symptoms of the problems. The plan should be unique to the appellant's facility and the circumstances related to the violations. The plan should also be measurable, so the licensing inspector will be able to determine compliance with the consent agreement and compliance plan during inspections.

Following discussion of the consent agreement and compliance plan, the appellant may re-submit the edited consent agreement and compliance plan within seven days of the IC, as described in SOP 502. The appellant shall submit two originally signed and dated hard copies of both the consent agreement and compliance plan and any attachments to the chair. The appellant should also send an electronic copy of both documents to the chair, if possible. Otherwise the chair will scan the copy of the agreement and compliance plan in order to email the copies.

The consent agreement covers a defined period of time. The chair will consult with the licensing administrator and inspector, and others if needed, to determine a reasonable time frame and will include the recommended time frame in the IC report.

The appellant may request in writing for the division director to approve an early termination of the consent agreement in its entirety, or as to specific terms and conditions, when compliance is achieved.

Recommendation and Approval Process

Prior to the IC report being completed by the chair, the chair shall provide the licensing administrator and inspector with a copy of the consent agreement and compliance plan and request that the inspector conduct an inspection at the appellant's facility to determine whether the appellant has implemented the compliance plan. Following the findings of the inspection, the chair will prepare the IC report, and make a recommendation to either accept or reject the consent agreement.

The chair will prepare a decision letter for the division director's signature to either accept or reject the consent agreement. If the division director signs the consent agreement, the original enforcement action or actions stated in the NOI is rescinded.

The chair may recommend or the division director may decide to incorporate into the consent agreement a lesser enforcement action compared to the action recommended in the original NOI. For instance, rather than proceed with a denial, the decision made by the division director may be to impose a civil penalty. The appellant must, then, decide whether to agree to the terms of the consent agreement or decline it and move forward with the appeal process.

If a lesser enforcement action is incorporated, the consent agreement must specify the lesser enforcement action. The rationale for the lesser enforcement action must be explained in the IC report and the special order. For example, a consent agreement may be accepted in lieu of a denial, but the division director may impose a prohibition of new admissions at an assisted living facility. The rationale for prohibiting new admissions could be based on the finding that inadequate staffing was a major contributing cause leading to some residents not getting scheduled medications and others being administered wrong medications. Therefore, the prohibition of new admissions is judged to help reduce mistakes made by the facility by improving its staff-to-resident ratio.

If an intermediate sanction is imposed in lieu of a ultimate sanction, the chair will prepare a special order for the signature of the commissioner, but will also prepare a memorandum for the signature of the division director. The memorandum serves as a cover letter for the special order. Although § 63.2-1709.2 of the Code of Virginia only require that civil penalties be issued by the commissioner in the form of special orders, all intermediate sanctions will be issued from the commissioner.

At the conclusion of the IC, the chair will submit to the associate director the IC report, along with other supporting documents the decision letter, or memorandum with the special order. Following a review, the associate director forwards the case with a recommendation to the division director to accept or modify the recommendation of the chair.

When the appellant accepts the terms of the consent agreement, as evidenced by his signature, the appellant agrees to withdraw the appeal of the NOI and waives further rights to appeal.

Oversight Responsibilities during the Effective Dates of Consent Agreements

When the appellant and division director have signed a consent agreement, the licensing inspector will inspect the appellant's facility during the period the consent agreement is in effect to ensure that (1) the terms of the compliance plan are being implemented, and (2) to document the progress being made toward full compliance. Throughout the duration of the consent agreement, licensing staff must increase their visibility in the facility and continually evaluate whether the consent agreement is being implemented satisfactorily and whether its intended results are being achieved.

At each inspection, licensing staff must give the appellant specific feedback with the inspector's observations on the effectiveness of the compliance plan. The rationale is that the appellant is more likely to stay focused on implementing and continuing with the requirements of the agreement if licensing staff are seen paying close attention.

According to SOP 306, a facility placed on enforcement watch before the execution of a consent agreement will be taken off enforcement watch when a consent agreement is accepted. However, during the period that the consent agreement is in effect, the facility could return to enforcement watch status due to new violations.

If enforcement watch is reinstated, the licensing inspector must inspect the facility according to the requirements in SOP 306, which requires the licensing inspector to inspect the facility every 60 days to ensure compliance with the standards and the provisions in the compliance plan.

Part XII.

When Things Go Awry Between the Issuance of a Sanction and the Informal Conference

If an IC to appeal an ultimate sanction is pending, and new and egregious health or safety violations are cited in appellant's facility, the licensing administrator generally should not submit an enforcement action for an intermediate sanction, unless it can be reasoned that a particular intermediate sanction would leverage increased protection for individuals in care.

