



COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: KARIN CLARK
Virginia Department of Social Services

FROM: ALLEN T. WILSON
Senior Assistant Attorney General

DATE: December 1, 2014

SUBJECT: Proposed Regulation 22 VAC 40-201
Permanency Services – Prevention, Foster Care,
Adoption and Independent Living

I have reviewed the attached proposed regulation to determine if the State Board of Social Services (“State Board”) has the statutory authority to promulgate the proposed regulation and if the proposed emergency regulation comports with applicable state law.

Chapter 437 of the 2013 Acts of Assembly required the State Board to promulgate regulations within 280 days of its enactment. In accordance with Virginia Code 2.2-4011, the State Board promulgated an emergency regulation, which became effective on June 25, 2014. This proposed regulation would replace the emergency regulation. It appears that the State Board has the authority to promulgate the proposed regulation, subject to compliance with the provisions of Article 2 of the Administrative Process Act and Executive Order 17 (2014), and has not exceeded that authority.

If you have any questions, please feel free to call me at 786-0095.

DEPARTMENT OF SOCIAL SERVICES

Fair Hearings for Foster Care Emergency Regulation

22VAC40-201-10. Definitions.

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

"Administrative panel review" means a review of a child in foster care that the local board conducts on a planned basis, and that is open to the participation of the birth parents or prior custodians and other individuals significant to the child and family, to evaluate the current status and effectiveness of the objectives in the service plan and the services being provided for the immediate care of the child and the plan to achieve a permanent home for the child.

"Adoption" means a legal process that entitles the person being adopted to all of the rights and privileges, and subjects the person to all of the obligations of a birth child.

"Adoption assistance" means a money payment or services provided to adoptive parents on behalf of a child with special needs.

"Adoption assistance agreement" means a written agreement between the child-placing agency and the adoptive parents of a child with special needs to provide for the unmet financial and service needs of the child.

"Adoption Manual" means Volume VII, Section III, Chapter C - Adoption/Agency Placement of the Service Program Manual of the Virginia Department of Social Services dated October 2009/March 2010.

"Adoption Progress Report" means a report filed with the juvenile court on the progress being made to place the child in an adoptive home. Section 16.1-283 of the Code of Virginia requires that an Adoption Progress Report be submitted to the juvenile court every six months following termination of parental rights until the adoption is final.

"Adoption search" means interviews and written or telephone inquiries made by a local department to locate and advise the biological parents or siblings of an adult adoptee's request, by Application for Disclosure or petition to the court, for identifying information from a closed adoption record.

"Adoptive home" means any family home selected and approved by a parent, local board or a licensed child-placing agency for the placement of a child with the intent of adoption.

"Adoptive home study" means an assessment of a family completed by a child-placing agency to determine the family's suitability for adoption. The adoptive home study is included in the dual approval process.

"Adoptive parent" means any provider selected and approved by a parent or a child-placing agency for the placement of a child with the intent of adoption.

"Adoptive placement" means arranging for the care of a child who is in the custody of a child-placing agency in an approved home for the purpose of adoption.

"Adult adoption" means the adoption of any person 18 years of age or older, carried out in accordance with § 63.2-1243 of the Code of Virginia.

"Agency placement adoption" means an adoption in which a child is placed in an adoptive home by a child-placing agency that has custody of the child.

"AREVA" means the Adoption Resource Exchange of Virginia that maintains a registry and photo-listing of children waiting for adoption and families seeking to adopt.

"Assessment" means an evaluation of the situation of the child and family to identify strengths and services needed.

"Birth family" means the child's biological family.

"Birth parent" means the child's biological parent and for purposes of adoptive placement means a parent by previous adoption.

"Birth sibling" means the child's biological sibling.

"Board" means the State Board of Social Services.

"Child" means any natural person under 18 years of age.

"Child-placing agency" means any person who places children in foster homes, adoptive homes, or independent living arrangements pursuant to § 63.2-1819 of the Code of Virginia or a local board that places children in foster homes or adoptive homes pursuant to §§ 63.2-900, 63.2-903, and 63.2-1221 of the Code of Virginia. Officers, employees, or agents of the Commonwealth, or any locality acting within the scope of their authority as such, who serve as or maintain a child-placing agency, shall not be required to be licensed.

"Child with special needs" as it relates to adoption assistance means a child who meets the definition of a child with special needs set forth in §§ 63.2-1300 and 63.2-1301 B of the Code of Virginia.

