




COMMONWEALTH *of* VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

TO: DUKE STOREN, Commissioner
Virginia Department of Social Services

FROM: ELLEN FULMER MALENKE 
Assistant Attorney General

DATE: August 12, 2020

SUBJECT: Regulation Section - 22VAC40-201 (Amend Permanency Regulation 2019)

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

This regulatory action provides standards for local departments of social services for prevention, foster care, adoption, and independent living services. This regulatory action makes changes in response to 2019 and 2020 legislation. The intent of this action is to make the regulation consistent with the Code of Virginia, and to make any other changes the agency deems necessary after comments and review.

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

If you have any questions or need additional information about these regulations, please contact me at 786-4856.

cc: Kim F. Piner, Esquire

Attachment

Project 6266 - Proposed

DEPARTMENT OF SOCIAL SERVICES

Amend Permanency Regulation 2019

22VAC40-201-40. Foster care placements.

A. Within 30 days of the child being placed in the custody of the local board, the local department shall exercise due diligence to identify and notify in writing all adult relatives, including the parents of siblings who have legal custody of such siblings, that the child has been removed and explain the options to relatives to participate in the care and placement of the child including eligibility as a kinship foster parent and the services and supports that may be available for children placed in such a home. The local department may determine it is not in the child's best interest to notify relatives who have a history of domestic violence; have been convicted of barrier crimes as defined in § 63.2-1719 of the Code of Virginia other than those described in subsections E, F, G, and H of § 63.2-1721 of the Code of Virginia; or are listed on the Virginia State Police Sex Offender Registry. Additionally, if the birth father is unknown, the local department shall search the Virginia Birth Father Registry within 30 days of the child entering foster care. At a minimum, the local department shall search for relatives at the time the child enters foster care, annually, and prior to any subsequent placement changes for the child.

B. The local department shall ensure a child in foster care is placed in an ~~approved~~ a home or licensed facility that complies with all applicable federal and state requirements for safety and child well-being. Placements shall be made subject to the requirements of § 63.2-901.1 of the Code of Virginia. The following requirements shall be met when placing a child in an approved home or licensed facility:

1. The local department shall exercise due diligence to locate and assess relatives as a foster home placement for the child, including in emergency situations.
2. The local department shall place the child in the least restrictive, most family like setting consistent with the best interests and needs of the child.
3. The local department shall attempt to place the child in as close proximity as possible to the birth parent's or prior custodian's home to facilitate visitation, provide continuity of connections, and provide educational stability for the child.
4. The local department shall take reasonable steps to place the child with siblings unless such a joint placement would be contrary to the safety or well-being of the child or siblings.
5. The local department shall, when appropriate, consider placement in a dually approved home so that if reunification fails, the placement is the best available placement to provide permanency through adoption for the child.
6. The local department shall not delay or deny placement of a child into a foster or adoptive family placement on the basis of race, color, or national origin of the foster or adoptive parent or child.
7. When a child being placed in foster care is of Native American, Alaskan Eskimo, or Aleut heritage and is a member of a nationally recognized tribe, the local department shall follow all federal laws, regulations, and policies regarding the referral of the child. The local department may contact the Department of Historic Resources for information on contacting Virginia tribes and shall consider tribal culture and connections in the placement and care of a child of Virginia Indian heritage.
8. If a child is placed in a kinship foster placement pursuant to § 63.2-900.1 of the Code of Virginia, the child shall not be removed from the physical custody of the kinship foster

parent, provided the child has been living with the kinship foster parent for six consecutive months and the placement continues to meet approval standards for foster care, unless (i) the kinship foster parent consents to the removal; (ii) removal is agreed upon at a family partnership meeting; (iii) removal is ordered by a court of competent jurisdiction; or (iv) removal is warranted pursuant to § 63.2-1517 of the Code of Virginia.

C. A service worker shall make a preplacement visit to any out-of-home placement to observe the environment where the child will be living and ensure that the placement is safe and capable of meeting the needs of the child. The preplacement visit shall precede the placement date except in cases of emergency. In cases of emergency, the visit shall occur on the same day as the placement.

D. Foster or adoptive homes shall meet standards established by the board and shall be approved by child-placing agencies. Prior to the placement of a child in a licensed child-placing agency (LCPA) foster home, the local department shall verify that the LCPA approved the foster home. Prior to the placement of a child in a children's residential facility, the local department shall verify that the facility is licensed to operate by the appropriate state regulatory authority.

E. Local departments shall receive notice of the approval from the department's office of the ICPC prior to placing a child out of state.

F. When the local department is considering placement of a child in a foster or adoptive home approved by another local department within Virginia, the local department intending to place the child shall consult with the approving local department about the placement of the child and shall also verify that the home is still approved.

G. When a child is moving with a foster or adoptive family from one jurisdiction to another, the local department holding custody shall notify the local department in the jurisdiction to which the foster or adoptive family is moving.

