

Relative Foster Care Licensing Waivers in the States: Policies and Possibilities

September 29, 2010



This document was prepared in collaboration with ChildFocus, the Children's Defense Fund, Generations United, and the Grandfamilies State Law and Policy Resource Center. The authors also wish to thank Dennis Blazey for his valuable feedback.

CLASP wishes to thank the following funders for their generous support of our child welfare work: The Annie E. Casey Foundation, The Atlantic Philanthropies, The George Gund Foundation, and an anonymous donor.

The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Introduction

On October 7, 2008, the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) was signed into law, helping to, among other things, ensure that children in foster care maintain family connections. Each year approximately 750,000 children spend time in foster care when their parents, for a variety of reasons, are unable to safely care for them. Fostering Connections included a number of provisions that all work together to help children maintain connections with their families of origin, including a requirement to identify and provide notice to all adult relatives when children enter care, an option to provide continuing support to children who exit care to live with relatives, and a provision that codified pre-existing guidance¹ allowing states to waive non-safety related licensing standards for relatives who wish to become licensed as foster parents on a case-by-case basis.

Fostering Connections requires that state child welfare agencies exercise due diligence to identify and provide notice to all adult grandparents and other relatives of each child within 30 days of the child's removal from his or her parent(s)' custody. This notice allows grandparents and other relatives to get involved early in the child's care and/or placement. The notice must, among other things, describe the requirements to become a foster family home and the additional services and supports that are available for children in such a home and describe how to enter into an agreement to receive guardianship assistance payments, if the state has elected to make them. Thus, states must be clear in providing notice to relatives about the requirements that must be met to become a licensed foster parent.

Fostering Connections gives states the option to use Title IV-E of the Social Security Act funds to provide guardianship assistance payments for children cared for by relative guardians who cared for child in foster care and who are committed to caring for these children permanently when they leave foster care. Among other requirements to qualify for this support, the relative's home must be licensed in accordance with Title IV-E licensing standards while the child is residing there for at least 6 months prior to exiting to guardianship.² Therefore, in states that take the Title IV-E guardianship assistance program option, it is important to consider the impact of licensure on a child's eligibility for federal support if they ultimately leave care to live permanently with a relative caregiver.

Fostering Connections clarifies that states may waive non-safety licensing standards on a case-by-case basis in order to eliminate barriers to placing children safely with relatives in licensed homes. Fostering Connections also requires the Department of Health and Human Services (HHS) to submit a report to Congress within two years of enactment of the law (before October 7, 2010) that examines state licensing standards, states' use of case-by-case waivers, and the effect of these waivers on children in foster care. The report must also review the reasons relative foster family homes may not be able to be licensed, and recommend administrative or legislative actions to allow more children to be safely placed in foster care with relatives who are licensed.

Fostering Connections may be prompting many states to evaluate their child welfare policies and practices, including those related to foster care licensing and case-by-case waivers that may be needed in the cases of children placed with relatives. As a result of the identification and notice provided as required by Fostering Connections, more children may be placed with relatives when they come into foster care. While a child's permanency goal may change over time (e.g from reunification to legal guardianship), the decision to license relatives at the beginning of the case may later result in the ability to obtain federal support for guardianship assistance for that child and family should reunification and adoption be determined not appropriate.

¹ ACYF-PIQ-85-11

² Id. §473(d)(3)(A)(i); P.L. 110-351 §101(b); ACYF-CB-PA-01-02

In an effort to provide states with critical information as they examine their licensing policies and practices, this document presents background information on licensing for relatives. It also includes an overview of IV–E reimbursement for relative foster homes and information on the current landscape of waivers of foster home licensing standards, as well as recommendations for licensing standards that can help further the goal of maintaining family connections for children in foster care.

I. Waiver and Licensing Background

A. Background on Licensing

Generally, when a child is in the custody of a state’s child welfare agency and placement out of the home is required, the foster home must be licensed. States have broad authority to establish their own licensing standards so long as those standards “are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights”.³ Licensing requirements differ from state to state and cover a wide range of issues - from number of children in the home, to training, to square footage. The entity responsible for licensing activities may vary from state to state but ultimately the state is responsible for compliance with federal requirements pertaining to licensing.

The majority of children in foster care are placed with non-relatives and licensing policies are often developed with these caregivers – rather than relative caregivers – in mind. Some licensing requirements, such as those related to physical space within the home, may pose particular challenges for relatives who want to care for relative children in foster care (kinship care). Furthermore, some of the requirements may not make as much sense in the context of kinship care or may be outweighed by the benefits of placing a child with a relative in order to lessen the trauma of removal and maintain family connections. Recognizing that some flexibility in the application of licensing standards might, particularly in the case of relative foster parents, be important in order to place children in the most appropriate setting, states have long been permitted to grant waivers of non-safety⁴ related standards on a case-by-case basis for relatives. A waiver allows a foster parent to become fully licensed, even though he or she is unable to comply with a particular licensing requirement.

