




COMMONWEALTH of VIRGINIA
Office of the Attorney General

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

Mark R. Herring
Attorney General

TO: KARIN CLARK
Virginia Department of Social Services

FROM: MICHELLE A. L'HOMMEDIU 
Assistant Attorney General

DATE: November 28, 2018

SUBJECT: Proposed Regulations to Review and Amend the Additional Daily
Supervision Rate Structure, 22 VAC 40-221 *et seq.* (4887/8268)

I am in receipt of the attached regulations to amend the regulations concerning the additional daily supervision rate structure, 22 VAC 40-221 *et seq.* You have asked the Office of the Attorney General to review and determine if the State Board of Social Services (“State Board”) has the statutory authority to promulgate the proposed regulations and if the proposed regulations comport with applicable state law.

Virginia Code § 63.2-217 mandates that the State Board promulgate regulations that are necessary to carry out the provisions of Title 63.2. Regulation of foster care, adoption assistance, and the kinship guardianship program includes payment for children covered by such programs. It is my opinion that the State Board has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”), and has not exceeded that authority. To date, the Board has not yet acted on these regulations; and the Agency Background Document available on Town Hall reflects the anticipated future date of Board action.

If you have any questions or need additional information about these regulations, please contact me at 786-6005.

cc: Kim F. Piner, Esquire

Attachment

Project 5241 - Proposed

**DEPARTMENT OF SOCIAL SERVICES
Review & Amend Additional Daily Supervision Rate Structure**

22VAC40-221-10. Definitions.

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

~~"Additional daily supervision" or "ADS" means a child's need for increased supervision and support based on the identified needs of the child. ADS is the basis for determining if an enhanced maintenance payment to a foster parent or an adoptive parent entering into an adoption assistance agreement is needed. The need for ADS is also the basis for increased expectations for the child-placing agency and the foster parent or the adoptive parent prior to the finalization of the adoption in meeting the needs of the child.~~

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

"Additional daily supervision payment" or "ADS payment" means a money payment included as part of a foster care maintenance payment, adoption assistance payment, or kinship guardianship assistance payment for the child's need for increased supervision and support.

"Adoption assistance agreement" means a written agreement, binding on the parties to the agreement, the Department, and other relative agencies, between the local department of social services (LDSS) and the adoptive parent of a minor child that is binding on both parties and includes maintenance and, when applicable, additional daily supervision, Medicaid, services and nonrecurring fees. that specifies the nature and the amount of any payments, services, and assistance to be provided under such agreement, and stipulates that the agreement shall remain in effect regardless of the State in which the adoptive parents reside.

"Adoptive placement" means the placement of a child for the purposes of adoption in a home with a signed adoptive placement agreement.

"ADS emergency placement" means the sudden, unplanned, or unexpected placement of a child who needs immediate care in a foster home and the placement occurs prior to the agency obtaining adequate information regarding the child's needs. ADS emergency placements require the foster parent to provide increased supervision and support to ensure the child's safety.

"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, or 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.

"CRAFFT" means Community Resource, Adoptive, and Foster Family Training. CRAFFT specialists are available to local departments of social services to provide assistance regarding training for foster families.

"Department" means the Virginia Department of Social Services.

~~"Enhanced maintenance payment" means the payment made to a foster parent over and above the basic foster care maintenance payment or to an adoptive parent when the adoption assistance agreement is negotiated. It is based on the needs of the child for additional daily supervision as identified by the uniform rate assessment tool.~~

"Foster care maintenance payment" means payments to cover the cost of food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child was enrolled at the time of placement. Additional daily supervision is included when supported by the identified and documented needs of the child.

"Kinship Guardianship Assistance payment" means a money payment provided to a relative custodian on behalf of a child that was discharged from foster care to the relative's custody in accordance with the requirements of Virginia Code § 63.2-1305.

"Kinship Guardianship Assistance Agreement" means a written agreement, binding on the parties to the agreement, between the agency and the prospective relative custodian(s) of the minor child that specifies the nature and the amount of any payments and assistance to be provided under such agreement, and stipulates that the agreement shall remain in effect regardless of the State in which the relative custodian resides.

"LDSS" means the local department of social services.

"Licensed" means licensed child-placing agencies; entities licensed by the Department of Behavioral Health and Developmental Services; licensed behavioral health professionals or behavioral health professionals working under the direct supervision of a licensed behavioral health professional.

"Treatment foster care" or "TFC" means a community-based program where services are designed to address the special needs of children and families. Services to children and youth are delivered primarily by treatment foster parents who are trained, supervised, and supported by agency staff. Treatment is primarily foster family based.

"Uniform rate assessment tool" means a department-approved web-based tool to assess the child's behavioral, emotional, physical, and personal care needs to determine if an additional daily supervision payment is necessary to ensure the safety and well-being of the child.

22VAC40-221-20. Administration Utilization of the uniform rate assessment tool.

A. A department approved uniform rate assessment tool shall be used to determine the additional daily supervision component, if any, of the foster care maintenance payment ~~or the adoption assistance payment, or the kinship guardianship assistance payment.~~ Use of the rate assessment tool to assess the documented needs of the child shall be applied ~~consistently consistent~~ regardless of the child's maintenance funding source.