For instance, a sanction to prohibit new admissions or to reduce the capacity might be appropriate if it can be established that inadequate staffing continues to be a major problem. Issuing a civil penalty, on the other hand, would not have a direct impact on increasing safety and, therefore, should not be issued following the issuance of an ultimate sanction.

When an IC is requested to appeal an intermediate sanction, and new and egregious health or safety violations are cited in appellant's facility, the licensing administrator could recommend either another intermediate sanction or an ultimate sanction, depending on the circumstances.

For instance, a licensee for a child day care center may have appealed a civil penalty, an intermediate sanction, for failing to have a qualified administrator. Before the IC can be held, the licensing inspector discovers that the facility was operating above its licensed capacity and was significantly out of staff-to-child ratio for the third time in less than a month. Having too few staff for the number of children in care contributed to services not being provided. In response, the licensing administrator could recommend a second NOI to reduce the capacity and prohibit new admissions. This enforcement action would be in addition to the civil penalty already issued.

In a different scenario, an ultimate sanction might be recommended by the licensing administrator, following the issuance of an intermediate sanction, if violations were found to warrant this action.

For instance, while waiting for the IC for the original intermediate sanction to take place, an inspection finds a repeat incident involving numerous residents being administered the wrong medications by a staff not authorized to administer medications. In this situation, the licensing administrator could recommend to revoke or enjoin the operation of the facility (an ultimate sanction). Should the licensing administrator recommend an ultimate sanction to follow an intermediate sanction that has been appealed but has not gone through the IC process, the licensing administrator may consider requesting that the NOI for the intermediate sanction be withdrawn. In withdrawing the original NOI for an intermediate sanction, a new NOI may be recommended by the licensing administrator that incorporates violations from the original NOI into a new NOI to support an ultimate sanction.

On the other hand, if the decision is to amend the original NOI to include new violations cited prior to the scheduled IC for the original NOI, then the licensing administrator must inform the appellant, in writing, at least 15 days prior to the date that the IC is to take place. The decision to move forward to the IC with new violations must only be made when the division director has determined that there is imminent risk for harm or injury to those in care from the new violations. As stated in General Procedures and Information for Licensure, the division director is authorized to take this action, even though the appellant has not exercised his right to appeal the new violations through the problem-solving conference.

Regardless of the action, that is, amending the original NOI or withdrawing the original NOI in order to issue a new one, the licensing administrator will need to consult the associate director before submitting the enforcement package. If an IC has been scheduled, the associate director will notify the chair who, in turn, will notify the appellant in regards to whether the IC can take place on the scheduled date.

Part XIII

Beyond the Informal Conference

The licensing inspector must keep the licensing administrator informed of inspection findings and assessments made while facility is under a consent agreement. The licensing administrator and inspector will alert the associate director if the appellant's compliance level compromises the health or safety of the individuals in care.

Upon finding that the health or safety of the individuals in care are at risk for serious harm, the department may terminate the consent agreement and undertake any enforcement action deemed appropriate. If a consent agreement is terminated due to the failure of the appellant to comply with its terms and conditions, it is not advisable to consider another consent agreement for the circumstances that resulted in the initial agreement. An intermediate, at a minimum, or an ultimate sanction, if warranted, must be considered based on the specific circumstances of the case.

Conclusion

As the industries for out-of-home care services for adults and children continue to evolve and become more complex in terms of monitoring and enforcing regulatory requirements, the enforcement manual is certain to need updating periodically. In spite of the vast differences between providers on the basis of age, disabilities, infirmities, the size of the facility or home, whether the business is a small "mom and pop" provider or a member of a corporation, serving primarily private versus public pay consumers, the department strives to achieve fair and consistent decisions related to enforcement actions.

It is the philosophy of the department to employ only those needed, measured, and progressive steps to prevent or reduce the threat of harm or injury to individuals in care by being proactive in its regulatory practices. This starts with offering or helping providers find additional training and education, having routine meetings with provider groups, and conducting individual consultations. It is also the belief of the department that no matter how much it believes that the right enforcement decision is made, there will be times that mistakes become apparent. To help ensure that mistakes on the part of the department are few, if not prevented, ongoing training and education are provided to licensing staff at their respective regional office and at statewide conferences.

To remedy situations where licensing staff and providers are on opposite sides regarding whether noncompliance occurred and the imposed enforcement response was appropriate and fair, the Administrative Process Act, § 2.2-4000 of the Code of Virginia, is available. No matter the outcome in exercising this process, both licensing staff and providers share a common interest... that of protecting the health, safety, and well-being of vulnerable adults and children.

Realizing the challenges for both regulators and providers working in the human care field, because of the multiplicity of variables, our respective missions are intertwined, thereby making our individual success in accomplishing our mission predicated on mutual respect and

professional collaboration.