"Claim for benefits" as used in § 63.2-915 of the Code of Virginia and 22VAC40-201-115 means (i) foster care maintenance, including enhanced maintenance; (ii) the services set forth in a court approved foster care service plan, the foster care services identified in an individual family service plan developed by a family assessment and planning team or other multi-disciplinary team pursuant to the Comprehensive Services Act (§ 2.2-5200 of the Code of Virginia et seq.), or a transitional living plan for independent living services; (iii) the placement of a child through an agreement with the child's parents or guardians, where legal custody remains with the parents or guardians; (iv) foster care prevention services as set out in a prevention service plan; or (v) placement of a child for adoption when an approved family is outside the locality with the legal custody of the child, in accordance with 42 USC § 671(a)(23).

"Close relative" means a grandparent, great-grandparent, adult nephew or niece, adult brother or sister, adult uncle or aunt, or adult great uncle or great aunt.

"Commissioner" means the commissioner of the department, his designee, or his authorized representative.

"Community Policy and Management Team (CPMT)" means a team appointed by the local governing body to receive funds pursuant to Chapter 52 (§ 2.2-5200 et seq.) of Title 2.2 of the Code of Virginia. The powers and duties of the CPMT are set out in § 2.2-5206 of the Code of Virginia.

"Comprehensive Services Act for At-Risk Youth and Families (CSA)" means a collaborative system of services and funding that is child centered, family focused, and community based when addressing the strengths and needs of troubled and at-risk youth and their families in the Commonwealth.

"Concurrent permanency planning" means a sequential, structured approach to case management which requires working towards a permanency goal (usually reunification) while at the same time establishing and working towards an alternative permanency plan.

"Custody investigation" means a method to gather information related to the parents and a child whose custody, visitation, or support is in controversy or requires determination.

"Department" means the State Department of Social Services.

"Denied" as used in § 63.2-915 of the Code of Virginia and 22VAC40-201-115 means the refusal to provide a claim for benefits.

"Dual approval process" means a process that includes a home study, mutual selection, interviews, training, and background checks to be completed on all applicants being considered for approval as a resource, foster or adoptive family home provider.

"Family Assessment and Planning Team (FAPT)" means the local team created by the CPMT (i) to assess the strengths and needs of troubled youths and families who are approved for referral to the team and (ii) to identify and determine the complement of services required to meet their unique needs. The powers and duties of the FAPT are set out in § 2.2-5208 of the Code of Virginia.

"Foster care" means 24-hour substitute care for children placed away from their parents or guardians and for whom the local board has placement and care responsibility. Foster care also includes children under the placement and care of the local board who have not been removed from their home.

"Foster care maintenance payments" means payments to cover federally allowable expenses made on behalf of a child in foster care including the cost of food, clothing, shelter, daily supervision, reasonable travel for the child to visit relatives and to remain in his previous school placement, and other allowable expenses in accordance with guidance developed by the department.

"Foster Care Manual" means Chapter E - Foster Care of the Child and Family Services Manual of the Virginia Department of Social Services dated July 2011.

"Foster care placement" means placement of a child through (i) an agreement between the parents or guardians and the local board or the public agency designated by the CPMT where legal custody remains with the parents or guardians, or (ii) an entrustment or commitment of the child to the local board or licensed child-placing agency.

"Foster care prevention" means the provision of services to a child and family to prevent the need for foster care placement.

"Foster care services" means the provision of a full range of prevention, placement, treatment, and community services, including but not limited to independent living services, for a planned period of time as set forth in § 63.2-905 of the Code of Virginia.

"Foster child" means a child for whom the local board has assumed placement and care responsibilities through a noncustodial foster care agreement, entrustment, or court commitment before 18 years of age.

"Foster home" means the place of residence of any natural person in which any child, other than a child by birth or adoption of such person, resides as a member of the household.

"Foster parent" means an approved provider who gives 24-hour substitute family care, room and board, and services for children or youth committed or entrusted to a child-placing agency.

"Independent living arrangement" means placement of a child at least 16 years of age who is in the custody of a local board or licensed child-placing agency and has been placed by the local board or

licensed child-placing agency in a living arrangement in which he does not have daily substitute parental supervision.

"Independent living services" means services and activities provided to a child in foster care 14 years of age or older who was committed or entrusted to a local board of social services, child welfare agency, or private child-placing agency. Independent living services may also mean services and activities provided to a person who was in foster care on his 18th birthday and has not yet reached the age of 21 years. Such services shall include counseling, education, housing, employment, and money management skills development, access to essential documents, and other appropriate services to help children or persons prepare for self-sufficiency.

"Individual Family Service Plan (IFSP)" means the plan for services developed by the FAPT in accordance with § 2.2-5208 of the Code of Virginia.

"Intercountry placement" means the arrangement for the care of a child in an adoptive home or foster care placement into or out of the Commonwealth by a licensed child-placing agency, court, or other entity authorized to make such placements in accordance with the laws of the foreign country under which it operates.

"Interstate Compact on the Placement of Children (ICPC)" means a uniform law that has been enacted by all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands which establishes orderly procedures for the interstate placement of children and sets responsibility for those involved in placing those children.