It is important to note that the criminal background and child abuse and neglect registry checks that are required under 471(a)(20)⁵ of the Social Security Act and as amended by the Adam Walsh Act, are required for **all** foster care, adoption and subsidized guardianship placements, and they cannot be waived or modified. States must provide, as part of their Title IV-E state plans, procedures for these criminal background and child abuse and neglect registry checks and these checks must be completed before a prospective foster or adoptive placement can be approved for placement of a child. The child abuse and neglect registry checks

³ Sec. 471(a)(10) of the Social Security Act; see for example, *Standards of Excellence for Family Foster Care Services*, available at: <http://www.cwla.org/programs/standards/cwsstandardsfostercare.htm>. It is important to note that if a state chooses not to operate a federal Child and Family Services Program and not receive any Title IV-B or IV-E dollars, they do not have to comply with any of the state plan requirements – including those related to foster home licensing – specified in 471(a)(10) of the Social Security Act.

⁴ For the purposes of foster care licensing, “non-safety” is not defined in federal law. Guidance issued on July 9, 2010 (ACYF-CB-PI-10-11) made clear that states have the discretion to determine what constitutes a non-safety standard for licensing purposes.

⁵ 471(a)(20) requires that before a prospective foster or adoptive placement may be finally approved for placement of a child a criminal background check and a child abuse and neglect registry check must be completed. The child abuse and neglect registry checks must also be completed for any adult living in the home of the prospective parent. If the criminal background check reveals certain convictions specified in statute, the placement cannot be finally approved. The same criminal background and child abuse and neglect registry checks are also required for relative guardians before they can receive kinship guardianship assistance payments on behalf of a child. The child abuse and neglect registry checks must be completed on any other adults living in the home of the relative guardian before the relative can receive such payments.

must also be completed for any adult living in the home of the prospective resource parent. If the criminal background check reveals certain convictions specified in 471(a)(20)(A)⁶ of the Social Security Act, the placement cannot be finally approved.

The same criminal background and child abuse and neglect registry checks are also required for relative guardians before they can receive guardianship assistance payments on behalf of a child. Additionally, the child abuse and neglect registry checks must be completed on any other adults living in the home of the relative guardian before the relative can receive such payments.

B. Waivers, Variance and Eligibility for Title IV-E Reimbursement

Licensing and title IV-E eligibility are closely linked and important to consider when thinking about providing support for children, particularly in the context of kinship care. Title IV-E requires that states establish licensing standards and that those standards “shall be applied by the State to any foster family home receiving funds under [Title IV-E] or [Title IV-B]”.⁷ In other words, if a state is drawing down either Title IV-E or Title IV-B funds for a foster family home, that home must be licensed in accordance with the state’s licensing standards as established pursuant to their IV-E state plan. While a state has the option to place a child in a non-licensed home, the state could then not claim any IV -E or IV-B funds for such placements. Similarly, States may place children in a home that meets some alternative licensing or approval standards, for example a relative home approved using standards only applied to relatives, but, again, states could not claim any IV-E or IV-B funds for such homes. Instead, in both cases, the state would have to use state or local funds (or other allowable federal funds) for any payments made on behalf of the child which may be, but do not have to be, equal to the foster care maintenance payments for children in licensed placements. It is important to note that placement in a licensed, IV-E eligible home is also an eligibility requirement for federally-funded guardianship assistance payments in states that take the option under Fostering Connections to operate such a program.

There are two approaches that allow for flexibility in the application of the state’s licensing standards without jeopardizing the Title IV-E eligibility. First, a state may license a foster family home that meets a standard for licensure through an alternative method that is equivalent to that specified in the state’s licensing standards. For example, a state may license a family foster home that doesn’t have safe drinking water in its well and, instead, allow them to purchase bottled drinking water. Since this alternative method still achieves the objective of the licensing standard, that the home has safe drinking water, federal guidance refers to this as a variance and permits IV-E reimbursement for a child living in a home licensed in this manner. Second, a state may, on a case-by-case basis exempt a home from compliance with a non-safety related standard for relatives.⁸ This is known in federal guidance as a waiver and otherwise eligible children living in homes licensed in this manner are also eligible for IV-E reimbursement. Consider, for example, a state that requires foster homes to provide a separate bedroom for each child. The state could choose to exempt a prospective relative foster parent with only one bedroom available for her two granddaughters from this requirement and still license the home.