H. When a child moves with a foster or adoptive family from one jurisdiction to another in Virginia, the local department holding custody shall continue supervision of the child unless supervision is transferred to the other local department.

I. A local department may petition the court to transfer custody of a child to another local department when the birth parent or prior custodian has moved to that locality.

J. In planned placement changes or relocation of foster parents, birth parents with residual parental rights or prior custodians and all other relevant parties shall be notified that a placement change or move is being considered if such notification is in the best interest of the child. The service worker shall consider the child's best interest and safety needs when involving the birth parent or prior custodian and all other relevant parties in the decision-making process regarding placement change or notification of the new placement.

K. In the case where an emergency situation requires an immediate placement change, the birth parent with residual parental rights or prior custodian and all other relevant parties shall be notified immediately of the placement change. The local department shall inform the birth parent or prior custodian why the placement change occurred and why the birth parent or prior custodian and all other relevant parties could not be involved in the decision-making process.

22VAC40-201-70. Foster care goals.

A. Foster care goals are established to assure permanency is achieved for the child.

Permissible foster care goals are:

1. Transfer custody of the child to his prior family;
2. Transfer custody of the child to a relative other than his prior family;
3. Finalize adoption of the child;
4. Place the child in permanent foster care;

5. Transition to independent living if the child is admitted to the United States as a refugee or asylee or is 18 years of age or older; or

6. Place the child in another planned permanent living arrangement in accordance with § 16.1-282.1 A2 of the Code of Virginia.

B. When the permanency goal is changed to adoption, the local department shall file petitions with the court 30 days prior to the hearing to:

1. Approve the foster care service plan seeking to change the permanency goal to adoption; and

2. Terminate parental rights.

Upon termination of parental rights, the local department shall provide an array of adoption services to support obtaining a finalized adoption.

C. The local department shall engage in concurrent permanency planning in order to achieve timely permanency for the child. Permanency goals shall be considered and addressed from the beginning of placement and continuously evaluated.

D. The goal of another planned permanent living arrangement may be chosen when the court has found that:

1. The child has a severe and chronic emotional, physical, or neurological disabling condition;

2. The child requires long-term residential care for the condition;

3. None of the alternatives listed in clauses (i) through (v) of § 16.1-282.1 A of the Code of Virginia is achievable for the child at the time placement in another planned permanent living arrangement is approved as the permanent goal for the child; and

4. The youth is 16 years of age or older.

E. The goal of permanent foster care may be chosen when the court has found that:

1. The child is placed in a foster home;
2. The child has developed a clearly established and documented significant relationship with a foster parent;
3. None of the alternatives listed in clauses (i) through (v) of § 16.1-282.1 A of the Code of Virginia is achievable for the child at the time placement in permanent foster care is approved as the permanent goal for the child; and
4. The youth is 16 years of age and older.

F. If either the goal of permanent foster care or another planned permanent living arrangement is selected, the local department shall continue to search for relatives and significant individuals as permanent families throughout the child's involvement with the child welfare system. The local department shall continuously evaluate the best interests of the child in light of the changing circumstances of the child and extended family to determine whether a change in goal to return home, placement with relatives, or adoption can achieve permanency.

G. The goal of independent living services shall only be selected for those children admitted to the United States as a refugee or asylee, those youth age 18 years leaving foster care and meeting the requirements to receive independent living services, or youth participating in the Fostering Futures program, as described in 22VAC40-201-105. For those youth with this goal, the service worker shall continue diligent efforts to search for a relative or other interested adult who will provide a permanent long-term family relationship for the youth.

H. When a child has been in care for 12 months and reunification remains the goal, the local department shall consult with the commissioner or designee regarding case planning.

22VAC40-201-100. Providing independent living services: service for youth 14 years of age and older.

A. Independent living services shall be identified by the youth, parent or prior custodian, foster or adoptive family, local department, service providers, legal community, and other interested individuals and shall be included in the service plan. Input from the youth in assembling these individuals and developing the services is required.

B. Independent living services shall be provided to all youth in foster care ages 14 to 18 years and shall be offered to any person between 18 and 21 from the age of 14 until they reach 23 years of age and who is in the process of transitioning from foster care to self-sufficiency was in foster care at any point between 14 and 21 years of age.

C. Independent living services include education, vocational training, employment, mental and physical health services, transportation, housing, financial support, daily living skills, counseling, and development of permanent connections with adults.

D. Local departments shall ~~assess the youth's independent living skills and needs and incorporate the assessment results into the youth's service plan~~ conduct life skills assessments and develop transition plans, which include independent living services to be offered, within 30 days of a child in foster care reaching 14 years of age or within 30 days of a child who is 14 years of age or older entering foster care and update such assessments and plans annually.