"Interstate placement" means the arrangement for the care of a child in an adoptive home, foster care placement, or in the home of the child's parent or with a relative or nonagency guardian, into or out of the Commonwealth, by a child-placing agency or court when the full legal right of the child's parent or nonagency guardian to plan for the child has been voluntarily terminated or limited or severed by the action of any court.

"Investigation" means the process by which the local department obtains information required by § 63.2-1208 of the Code of Virginia about the placement and the suitability of the adoption. The findings

of the investigation are compiled into a written report for the circuit court containing a recommendation on the action to be taken by the court.

"Local department" means the local department of social services of any county or city in the Commonwealth.

"Nonagency placement adoption" means an adoption in which the child is not in the custody of a child-placing agency and is placed in the adoptive home directly by the birth parent or legal guardian.

"Noncustodial foster care agreement" means an agreement that the local department enters into with the parent or guardian of a child to place the child in foster care when the parent or guardian retains custody of the child. The agreement specifies the conditions for placement and care of the child.

"Nonrecurring expenses" means expenses of adoptive parents directly related to the adoption of a child with special needs including, but not limited to, attorney or other fees directly related to the finalization of the adoption; transportation; court costs; and reasonable and necessary fees of licensed child-placing agencies.

"Parental placement" means locating or effecting the placement of a child or the placing of a child in a family home by the child's parent or legal guardian for the purpose of foster care or adoption.

"Permanency" means establishing family connections and placement options for a child to provide a lifetime of commitment, continuity of care, a sense of belonging, and a legal and social status that go beyond a child's temporary foster care placements.

"Permanency planning" means a social work practice philosophy that promotes establishing a permanent living situation for every child with an adult with whom the child has a continuous, reciprocal relationship within a minimum amount of time after the child enters the foster care system.

"Permanency planning indicator (PPI)" means a tool used in concurrent permanency planning to assess the likelihood of reunification. This tool assists the worker in determining if a child should be placed with a resource family and if a concurrent goal should be established.

"Prior custodian" means the person who had custody of the child and with whom the child resided, other than the birth parent, before custody was transferred to or placement made with the child-placing agency when that person had custody of the child.

"Putative Father Registry" means a confidential database designed to protect the rights of a putative father who wants to be notified in the event of a proceeding related to termination of parental rights or adoption for a child he may have fathered.

"Residential placement" means a placement in a licensed publicly or privately owned facility, other than a private family home, where 24-hour care is provided to children separated from their families. A residential placement includes children's residential facilities as defined in § 63.2-100 of the Code of Virginia.

"Resource parent" means a provider who has completed the dual approval process and has been approved as both a foster and adoptive family home provider.

"Reunification" means the return of the child to his home after removal for reasons of child abuse and neglect, abandonment, child in need of services, parental request for relief of custody, noncustodial agreement, entrustment, or any other court-ordered removal.

"Service plan" means a written document that describes the programs, care, services, and other support which will be offered to the child and his parents and other prior custodians pursuant to § 16.1-281 of the Code of Virginia,

"Service worker" means a worker responsible for case management or service coordination for prevention, foster care, or adoption cases.

"SSI" means Supplemental Security Income.

"State pool fund" means the pooled state and local funds administered by CSA and used to pay for services authorized by the CPMT.

"Step-parent adoption" means the adoption of a child by a spouse; or the adoption of a child by a former spouse of the birth or adoptive parent in accordance with § 63.2-1201.1 of the Code of Virginia.

"Title IV-E" means the title of the Social Security Act that authorizes federal funds for foster care and adoption assistance.

"Visitation and report" means the visitation conducted pursuant to § 63.2-1212 of the Code of Virginia subsequent to the entry of an interlocutory order of adoption and the written report compiling the findings of the visitation which is filed in the circuit court.

"Wrap around services" means an individually designed set of services and supports provided to a child and his family that includes treatment services, personal support services or any other supports necessary to achieve the desired outcome. Wrap around services are developed through a team approach.

"Youth" means any child in foster care between 16 and 18 years of age or any person 18 to 21 years of age transitioning out of foster care and receiving independent living services pursuant to § 63.2-905.1 of the Code of Virginia.

22VAC40-201-115. Foster care appeal process..

A. Any individual whose claim for benefits available pursuant to 42 USC § 670 et seq. or whose claim for benefits pursuant to § 63.2-905 of the Code of Virginia is denied or is not acted upon by the local department with reasonable promptness shall have a right to appeal to the commissioner.

B. A hearing need not be granted when either state or federal law requires automatic maintenance payment adjustments for classes of recipients unless the reason for an individual appeal is incorrect maintenance amount computation.

C. Placement decisions of local boards are final when in accordance with the relevant provisions of Title 16.1 of the Code of Virginia. However, in accordance with 42 USC § 671(a)(23), a hearing shall be granted for the denial or delay in placement of a child for adoption when an approved family is outside the locality with the legal custody of the child.