⁶ Sec. 471(a)(20)(A)(i) in any case involving a child on whose behalf such payments are to be made in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery, if a State finds that a court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and (ii) in any case involving a child on whose behalf such payments are to be made in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted.

⁷ Sec. 471(a)(10)

⁸ The guidance suggests that a foster family home licensed via a waiver is only eligible for Title IV-E reimbursement if it is a relative foster family home. Thus, it may be that non-relative foster placements licensed via a waiver would not be eligible for Title IV-E reimbursement.

It should be noted that states define and use the terms “waiver” and “variance” differently and not always in a way that is consistent with how the terms are used at the federal level. Some states have a process that they refer to as a “waiver” yet they still require applicants show another way to comply with the standard’s intent. In spite of the terminology used by these states, based on federal guidance, this process would likely be considered a “variance” rather than a waiver. Other states appear to use the words “variance” and “waiver” interchangeably. A few states have adopted their own specific language, referring to what would be considered a waiver or variance at the federal level as an “exception,” “modification,” or “alternative compliance.” This document looks exclusively at states’ policies and practices regarding waivers as described in federal guidance – only those policies that allow a state to fully exempt a relative from addressing a non-safety licensing standard – regardless of the language used by states.

C. Licensing and Fostering Connections

Fostering Connections includes two very important provisions specific to licensing relative foster homes. First, Fostering Connections codifies earlier guidance that states may waive non-safety licensing standards on a case-by-case basis in order to eliminate barriers to placing children safely with relatives in licensed homes. These standards may include requirements such as mandatory square footage and minimum numbers of bedrooms or bathrooms per person. Guidance issued on July 9, 2010, made clear that states will have the flexibility to determine what constitutes a non-safety standard but that states are expected to clearly document the reason for the waiver in the licensing/approval record for the relative foster home. The certification of licensure/approval must also indicate its applicability to the specific relative child.⁹

This provision does not represent a change in policy but, instead, incorporates into federal statute the provisions of pre-existing guidance.¹⁰ As such, the laws relevant to foster care licensing that predate Fostering Connections, including those related to criminal background and child abuse and neglect registry checks, still apply. In highlighting the flexibility to waive non-safety related standards on a case-by-case basis for relatives, the provision serves to emphasize an important opportunity that states have to develop licensing policies that will help maintain family connections for children in foster care.

Fostering Connections also requires the Department of Health and Human Services (HHS) to submit a report to Congress within two years of enactment of the law (before October 7, 2010) that examines state licensing standards, states’ use of case-by-case waivers, and the effect of these waivers on children in foster care. The report must also review the reasons relative foster family homes may not be able to be licensed, and recommend administrative or legislative actions to allow more children to be safely placed in foster care with relatives and be eligible for federal support.

II. Overview of State Waiver Provisions

The following section provides an overview of current foster family home licensing policies and rules in the 50 states and DC pertaining to waivers as they apply to both Title IV-E and non-Title IV-E eligible foster homes. It does not include information on child care institutions, group homes or emergency placements. It is based on information that was available in late 2009 and early 2010 in statutes, policy manuals, and administrative codes. This research is accessible online through the Grandfamilies State Law and Policy Resource Center state law database at <http://www.grandfamilies.org/>. It does not, therefore, provide information on unwritten or informal policies nor does it describe the extent to which waivers are actually being utilized. Readers should also note that states may be in the process of reevaluating and rewriting their

⁹ ACYF-CB-PI-10-11

¹⁰ ACYF-PIQ-85-11

waiver policies. Additionally, while states exploring opportunities for placing more children with licensed relatives may wish to consider variances, this overview only includes information on waivers.

A. Categories of Waivers

Our review of licensing across states found that there was at least some mention of waivers for relative and/or other foster family homes in the majority of states. Our review also indicated that, consistent with the broad flexibility states are given to establish their own licensing standards, there is considerable variability across states in terms of their approaches to waivers specifically and licensing policy more broadly. The information available on states’ licensing policies as related to waivers suggests that there are at least 2 different categories of waivers available in states. These include waivers that are available only to relatives and those that are made available to all foster parents, including relatives. Notably some states will only provide waivers for a specified child rather than for the prospective home more broadly. A few states also appear to have waivers that are only available in order to place siblings together but, by and large, states that account for the unique needs of siblings do so as part of their standards.