E. ~~A youth placed in foster care before the age of 18 years who turns age 18 years prior to July 1, 2016, may continue to receive independent living services from the local department between the ages of 18 and 21 years if:~~

- ~~1. The youth is making progress in an educational or vocational program, has employment, or is in a treatment or training program; and~~

~~2. The youth agrees to participate with the local department in (i) developing a service agreement and (ii) signing the service agreement. The service agreement shall require that the youth shall cooperate with all services; or~~

~~3. The youth is in permanent foster care and is making progress in an educational or vocational program, has employment, or is in a treatment or training program.~~

F. A youth age 16 years and older is eligible to live in an independent living arrangement provided the local department utilizes the independent living arrangement placement criteria developed by the department to determine that such an arrangement is in the youth's best interest. An eligible youth may receive an independent living stipend to assist him with the costs of maintenance. The eligibility criteria for receiving an independent living stipend will be developed by the department.

~~G. Any person who was committed or entrusted to a local department, turned 18 years of age prior to July 1, 2016, and chooses to discontinue receiving independent living services after age 18 years may request a resumption of independent living services provided that (i) the person has not yet reached 21 years of age and (ii) the person has entered into a written agreement, less than 60 days after independent living services have been discontinued, with the local board regarding the terms and conditions of his receipt of independent living services. Local departments shall provide any person who chooses to leave foster care or terminate independent living services before his 21st birthday written notice of his right to request restoration of independent living services in accordance with § 63.2-905.1 of the Code of Virginia by including such written notice in the person's transition plan.~~

H. Local departments shall assist eligible youth in applying for educational and vocational financial assistance. Educational and vocational specific funding sources shall be used prior to using other sources.

~~I. Local departments shall provide independent living services to any person between 18 and 21 years of age who:~~

- ~~1. Turned 18 years of age prior to July 1, 2016;~~
- ~~2. Was in the custody of the local board immediately prior to his commitment to the Department of Juvenile Justice;~~
- ~~3. Is in the process of transitioning from a commitment to the Department of Juvenile Justice to self-sufficiency; and~~
- ~~4. Provides written notice of his intent to receive independent living services and enters into a written agreement which sets forth the terms and conditions for the provision of independent living services with the local board within 60 days of his release from commitment.~~

~~J. Every six months a supervisory review of service plans for youth receiving independent living services after age 18 years shall be conducted to assure the effectiveness of service provision.~~

K. A youth who has been in care six months or more and turns 18 years of age while in foster care shall receive a certified copy of his birth certificate, social security card, health insurance information, medical records, and state-issued identification or driver's license.

L. The local department shall run annual credit checks on all youth in foster care who are 14 years of age and older but less than 18 years of age. The local department shall assist a youth in resolving any discrepancies in the youth's credit report. The local department shall assist a youth in foster care over 18 years of age in obtaining the youth's annual credit report.

22VAC40-201-110. Court hearings and case reviews.

A. For all court hearings, local departments shall:

1. Facilitate a meeting prior to the development of the foster care service plan and foster care service plan review to ensure participation and consider input from the child, the birth parents or prior custodians, the foster or adoptive parents, and any other interested individuals, who may include service providers, in the development of the service plan and service plan review. All youth 14 years of age and older shall be given the opportunity to choose up to two people to attend the meeting who are not the foster parent or caseworker. All of these persons shall be involved in sharing information for the purposes of well-informed decisions and planning for the child with a focus on safety and permanence.

2. File petitions in accordance with the requirements for the type of hearing.

3. Obtain and consider the child's input as to who should be included in the court hearing. If persons identified by the child will not be included in the court hearing, the service worker shall explain the reasons to the child for such a decision consistent with the child's developmental and psychological status.

4. Inform the court of reasonable efforts made to achieve concurrent permanency goals.

5. Document the appropriateness of the placement, including the continued appropriateness of an out-of-state placement if applicable.

6. Ensure the child or youth is present for the permanency planning hearing unless the court determines this not to be in the child's best interest.

B. The child or youth shall be consulted in an age-appropriate manner about his permanency plan at the permanency planning hearing and subsequent administrative panel reviews.

C. An administrative panel review shall be held six months after a permanency planning hearing when the goal of permanent foster care has been approved by the court. A foster care

review hearing will be held annually. The child will continue to have administrative panel reviews or review hearings every six months until the child reaches age 18 years.

D. The local department shall invite the child; the child's birth parents or prior custodians when appropriate; and the child's foster or adoptive parents, placement providers, guardian ad litem, court appointed special advocate, relatives, and service providers to participate in the administrative panel reviews.

E. The local department shall consider all recommendations made during the administrative panel review in planning services for the child and birth parents or prior custodians and document the recommendations on the department approved form. Individuals who were invited, including those not in attendance, shall be given a copy of the results of the administrative panel review as documented on the department approved form.

