



Governor's Advisory Council for Exceptional Citizens (GACEC)
516 West Loockerman St., Dover, DE 19904
302-739-4553 (voice) 302-739-6126 (fax) <http://www.gacec.delaware.gov>

May 29, 2019

Kelly McDowell
Office of Child Care Licensing
3411 Silverside Road
Concord Plaza, Hagley Building
Wilmington, DE 19810

RE: 22 DE Reg. 933 DFS OCCL Proposed DELACARE Regulations for Child Placing Agencies Regulation [(May 1, 2019)]

Dear Ms. McDowell:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Family Services Office of Child Care Licensing (OCCL) proposed amendments to the Delacare regulations for Child Placing Agencies. The amendments clarify 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 proposed amendments to the Delacare regulations mostly 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 may wish to become foster parents.

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 of 2018. 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"). 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. CB Memo at 3. Council would like to share the following observations on the proposed amendments.

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. *Id.*

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. Also, the proposed amendments to the Delacare regulations do not provide this guidance. Council suggests adding 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 (see, 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, 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.

There are no additional 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 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. Council would suggest modifying the proposed language regarding substance abuse and mental health histories to make it clear that having such a history is not disqualifying on its own. It would also be helpful to identify 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.

The existing regulations already state at section 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. Without additional guidance it is possible that these requirements could be detrimental 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.

Third, section 40.1.28 of the proposed regulations require 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 it 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.” *Id.* Council suggests the adding language similar to that used in the CB memo to make it clear that “safe transport arrangements with family friends, case workers and teen household members” would comply with the transportation requirements.

Fourth, the proposed amendment mentions 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.” Council notes that 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. Council suggests that the regulations should provide a definition of the term "child with a severe disability". It would also be helpful to add 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.

Thank you for your consideration of our observations. Please contact me or Wendy Strauss at the GACEC office if you have any questions on our observations.

Sincerely,

Ann C Fisher

Ann C. Fisher
Chairperson

ACF: kpc