Waivers may be general or specific. General waivers do not specify which standard or standards may be waived but, instead, allow for the waiver of any standard that is not otherwise prohibited from being waived. A number of states, for example, do not allow standards specified in statute to be waived. Other states prohibit waiving of training requirements. Specific waivers, on the other hand, provide for waivers of specified standards such as those related to the number of children in the home, training or space/structure of the home. Both types of waivers are often layered with mandatory considerations and/or procedural protections. For example, some states require that the impact of the waiver on the needs of the child be considered. Other states require consideration of the circumstances of the individual caregiver. See sections B and C for more detail.

Type of waiver	What can be waived?	For whom?
General waiver	Any standard that is not otherwise prohibited from being waived	<ul style="list-style-type: none"> • Relatives (“general waiver – relatives only”) • All foster parents (“general waiver – all foster parents”)
Specific waiver	Specified standards only	<ul style="list-style-type: none"> • Relatives (“specific waiver – relatives only”) • All foster parents (“specific waiver – all foster parents”)

General Waiver

The following are examples of general waivers which allow for the waiver of any standard that is not otherwise prohibited from being waived. Inclusion of specific examples is for illustrative purposes only and does not imply endorsement.

General waiver – relatives only

“The commissioner may grant a waiver from such procedure or standard, except any safety standard, for a child placed with a relative, on a case-by-case basis, from such procedure or standard, except any safety standard [sic], based on the home of the relative and the needs and best interests of such

child. The reason for any waiver granted shall be documented in writing. The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, to establish certification procedures and standards for a caregiver under this section.”

- Connecticut General Statute Sec. 17a-114

“The term waiver, as it applies to resource family licensure, is defined as the non application of a licensing standard extended to a relative resource family which serves to promote a child’s well being while not compromising their safety. Examples of non safety foster care standards which may be considered for a waiver include, but may not be limited to; training requirements, bedroom and sleeping arrangements and space requirements. To consider the waiver of a foster care standard for any relative family, the following requirements must be satisfied:

- *A waiver must only be considered for a relative resource family as defined in IDAPA. No waiver may be approved for fictive kin or non relatives,*
- *A waiver may only be considered on an individual basis,*
- *Only non safety related standards may be waived. The standards related to safety may not be waived,*
- *Waivers must be approved by the CFS Program Manager or their designee and the approval must indicate its applicability only to the specific relative child, and*
- *The continuing appropriateness of a waiver must be reviewed, approved and documented in the family’s file at regular intervals not to exceed six (6) months.*
- *When a foster care standard is waived this information must be documented in the body of the resource parent assessment as either part of the initial assessment or updated assessment. The documentation shall describe the reason(s) for issuing a waiver, what standard is being waived, and how child safety will be assured.*
- *Relative foster families who receive a waiver, in accordance with the requirements above, will be considered to have satisfied the requirements for full, regular foster care licensure and is[sic] Title IV-E reimbursable.”*

- Idaho Resource Family Licensing for Relatives, Fictive Kin & Non-Relatives Standard, available at: <http://www.healthandwelfare.idaho.gov>

“A grandparent or other relative may, on a case-by-case basis, have standards for licensure not related to safety waived for specific children in care that would otherwise impede licensing of the grandparent's or relative's home.”

- Missouri Revised Statutes §210.565

General waiver – all foster parents

“Exceptions¹¹ to the requirements of this chapter [Licensing of Foster Family Homes for Children] may be made at the discretion of the department provided they do not violate federal or state statutes or pose a risk to the health, safety, or well-being of children.”

- Hawaii Administrative Rule §17-1625-5

“Unless prohibited by law, the Director of the Department may waive, or may conditionally waive, any requirement under this Part, if doing so is in the best interest of the foster children. Waivers from the Director shall be in writing. Written notification of any waiver under this Section, with an

¹¹ As noted above, this overview looks exclusively at states’ policies and practices regarding waivers as described in federal guidance regardless of if a state uses other language such as, in this case, “exceptions”.

explanation of the waived provision and the basis for the best interest determination, shall be sent to the child's parents, unless their parental rights have been terminated, the State's Attorney, and the child's attorney.”

- *Illinois Administrative Code §402.29*

“At its discretion, the department may make exceptions and license or continue to license a home or facility that does not meet the minimum licensing requirements.

- (1) Exceptions are approved for nonsafety requirements only.*
- (2) The safety and well-being of the children receiving care must not be compromised.*
- (3) The request for an exception to the licensing requirements must be in writing.*
- (4) You must keep a copy of the approved exception to the licensing requirements for your files.*
- (5) Along with an exception to the licensing requirements, the department may limit or restrict a license issued to you and/or require you to enter into a compliance agreement to ensure the safety and well-being of the children in your care.*
- (6) You do not have appeal rights if the department in its discretion denies your request for an exception to the minimum licensing requirements.*

- *Washington Administrative Code §388-148-0085*

Specific Waiver

The following are examples of specific waivers which provide for waivers of specified standards. Inclusion of specific examples is for illustrative purposes only and does not imply endorsement.