D. The hearing shall be face-to-face, or at the option of the commissioner or his designee, a hearing by telephone may be held if the individual agrees. The individual shall be afforded all rights as specified in this section, whether the hearing is face-to-face or by telephone.

E. The local department or, in those cases where the local department is not involved, the licensed child-placing agency, the family assessment and planning team, or other multi-disciplinary team shall inform an individual in writing of the right to appeal the denial of a benefit or the delay of a decision regarding a benefit under this section at the time the applicable plan is written and at the time of any action affecting claim for benefit. This shall include a written notice to the birth parents or caretaker at the time a child comes into foster care, a written notice to the guardian ad litem, and written notice to foster parents at the time the foster care agreement is signed. The notice shall include:

1. The right to a hearing;
2. The method by which the individual may obtain a hearing; and
3. That the individual may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman, or he may represent himself.

F. The local department or, in those cases where the local department is not involved, the licensed child-placing agency, the family assessment and planning team, or other multi-disciplinary team shall provide timely notice of a decision to discontinue, terminate, suspend, or change a benefit for the child. Timely notice means the notice is mailed at least 10 days before the date the action becomes effective. If the individual requests a hearing within the timely notice period, the benefit shall not be suspended, reduced, discontinued, or terminated (but is subject to recovery if the action is sustained), until a decision is rendered after a hearing, unless:

1. A determination is made at the hearing that the sole issue is one of state or federal law or policy or a change in state or federal law and not one of incorrect benefit computation;
2. A change affecting the individual's benefit occurs while the hearing decision is pending and the individual fails to request a hearing after notice of the change; or

3. The individual specifically requests that he not receive continued benefits pending a hearing decision.

G. An individual shall be allowed to request a hearing for up to 30 days after the denial of a claim for benefit. Reasonable notice of the hearing shall be provided to the individual. Within 90 days of the request for a hearing, the hearing shall be conducted, a decision reached, and the individual notified of the decision.

H. The commissioner may provide that a hearing request made after the date of action, but during a period not in excess of 10 days following such date, shall result in reinstatement of the benefit to be continued until the hearing decision unless (i) the individual specifically requests that continued benefit not be paid pending the hearing decision or (ii) at the hearing it is determined that the sole issue is one of state or federal law or policy. In any case where action was taken without timely notice, if the individual requests a hearing within 10 days of the mailing of the notice of the action and the commissioner determines that the action resulted from other than the application of state or federal law or policy or a change in state or federal law, the benefit shall be reinstated and continued until a decision is rendered after the hearing unless the individual specifically requests that he not receive continued benefits pending the hearing decision.

I. Pursuant to § 63.2-915 of the Code of Virginia, the commissioner may delegate the duty and authority to consider and make determinations on any appeal filed in accordance with this section to duly qualified officers.

J. The commissioner or designated hearing officer may deny or dismiss a request for a hearing where it has been withdrawn by the individual in writing or where it is abandoned. Abandonment may be deemed to have occurred if the individual without good cause therefor fails to appear by himself or by authorized representative at the hearing scheduled for such individual.

K. The hearing shall include consideration of the denial of a claim for benefits or the local department's failure to act with reasonable promptness on a request for a benefit for the individual.

L. The individual requesting the hearing or his representative shall have adequate opportunity to:

1. Examine information relied upon by the local department, licensed child-placing agency, family assessment and planning team, or other multi-disciplinary team in considering the request for a benefit to the extent that the information does not violate confidentiality requirements.

2. Bring witnesses;

3. Establish all pertinent facts and circumstances;

4. Advance any arguments without undue interference;

5. Question or refute testimony or evidence; and

6. Confront and cross-examine witnesses.

M. Decisions of the commissioner or designated hearing officer shall be based exclusively on evidence and other material introduced at the hearing. The transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all the papers and requests filed in the proceeding and the decision of the commissioner or hearing officer shall constitute the exclusive record and shall be available to the individual at a place accessible to him or his representative at a reasonable time.

N. Decisions by the commissioner or hearing officer shall consist of a memorandum decision summarizing the facts and identifying the regulations and policy supporting the decision.

O. The individual shall be notified of the decision in writing.

P. When the hearing decision is favorable to the individual, the local department, licensed child-placing agency, family assessment and planning team, or other multi-disciplinary team shall promptly begin the process to provide the requested service or, in the case of foster care maintenance, make corrective payments retroactively to the date the incorrect action was taken, unless foster care maintenance payments were continued during the pendency of the hearing decision.

Q. The decision of the commissioner shall be binding and considered a final agency action for purposes of judicial review. The hearing decision shall be a memorandum decision summarizing the facts and identifying the statutes and regulations supporting the decision.