1. The LDSS having care and responsibility for the child is responsible to ensure the assessment is completed for every child placed in a foster home, including both TFC homes and non-TFC homes.

2. The LDSS having care and responsibility for the child is responsible to ensure the tool assessment is completed with input from a child-specific team of individuals who are knowledgeable about the child's characteristics.

23. The child-specific team shall include (i) the caseworker, (ii) foster ~~or parent,~~ adoptive ~~parents~~ parent, or relative custodian, and (iii) an individual trained to administer use the uniform rate assessment tool. Other individuals with knowledge of the child shall be invited to participate in the meeting or provide input about the child's needs. This shall ~~may~~ include family members, and the child, as if appropriate, other significant individuals in the child's social support network, the private child-placing agency staff involved in the care of the child, and other ~~providers~~ individuals providing care to the child.

34. ~~LDSS staff or other public child-serving agency individuals may~~ shall be trained in accordance with the department's Child and Family Services Manual, Chapter E Foster

Care, Section 14, July 2011 to administer use the uniform rate assessment tool in assessing the child's documented needs.

~~45. The child's assigned caseworker, foster or adoptive parents, or private agency staff shall not administer the tool. Only trained LDSS staff that are not associated with the case shall use the uniform rate assessment tool to assess the child's documented needs.~~

~~5. The rate assessment tool shall be administered according to the following criteria and in accordance with the department's Child and Family Services Manual, Chapter E Foster Care, Section 14, July 2011:~~

~~a. If the child is to be placed in a TFC home;~~

~~b. If the LDSS chooses to make enhanced maintenance payments for children in non-TFC homes;~~

~~c. At the time an adoption assistance agreement is negotiated when the child's needs prior to negotiating and signing the agreement indicate a need for ADS. A re-administration of the tool is not required if the adoption assistance agreement is signed within three months of a prior ADS assessment.~~

~~6. The rate assessment tool shall be re-administered:~~

~~a. When requested and there is evidence of significant behavioral, emotional, or medical changes and four or more weeks of additional support have become necessary to maintain the child in the home.~~

~~(1) Once requested, the rate assessment tool must be administered within 14 calendar days.~~

~~(2) If the rate assessment tool indicates a need for an increase or decrease in ADS, the increase or decrease takes effect on the first day of the subsequent month.~~

~~b. No more often than quarterly for any child unless the previously stated criteria apply.~~

~~c. A minimum of once per year.~~

B. The child's need for additional daily supervision shall be assessed when:

1. The child is placed in a TFC home;

2. The child is placed in a non-TFC home; or

3. An adoption assistance agreement or kinship guardianship assistance agreement is negotiated and the child's needs indicate a need for ADS prior to the negotiating and signing of the agreement. An assessment of the child's needs, through the use of the uniform rate assessment tool, is not required if the adoption assistance agreement or kinship guardianship assistance agreement is signed within the six months after the child's last assessment.

C. A child's needs shall be re-assessed through the use of the uniform rate assessment tool for additional daily supervision payments for children in foster care, as follows:

1. When requested by the foster parent and there is evidence of significant behavioral, emotional, or medical changes and four or more weeks of additional support have become necessary to maintain the child in the home.

a. Once requested, the child's needs must be assessed through the use of the uniform rate assessment tool within 14 calendar days.

b. If the uniform rate assessment tool indicates a need for an increase or decrease in ADS, the increase or decrease takes effect on the first day of the subsequent month.

2. At least annually, but no more often than once per quarter for any child unless the provisions of subsection C1 of this section apply.

BD. The individual administering using the rate assessment tool shall:

1. Consider all input from all sources regarding the emotional, behavioral, and medical characteristics of the child and will rate each item on the tool;
2. Make the final decision as to how to rate a child's characteristics based on the evidence as presented;
3. Issue a final score on the tool within five business days of the meeting; and
4. Share a copy of the scored tool with the foster or parent, adoptive parents parent, or relative custodian and, if requested, review the tool assessment with them; and
5. Inform the foster parent, adoptive parent, or relative custodian in writing of the right to appeal decisions relating to the ADS payments and the applicable appeal process.

22VAC40-221-25. Determining the enhanced maintenance rate.

~~The child-specific team shall consider the services provided to the child that reduce or eliminate any direct additional supervision or support provided to the child by the foster parent and reduce the enhanced maintenance payment based on these services.~~

22VAC40-221-30. Child-placing agency requirements for children in foster care.

A. The child-placing agency that approved the foster care home shall have face-to-face contacts with the foster parents at least monthly. Child-placing agencies may contract with licensed providers to conduct the in-home contacts with the foster parent.

B. Child-placing agencies shall have an appointed case worker on call and available to make face-to-face contact if necessary to provide services to the child and the foster family 24 hours per day, seven days per week.

1. Child-placing agencies may contract with licensed providers to perform this service.
2. Supervisory consultation to the on-call worker shall be available 24 hours per day, seven days per week and may be a service obtained through a contract with a licensed provider.