Specific waiver – relatives only

“(4) Exception to subsection (3)(e)2 of this section [proof of applicant being at least 21 years of age] shall be granted if the applicant is:

- (a) Between eighteen (18) and twenty-one (21) years of age;*
- (b) A relative of the child to be placed in the applicant's home; and*
- (c) Able to meet the needs of the child to be placed in the applicant's home.”*

- *Kentucky Administrative Regulations 922 KAR 1:310.
Standards for child-placing agencies*

“(7) The home must have bedrooms which provide at least 50 square feet per child, except the Department may waive this requirement for kinship homes if the bedrooms provide at least 35 square feet per child, and shall accommodate no more than four children per bedroom.”

- *Code of Massachusetts Regulations 7.105: Standards for
Licensure of Foster/Pre-adoptive Homes*

“Foster children must have 50 square feet per child in a junior size bed and 24 square feet for a child in a crib. Relative providers are exempt¹² from this section, providing the sleeping arrangement is approved by the Fire Inspectors.

- *Rhode Island Foster Care Regulations 1998, Application process for receiving
a foster care license/certification, Fire and Safety Inspections, pg. 6*

¹² As noted above, this overview looks exclusively at states' policies and practices regarding waivers as described in federal guidance regardless of if a state uses other language such as, in this case, “exempt”.

“The kinship foster parent must be twenty-one years of age or older, except that if the spouse or partner of the relative is twenty-one years of age or older and living in the home, and the relative is between eighteen and twenty-one years of age, the department may waive the age requirement.”
- South Carolina Code of Laws §63-7-2320

Specific waiver – all foster parents

“There shall be a minimum of 40 square feet, excluding the closet and wardrobe area, for the first child occupying a bedroom and a minimum of 35 square feet for each additional child sharing the room. However, the supervising agency may approve a smaller room size on an individual case basis when such approval is in the best interests of the children. Such approvals shall be in writing and shall contain the names and birth dates of the children for whom the approval was issued. These approvals shall be reviewed at each license renewal.”

- Illinois Administrative Code §402.9

“As a condition for initial licensure, each individual licensee shall complete thirty hours of foster parent training offered or approved by the department. However, if the licensee has completed relevant training or has a combination of completed relevant training and experience, and the department deems such training or combination to be an acceptable equivalent to all or a portion of the initial licensure training requirement, or based upon the circumstances of the child and the licensee the department finds there is other good cause, the department may waive all or a portion of the training requirement.”

- Iowa Code §237.5A

“FFCA’s shall limit the number of children living with any foster family to six. The maximum of six children includes the foster parents’ own children. Exception to this requirement may be made only with prior approval obtained in writing from the appropriate regional office of the Department.”
- Pennsylvania Code §3700.31

B. Factors Considered when Granting/Denying a Waiver Request

In reviewing the licensing statutes, policies and administrative codes, we found that states often identified certain considerations that must be taken into account when deciding whether or not to grant a waiver. They sometimes combined such requirements with procedural protections, described in more detail in C.

Procedural Protections. The following are examples of the factors that appear to be most often used by states when considering whether or not to grant a waiver. Generally they are focused on ensuring that a decision about a waiver takes into account the individual needs of the child and/or circumstances of the foster parent. Some states require that multiple considerations be taken into account when deciding whether or not to grant a waiver.

Impact on/Needs of Child: A number of states, in allowing for waivers, require that consideration be given to the impact that granting the waiver would have on the child including on the child’s best interests, risk of harm to the child, any adverse effects on the child and his or her specific needs. For example:

- In *Connecticut*, the granting of a waiver from any non-safety standard for a child placed with a relative must be based on the “home of the relative and the needs and best interests” of the child.¹³

¹³ Connecticut General Statute Sec. 17a-114

- *Illinois* allows for a waiver or conditional waiver of standards “if doing so is in the best interest of the foster children.”¹⁴
- In *Kentucky*, when considering whether or not to grant a waiver of foster parent age requirements for a relative, agency staff consider whether the foster parent will be “able to meet the needs of the child to be placed in the applicant’s home.”¹⁵

Circumstances and Capacities of Potential Foster Parents: Some states require that specific attention be given to how the waiver interacts with the circumstances of the individual caregivers. Some require prospective foster parents to show that compliance with the licensing standard would cause them undue or unfair hardship; others consider specific unique circumstances of potential foster parents that require a waiver before a license can be issued. For example:

- In *Nebraska*, training requirements for relative foster parents may be waived only if certain conditions are met including that the relative is willing and able to understand the needs of the child, the relative understands his or her role with the Department, the child and the child’s other relatives and the relative is willing and able to cooperate with the case plan.¹⁶
- In considering whether to grant a waiver of certain requirements for foster parents, *New Jersey* requires that the Office of Licensing consider a number of criteria including “the type and degree of hardship that would result to the resource family parent or applicant if the waiver were not granted.”
- When granting a waiver for the maximum number of children placed in a foster home *Oregon* considers the following: skills, ability, and training of potential foster family; their support network; maximum safe physical capacity of the home; and emergency or fire escape plan for each occupant of the home.¹⁷
- In *Texas*, when deciding whether to grant a waiver, “economic factors or other constraints affecting the relative’s ability to comply” with a licensing standard are considered.¹⁸

Substantial Compliance with Other Licensing Standards: Some states condition the granting of a specific waiver on a requirement that a foster parent demonstrate that all other licensing requirements have been met. For example:

- *Idaho* requires that “all other licensing or certification requirements have been met” before granting a waiver.¹⁹
- In *Washington*, a waiver of the maximum number of children in the home may be made if the foster parent(s) “meet the other licensing requirements.”²⁰

Additionally, a limited number of states specify licensing standards that cannot be waived. Most often the standards that are prohibited from being waived are those required specifically by statute. For example, in

¹⁴ Illinois Administrative Code §402.29

¹⁵ 922 Ky. Admin. Regs. 1:310

¹⁶ Nebraska Human Services Manual, Manual Letter # 75-2002

¹⁷ Oregon Administrative Rules 413-200-0276

¹⁸ 40 Tex. Admin. Code 19-745.8307

¹⁹ Idaho Admin. Code r. 16.06.02.102(03)

²⁰ Washington Administrative Code 388-148-0525

North Carolina, waivers are not allowed for building code standards, fire safety rules, and any standard adopted by the Health Services Commission.²¹

C. Procedural Protections

Our review of licensing statutes, policies and administrative codes also revealed that some states have established specific procedures that must be followed when waiving licensing standards. These protections may help document why a decision was made to grant a waiver, provide supporting details on why a particular waiver is appropriate or, in some cases, ensure that there is some measure of review of the decisions. These procedural protections may or may not be coupled with requirements to consider certain factors like those in *B. Factors Considered*. The following are examples of the protections that appear to be used most commonly by states. Some states combine multiple procedural protections in the context of waivers.

Written Application/Required Form: The application for a waiver must be in writing; this may include use of a specified form.

- *Connecticut* requires licensing workers to submit waiver requests via specified form, DCF-0043, “Verification of Requirements for Licensure”.²²
- *Texas* specifies the waiver requests must be in writing using a specified format – either a “PRS Child Care Waiver/Variance Request Form” or a letter containing all of the information required on the form.²³
- In *Washington*, requests for exceptions to licensing requirements must be in writing.²⁴

Specified Information: The waiver application must contain specific information – such as the reason for the waiver request.

- In order to request a waiver, *Indiana* requires that the applicant or licensee submit documentation that compliance with the specified rule would create an undue hardship on the applicant and that noncompliance with that rule would not be adverse to the health, safety or welfare of any children receiving services from the applicant.²⁵
- In *New Jersey*, requests for waivers must be submitted to the Office of Licensing in writing and be accompanied by supporting information justifying the request.²⁶

Written Decision: The agency must provide a written response (grant/refusal) to the application for a waiver. Some states specify that the decision regarding the waiver must be placed in the applicant’s file or kept with the applicant’s final license.

- In *Connecticut*, the reason for any waiver that is granted must be documented in writing.²⁷

²¹ N.C. Policy Manual Chapter IV 1213 Licensure (III(B))

²² Connecticut Policy Manual Foster and Adoptive Services 41-17-12

²³ 40 Tex. Admin. Code 19-745.8305

²⁴ Washington Administrative Code 388-148-0085; As noted above, this overview looks exclusively at states’ policies and practices regarding waivers as described in federal guidance regardless of if a state uses other language such as, in this case, “exception”.

²⁵ Indiana Department of Child Services Child Welfare Manual, Ch. 12, Section 19

²⁶ New Jersey Administrative Code 10:122C-2.2

²⁷ Connecticut General Statute Sec. 17a-114

- In *Illinois*, a waiver may be granted to approve the use of a multi-purpose room for a bedroom in order to place siblings together. If such a waiver is granted, the approval must be in writing and include the names and birth dates of the children for whom the approval was issued.²⁸
- In *Nebraska*, if a waiver is granted for a relative foster parent for training requirements, the approval must be done in writing and in a designated format.²⁹

Required Review: State requires a review of the waiver – in some cases by the director or supervisor, in others by a panel or some other entity. This review may be required for actually making the decision of whether or not a waiver is granted or to review decisions that have already been made.

