



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney
Governor

John A. McNeal
Director

MEMORANDUM

DATE: May 30, 2019

TO: Ms. Kelly McDowell
Division of Family Services – Office of Child Care Licensing

FROM: J. Todd Webb – Chairperson
State Council for Persons with Disabilities

RE: 22 DE Reg. 933 [Proposed Amendments for Child Placing Agencies (May 1, 2019)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Services for Children, Youth and Their Families, Division of Family Services, Office of Child Care Licensing's (OCCL) proposed amendments concerning the Delaware regulations for Child Placing Agencies. The amendments are primarily focused on clarifying the procedures and standards for licensure of placing agencies, as well as the criteria that should be used to evaluate individuals who apply to be foster parents and foster family homes. The summary also states the proposed regulations include "an updated anti-discrimination policy." The analysis below will focus on amendments to the standards for foster family homes.

By way of background, the federal Family First Prevention Services Act (FFPSA), passed as part of the Bipartisan Budget Act of 2018 in February 2018, included a provision mandating the U.S. Department of Health & Human Services (HHS) identify model standards for licensing of foster family homes that could be used by states. The standards recommended by the Children's Bureau of HHS's Administration of Children Families were introduced for comment in the Federal Register in July 2018. The Children's Bureau acknowledged that it had "relied heavily upon" the model standards formulated by the National Association for Regulatory Administration (NARA) in crafting the proposed model standards. See 83 Fed. Reg. 37496. The final model standards were announced by an Information Memorandum issued by the

Children's Bureau on February 4, 2019 (hereinafter referred to as "the CB Memo").¹ While the standards in this memo are not binding, states were required to submit amendments to their title IV-E plans explaining any deviations from the standards. See CB Memo at 3.

The proposed amendments to the Delacare regulations largely replicate language used in the model standards; however, there are a few specific additions to the eligibility requirements for foster families appearing in both sets of rules that are potentially of concern for individuals with disabilities who wish to become foster parents. The proposed regulation was published as 22 DE Reg. 933 in the May 1, 2019 issue of the Register of Regulations. SCPD has the following observations and recommendations.

First, the summary of the proposed regulations indicates the intention to require that at least one applicant in a prospective foster family must have "functional literacy," although that term is not defined in the subsequent regulations. The proposed regulations state at 39.19 that in evaluating an application from a potential foster parent, "a licensee shall ensure an applicant is able to read and write." The model standards in the CB memo do not define functional literacy either; however, the memo further explains that the functional literacy requirement is to "ensure at least one applicant reads and writes at the level necessary to participate effectively in the community in which they live." CB Memo at 4. "[H]aving the ability to read medication labels" is provided as a specific example.

The proposed amendments require that licensed agencies have policies to ensure "that the foster parent is able to communicate with the child." See proposed regulations at 26.1.4. This is not explained further. The CB Memo simply states that "[t]he communication standards are flexible in that applicants must be able to communicate with the Title IV-E agency, service providers, and a child in foster care." CB Memo at 4. Additionally, in an end note, the CB Memo clarifies that the requirement had initially been worded to require communication "in the child's own language," however, this language was stricken due to "comments about the availability of communication aids, non-verbal communication and other efforts to address language barriers." CB Memo at 13. While this caveat indicates that American Sign Language and augmentative communication devices could therefore be considered suitable, there is no specific reference to children or foster parents with disabilities in the discussion of communication requirements. Further, the proposed amendments to the Delacare regulations do not provide this guidance. SCPD recommends the addition of language to the requirements regarding literacy and communication to make clear that communication does not have to be "in the child's own language," and that a prospective foster parent could satisfy the requirement with or without the assistance of communication aids, non-verbal communication or other accommodations.

Second, another potential concern is that the proposed amendments require, in numerous provisions, (e.g., 39.7) that any history of drug or alcohol abuse or treatment of any family household member must be disclosed (the model standards have the same requirement). This requirement supplements existing language in Delaware's regulations stating an applicant must have "demonstrate[d] emotional stability" as well as "freedom from abuse of alcohol or medications and freedom from use of any illegal drug. See existing text of 39.7. Additionally,

¹ The full text of the Children's Bureau memorandum is available at <https://www.acf.hhs.gov/sites/default/files/cb/im1901.pdf>

the existing regulations require that “a staff member diagnosed with a mental illness that might create a significant risk of harm to children does not work with children until a health care provider states children are not at risk.” See existing text of 19.5. Per the definitions provided in the existing regulations a “staff member” includes “an agency employee, contractor or volunteer working more than five days or 40 hours a year.” See existing text of 4.0. While it is unclear, this could be read to include foster parents.