C. The child-placing agency shall monitor and document the contractor's performance if ~~they choose~~ it chooses to contract out the activities in subsections A and B of this section ~~in accordance with the department's Child and Family Services Manual, Chapter E Foster Care, Section 14, July 2011.~~

D. Additional training shall be provided to the foster parents receiving an enhanced maintenance additional daily supervision payment based on the needs of the foster parent and the children in care. ~~Foster parents, and adoptive parents, and prospective relative custodians prior to finalization of the adoption receiving enhanced maintenance payments~~ payments that include additional daily supervision shall be consulted on their training needs. Adoptive parents and prospective relative custodians shall be consulted on their training needs prior to finalization of the adoption or kinship guardianship.

E. Foster parents receiving ADS payments shall be required to:

1. Participate in and cooperate with the LDSS in developing the foster care plan;
2. Participate in Family Partnership Meetings and Child and Family Team Meetings;
3. Participate in meetings as requested by the school or other service providers;
4. Discuss with the agency and follow through on all services provided or expected of them to ensure the child's well-being and progress;

5. Assume responsibility for managing the daily supervision and supportive tasks a child may need, including transportation to the child's appointments, visitation, school, and extra-curricular activities;

6. Attend and participate in court hearings, therapy, or other appointments; and

7. Accurately and consistently monitor and document the child's behaviors in the manner in which the LDSS has requested.

F. Failure of the foster parent receiving ADS payments to comply with the requirements of this section may result in termination of the ADS payments, removal of the child from the foster care placement, or other action by the LDSS pursuant to federal and state law unless the foster parent is able to provide good cause as to why he is unable to perform any of these duties.

EG. The foster care service plans developed for a child for whom enhanced maintenance is additional daily supervision payments are paid shall include but not be limited to:

1. Measurable goals, objectives, and strategies for the foster ~~or parent~~, adoptive parent, or prospective relative custodian and the child-placing agency in addressing the identified needs of the child;

2. Provisions for providing training for the foster ~~or parent~~, adoptive ~~parents~~ parent, or prospective relative custodian consistent with the identified needs of the child;

3. Provisions for services to prevent placement disruption and maintain a stable placement; and

4. The method developed jointly by the child-placing agency and the foster ~~or parent~~, adoptive parent, or prospective relative custodian to document the child's progress.

FH. This section is ~~does not applicable in cases where a~~ apply after entry of the final order of adoption has been issued or final order from the court awarding custody to the relative custodian for kinship guardianship.

22VAC40-221-50. ADS payments for emergency placement foster care placements.

~~Enhanced maintenance payments~~ A. The additional daily supervision portion of the foster care maintenance payment for the initial emergency foster care placement of a child shall be based on a per diem not to exceed \$1,600 \$1,120 per month.

~~4B. The department may change the maximum per diem for initial emergency foster care placements upon approval from the State Board of Social Services.~~

~~2. The enhanced maintenance payment per diem for the initial emergency placement includes the day the uniform rate assessment tool is administered to determine the on-going enhanced maintenance rate.~~

~~3C. The uniform rate assessment tool shall be administered~~ utilized to assess the child's needs within 60 calendar days of the initial emergency foster care placement of a child.

22VAC40-221-70. Post-finalized adoptions.

~~Enhanced maintenance~~ Adoption assistance payments based in whole or in part on a child's need for additional daily supervision shall be made available to adoptive parents after the adoption has been finalized pursuant to the department's Child and Family Services Manual, Chapter E Foster Care, Section 17, April 2013. entry of the final order of adoption if the following criteria are met:

1. The adoptive parent shall ~~be required to either~~ submit an application for renegotiation of their adoption assistance agreement. adoption assistance, if there is not an adoption assistance agreement, or submit a request to amend the existing adoption assistance agreement;

2. The documented needs of the child shall be the basis for a decision to provide an enhanced maintenance payment or a services payment. All requests for adoption assistance shall be supported with documentation from a licensed professional. Failure to provide written supporting documentation from a licensed professional will result in denial of a request for adoption assistance or an amendment to an adoption assistance agreement;

3. The uniform rate assessment tool shall be administered pursuant to 22VAC40-221-20; and

34. Enhanced maintenance payments shall be documented in an adoption assistance payment is documented in an adoption assistance agreement or an adoption assistance agreement addendum if an adoption assistance agreement existed at the time of the request for an assessment of the child's need for additional daily supervision.

22VAC40-221-80. Post-finalized kinship guardianship..

Kinship guardianship assistance payments that are based in whole or in part on a child's need for additional daily supervision shall be made available to a relative custodian after custody is awarded by the court to the relative custodian, if all of the following criteria are met:

1. A valid kinship guardianship agreement that complies with the requirements of Virginia Code § 63.2-1305 exists;

2. The relative custodian has submitted a written request to amend the kinship guardianship assistance agreement;

3. The documented needs of the child have been assessed using the uniform rate assessment tool and, based on that assessment, it is necessary to amend the kinship guardianship assistance agreement concerning additional daily supervision; and

4. Any change to the kinship guardianship assistance agreement has been documented in a kinship guardianship assistance agreement addendum.