- *Arkansas* requires that all waiver requests be approved by the Director of the Division of Children and Family Services.³⁰
- *Florida* requires that waivers for the number of children who may be placed in a home be reviewed and approved by the services' worker's supervisor.³¹
- In *Idaho*, waivers for relative foster homes must be approved by the Children and Family Services Program Manager or their designee and the approval must indicate its applicability to only the specific relative child.³²

Limited Duration/Subject to Review: Some states require that the waiver of a licensing standard only be allowed for a specified amount of time. Similarly, some states require that waivers be reassessed at appropriate points such as when the license is renewed.

- In *Idaho*, the continuing appropriateness of a waiver must be reviewed, approved and documented in the family's file at least every 6 months.³³
- *Iowa* allows for the waiver of minimum square footage requirements for a child's bedroom. Such waivers must be reviewed at each license renewal.³⁴
- *Ohio* specifies that requests for waivers shall be written and time limited; the time limit cannot exceed the expiration date of the current certificate.³⁵

²⁸ Illinois Administrative Code §402.9

²⁹ Nebraska Health and Human Services Manual, 6-003.34B

³⁰ Arkansas Standards of Approval for Family Foster Homes, available at: <https://ardhs.sharepoint.com/CW/DCFS/20Publications/Pub-22.pdf>

³¹ Florida Administrative Code, 65C-13.032

³² Idaho Resource Family Licensing for Relatives, Fictive Kin, and Non-Relatives, available at: <http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/CWStandard-resource%20Family%20Licensing%20for%20Relatives,%20Fictive%20Kin,%20and%20Non-Relatives.pdf>

³³ Idaho Resource Family Licensing for Relatives, Fictive Kin, and Non-Relatives, available at: <http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/CWStandard-resource%20Family%20Licensing%20for%20Relatives,%20Fictive%20Kin,%20and%20Non-Relatives.pdf>

³⁴ Iowa Administrative Code 441 – 113.5(237)

³⁵ Ohio Administrative Code 5101:2-5-18

III. Conclusions/Recommendations

This review of states' policies for waivers of licensing standards for foster family homes clearly demonstrates that there is considerable variability across states in terms of their approaches to and standards for licensing relative foster family homes.

While this document focuses on waivers, one aspect of licensing policy, it was evident in the review that this variability extends to states' licensing policies more broadly. This is not surprising given that states have broad authority under Title IV-E to establish their own licensing standards and to date there is limited guidance on waivers.

We recognize that states may, particularly in response to Fostering Connections, be considering opportunities for revising their licensing policies in ways that go beyond providing waivers to relatives. Therefore below we offer first a number of more general licensing recommendations followed by some waiver-specific recommendations.

General Recommendations for Licensing Standards

Build flexibility into licensing standards

Some states have very specific licensing standards requiring, for example, 60 square feet of space per child in the child's bedroom. This leaves little room for considering, on a case-by-case basis, the needs and best interests of a child. The only option for licensing and drawing down Title IV-E funds for a home with a bedroom measuring 59 square feet would be to utilize a waiver. On the other hand, a standard that required that each child's bedroom provide adequate space for the safety and well-being of the child would allow for the consideration of such a home. Nothing in federal law or guidance requires rigidity in licensing standards. In fact, there is guidance identifying a broader approach that is allowable under Title IV-E that a number of states utilize.

ACYF-CB-IM-01-05 reiterates that states "may define their licensing standards as they see fit" and discusses how a less rigid approach to licensing standards can afford states more flexibility. The guidance, which is referenced more recently in ACYF-PI-10-11,³⁶ contrasts a "detailed procedural approach" with an approach that defines standards as the "result of certain procedures":

Detailed procedural approach

If a State has a detailed procedural approach, a State may limit the foster family home's ability to achieve a specific standard. For example, a State may have a licensing standard that requires that: *hot water delivered to faucets in the home be between 105 and 120 degrees Fahrenheit*. If an inspector finds that the hot water temperature reaches a maximum temperature of 104 degrees, the foster family home would need to have the hot water adjusted to fall within the specific temperature to meet the standard.

Result of certain procedures

On the other hand, if a State has a broadly defined licensing standard, it may allow different procedures to attaining the standard. For example, a State may have a licensing standard that requires that: *drinking water in the foster home not present a health hazard to the child*. If an inspector finds a prospective foster family home with tainted well water, because the standard is result-oriented, the State could allow the foster family home to meet the standard by

³⁶ ACYF-CB-PI-10-11

treating the well water or by using bottled water. The Federal requirement is satisfied so long as the State applies to each foster family home the standard that it has adopted.