F. A supervisory review is required every six months for youth ages 18 to 21 years who are receiving independent living services only.

G. An administrative panel review is required every six months for Fostering Futures program participants unless a court review is held.

H. In accordance with § 16.1-242.1 of the Code of Virginia, when a case is on appeal for termination of parental rights, the juvenile and domestic relations district court retains jurisdiction on all matters not on appeal. The circuit court appeal hearing may substitute for a review hearing if the circuit court addresses the future status of the child.

I. An adoption progress report shall be prepared every six months after a permanency planning hearing when the goal of adoption has been approved by the court. The adoption progress report shall be entered into the automated child welfare data system. The child will continue to have annual review hearings in addition to adoption progress reports until a final order of adoption is issued or the child reaches age 18 years.

J. If a child is in the custody of the local department and a preadoptive family has not been identified and approved for the child, the child's guardian ad litem or the local board of social services may file a petition to restore the previously terminated parental rights of the child's parent in accordance with § 16.1-283.2 of the Code of Virginia.

K. If a child has been in foster care 15 out of the last 22 months or if the parent of the child in foster care has been convicted of an offense as outlined in § 63.2-910.2 of the Code of Virginia, the local department shall file a petition to terminate the parental rights and concurrently identify, recruit, process, and approve a qualified family for adoption of the child, unless certain exceptions, as outlined in § 63.2-910.2, are met. These exceptions, which shall be documented in the child's case plan submitted to court, include:

1. The child is being cared for by a relative and the relative is pursuing custody of the child and does not want to adopt.

2. The local department has not provided services to the parents deemed necessary for the safe return of the child.

3. Termination of parental rights is not in the best interests of the child and the local department has documented a compelling reason explaining why termination is not in the best interests of the child. Determinations regarding compelling reasons not to terminate parental rights shall be made based on the unique circumstances of the case.

Compelling reasons may include:

a. A parent has made substantial progress toward eliminating the conditions that caused the child's placement in foster care; it is possible for the child to safely return home within six months; and the child's return home will be in the child's best interest.

b. Another permanency plan is better suited to meet the health and safety needs of the child.

L. If a local department does not file a petition to terminate parental rights when a child has been in care for 15 of the most recent 22 months, the local department shall report to the commissioner or designee a clear description of the reason why such petition has not been filed and the reasonable efforts made regarding reunification or placement of the child with a relative.

1. The commissioner or designee shall compile the information reported into a de-identified annual report and provide such report to all local departments.

2. The commissioner or designee shall use the information contained in the report to establish a training program that educates local departments regarding common errors made by local departments when declining to file a petition for termination of parental rights.

22VAC40-201-140. Other foster care requirements.

A. Pursuant to § 63.2-908 of the Code of Virginia, a foster parent may consent to a marriage or entry into the military if the child has been placed with him through a permanent foster care agreement that has been approved by the court.

B. An employee of a local department, including a relative, cannot serve as a foster, adoptive, or licensed child-placing agency parent for a child in the custody of that local department. In the event it is in the child's best interest that a local employee be the foster parent, the child's custody may be transferred to another local department.

C. The child of a foster child remains the responsibility of his parent, unless custody has been removed by the court.

1. The child is not subject to requirements for foster care plans, reviews, or hearings. However, the needs and safety of the child shall be considered and documented in the foster care plan for the foster child (parent).

2. The child is eligible for maintenance payments in accordance with 42 USC § 675(4)(B) and Medicaid in accordance with 42 USC § 672(h).

D. When a child in foster care is committed to the Department of Juvenile Justice, the local department no longer has custody or placement and care responsibility for the child. As long as the discharge or release plan for the child is to return to the local department prior to reaching age 18 years, the local department shall maintain a connection with the child.

E. At least 90 days prior to a child's release from commitment to the Department of Juvenile Justice, the local department shall:

1. Consult with the court services unit concerning the child's return to the locality; and
2. Work collaboratively with the court services unit to develop a plan for the child's successful transition back to the community, which will identify the services necessary to facilitate the transition and will describe how the services will be provided.

F. The caseload standard for foster care workers is 15 cases maximum per foster care worker. Each child in foster care is considered an individual foster care case.

22VAC40-201-145. Foster Care Complaint System.

A. Upon receipt of a complaint from a constituent regarding a foster care case, the Department will investigate such complaint by conducting a review of case documentation, foster care policy, and state and federal code, and gather information from the constituent, local department, and other collaterals as needed.

B. The Department shall provide the constituent a resolution to their concern that includes the methods used to assess the concern and a response to the concern. This resolution will be provided via the communication method of the constituent.

C. All information received or maintained by the Department in connection with such reports, complaints, or investigations shall be confidential and not subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except that such information may be relayed and used on a confidential basis for the purposes of investigation and to protect the health, safety, and well-being of children in foster care.