Again, there are no further definitions of terms such as “emotional stability” or “significant risk of harm to children” in the regulations, as they exist now or with the proposed amendments, to provide further guidance as to how a licensee should make determinations. This could adversely affect foster families who have a member with a diagnosed mental illness, even if they are receiving appropriate treatment, or is in recovery from substance use disorder, as the regulations could be read to imply that an individual is unsuitable solely on the basis of a history of treatment for mental illness or substance use disorder. SCPD also suggests modifying the proposed language regarding substance abuse and mental health histories to make clear that having such a history is not on its own disqualifying, and identifying factors that should be taken into consideration when determining suitability of a potential foster parent who discloses a history of mental health disorders or substance abuse, or treatment for such conditions.

Third, the existing regulations already state at 50.7 that “[a] licensee shall ensure a disability of an applicant or household member is only considered as it affects the ability to care for a child,” however, there are no clear guidelines provided in the regulations as to how “functional literacy” should be measured, and how a household member’s history of drug or alcohol misuse should be taken into consideration. Although the language in the proposed regulations pertaining to the evaluation of potential foster families is largely duplicative of the federal model standards, without further guidance, it is possible that these requirements could be prejudicial to potential foster parents with disabilities. Staff at OCCL and licensed agencies may not be well-trained on issues relating to disability and accessibility and, therefore, may be inclined to reject potential foster parents with disabilities based on apparent noncompliance with requirements.

Fourth, the proposed regulations also require, at 40.1.28, that an applicant has “reliable and safe transportation,” which is defined to include “a properly maintained vehicle or access to reliable public transportation.” This mirrors language in the CB memo regarding transportation. Some advocates see this as a step in the right direction to being more inclusive of potential foster parents, as some states specifically require foster parents to have a motor vehicle. See e.g., *States Are Struggling to Meet Foster Care Needs. New Federal Rules Could Help.* (Dec. 6, 2018), available at <https://www.governing.com/topics/health-human-services/sl-foster-care-demands-states-federal-rule.html>. The CB memo also notes that all “references to ‘only adults in the home’ providing transportation” had been removed. See CB Memo at 14, endnote x. This makes clear that in the case of a foster family where the adults in the household cannot drive for whatever reason, transport by third parties could satisfy the requirements. The CB Memo also clarifies that the “license, insurance and safety restraint requirements apply only to vehicles of applicants, family or friends that are used to transport a child in foster care.” SCPD suggests the addition of language similar to that used in the CB memo to make clear that “safe transport arrangements with family, friends, case workers and teen household members” would comply with the transportation requirements.

Fifth, the only specific reference to children with disabilities in the proposed amended regulations is in reference to newly imposed limit that there shall be no more than six children in foster care placed in one home. See proposed regulations at 26.23. The rule provides for a number of exceptions, including “[t]o allow a family with special training or skills to provide care to a child who has a severe disability.” While this provision on its own is not objectionable, there is not any specific guidance as to what constitutes a “severe disability.” The Children’s Bureau also declined to define the term “child with a severe disability.” See CB Memo at 2. The proposed regulations do not make clear what alternatives could be available in the case that there are already at least six foster children placed with the only eligible foster parents who have the necessary training to address a child’s specific needs. While certainly the proposed regulations don’t require that a child with a severe disability be placed with a foster parent even if they already have six or more foster children in their home, there may be many cases where placement in a foster family home with fewer children would be better suited to the child’s needs and the additional demands a “severe disability” may place upon a foster parent. The DLP suggests that the regulations should provide a definition of the term “child with a severe disability” and also contain additional language to indicate that such placement would be an individualized determination, and that all available options should be considered in addition to placing a child with severe disabilities in a foster home already at capacity.

In summary, although the proposed amendments mostly mirror language used in the federal model standards, further clarification in the aforementioned areas would be helpful to ensure that the requirements are not construed to disqualify potential foster families in which a parent or other household member has a disability, and to clarify placement considerations for children with “severe” disabilities.

Thank you for your consideration and please contact the SCPD if you have any questions regarding our position or recommendations on the proposed regulation.

cc: Ms. Trenee Parker, DFS
Ms. Laura Waterland, DLP
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council