Broadly defined, results-oriented licensing standards can provide states with the flexibility to, on a case-by-case basis, license safe and appropriate foster family homes. This kind of approach allows for consideration of the unique needs of the child and the circumstances of the particular foster family home.

Make appropriate use of variances

Broadly defined licensing standards allow room for the appropriate use of variances. As noted above, federal guidance defines a variance as, “a mechanism that allows the State to meet a standard for licensure in a way other than is specified in the rule that governs licensure in that State.” Thus, if a state were to establish prescriptive standards such as specific square footage or temperature requirements, it may be difficult to identify alternative means to meeting the standard. With more broadly defined standards, however, states can determine, on a case-by-case basis, whether a variance would maintain the safety of the child and satisfy the intent of the standard and act accordingly.

Ensure staff receives regular training on licensing policies and waiver practices

Regardless of the approach a state takes to licensing – whether it be flexible or not – it is critical that staff working with current and potential foster parents receive regular training on licensing policies and waiver practices. Such training is important not just for those staff involved with licensing homes but also for caseworkers who may, for example, be responsible for identifying and providing notice to relatives about their options to participate in the care and placement of a child. It is important that staff and caregivers fully understand the options available under policy and practice to ensure that children are placed in the most appropriate homes possible.

Use administrative funds to assist relatives in becoming licensed

Guidance issued in July of 2010 encourages states to “use a variety of means to ensure that, when appropriate, relatives are able to meet licensing standards and provide a foster family home to a child safely.”³⁷ One example offered was, consistent with existing policy, using title IV-E administrative funds to assist relative foster family homes in becoming licensed without having to use a waiver. For example, administrative dollars could be used to purchase items that may be needed for licensure – such as a bed, crib or smoke detector.

Recommendations Specific to Waivers

Building flexibility into foster care licensing standards affords states broad opportunities to place children in the most appropriate settings and further the goal of Fostering Connections to maintain family connections for children in foster care by allowing for licensure of more relative foster parents. However, not all states currently incorporate or will be interested in including such flexibility in their licensing policies and practices. Particularly in these cases, waivers are an important way to allow for flexible application of licensing policies for relatives so that, whenever safe and appropriate, children can be placed with relatives. The following recommendations are specific to waivers.

Provide waivers when safe and appropriate

Recognizing that licensing standards may be designed with the needs of children living with non-relative foster parents in mind, waivers help ensure that non-safety related licensing standards that are not appropriate in the context of kinship care don't prevent a child from being placed with a relative.

³⁷ ACYF-CB-PI-10-11

Particularly when states have licensing standards that are more prescriptive, waivers should be used to allow for the flexible application of non-safety related standards for relatives.

Even with broadly defined licensing standards and appropriate use of variances, there may be some situations in which waivers of non-safety related standards are appropriate in order to license relatives. For example, a state may require that the total number of children in the foster family home not exceed 5 children, including biological children. There is not room in such a standard for a variance. In the case of an aunt and uncle with 5 children of their own who want care for their nephew in foster care, it may make sense to waive the capacity requirement, because the state may determine that keeping a particular child with known family members is more important than the concern about the number of children living in the home.

Include protections to ensure waivers are used appropriately

This review indicated that many states' waiver policies include requirements that there be certain considerations and/or procedural protections applied when granting a waiver. For example, a state may require that there be consideration of the best interests of the child and that the waiver be reviewed and approved by a supervisor before a home can be licensed with a waiver. While such protections are not required in Federal law or guidance, it would be to the benefit of everyone involved to incorporate them. For states, required considerations and procedural protections can provide a structure for documenting that waivers are provided on a case-by-case basis as is required. For children, these protections can help ensure that placement decisions are thoughtfully made and consider their unique needs. Procedural protections can also help ensure that waivers are provided fairly and equitably to potential relative foster parents.

Fostering Connections requires that the Secretary of HHS submit a report to Congress by October 7, 2010 detailing states' use of waivers and other information on licensing of relatives. It is hoped that that report will provide a clear picture of current states policies and practices related to the licensing of relative foster family homes and recommendations for further steps that states and the federal government should take to eliminate barriers to licensing relative foster homes for children when safe and appropriate. We recommend that HHS convene a group of stakeholders once the report is issued to explore additional steps that can be taken to ensure that licensing is not a barrier to placing children with relatives in safe and appropriate homes. In the meantime, HHS can continue to support states' flexibility in licensing standards and encourage development and implementation of standards that increase the likelihood of placing children safely with relatives in licensed foster homes.