



# Office of Children and Family Services

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## Administrative Directive

<b>Transmittal:</b>	17-OCFS-ADM-01
<b>To:</b>	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies
<b>Issuing Division/Office:</b>	Strategic Planning and Policy Development
<b>Date:</b>	February 17, 2017
<b>Subject:</b>	<b>Immunity From Liability When Applying the Reasonable and Prudent Parent Standard</b>
<b>Suggested Distribution:</b>	Directors of Social Services Child Protective Services Supervisors Child Welfare Supervisors Foster Care Supervisors Staff Development Coordinators
<b>Contact Person(s):</b>	Please see section V for contact information.
<b>Attachments:</b>	

### Filing References

Previous ADMs/INFs	Releases Cancelled	NYS Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
15-OCFS-ADM-21		18 NYCRR 441.25, 443.2(e), and 443.3(b)	SSL § 383-a 42 U.S.C. 671 and 675		Preventing Sex Trafficking and Strengthening Families Act (P.L. 113-183)

### I. Purpose

The purpose of this Administrative Directive (ADM) is to advise local departments of social services (LDSSs) and voluntary authorized agencies (VAs) of provisions of Part M of Chapter 54 of the Laws of 2016 (Chapter 54), which provide immunity from liability to foster parents, designated congregate care staff, VAs and LDSSs in regard to the application of the reasonable and prudent parent standard (the standard).

## II. Background

The federal Preventing Sex Trafficking and Strengthening Families Act [the Act] (P.L. 113-183), which was signed into law by President Obama on September 29, 2014, amended various provisions of Title IV-E of the Social Security Act (SSA). Section 111 of the Act requires states to support normative experiences for children in foster care through the implementation of the standard. The standard provides for a foster parent or a designated employee of a child care facility to make careful and sensible parental decisions that maintain the health, safety, and best interests of a child. These decisions include those that relate to the child's participation in extracurricular, enrichment, cultural, and social activities, and must be made in a way that protects the child while allowing for normative experiences. The Act also requires states to provide caregivers with "knowledge and skills relating to the reasonable and prudent parent standard for the participation of the child in age or developmentally-appropriate activities, including knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child, and knowledge and skills relating to applying the standard to decisions such as whether to allow the child to engage in social, extracurricular, enrichment, cultural, and social activities."<sup>1</sup> States are also required to establish policies related to the liability of foster parents and congregate care staff who apply the standard. The Act did not expressly clarify how state policies must address such issues as immunity from liability.

On September 25, 2015, OCFS issued 15-OCFS-ADM-21, *Supporting Normative Experiences for Children, Youth, and Young Adults in Foster Care: Applying a Reasonable and Prudent Parent Standard*. The ADM provided information to LDSSs and VAs on the requirement to implement the standard and to provide training to caregivers. It also addressed the statutory and regulatory requirements regarding the implementation and application of the standard that took effect on September 1, 2015. Suggestions on how to reduce the liability of caretakers who apply the standard were included; however, at the time the ADM was released, there were no specific statutory or regulatory liability protections for caregivers.

The introduction of the standard raised the issue of liability for caregivers and agencies who apply the standard, allowing children in foster care to participate in age and developmentally appropriate activities. The concern was that if a child sustained an injury while participating in any of these activities, the decision-maker could be held liable for these injuries. Youth in foster care also voiced a concern that caregivers are too worried about potential liability issues to allow them to participate in these activities. It became apparent from these and other conversations, that in order to effectively implement the standard with children in foster care, statutory changes would need to be made in order to address the potential liability of the caregivers and agencies who would be applying the standard. Therefore, OCFS proposed immunity language that was enacted as Chapter 54. Chapter 54, which was signed into law by Governor Andrew Cuomo on April 4, 2016, amended the Social Services Law (SSL) to include a new section 383-a titled "Immunity from liability for application of the reasonable and prudent parent standard."

In addition to addressing the subject of immunity from liability, Chapter 54 expressly states that caregivers must apply the standard when deciding whether or not to allow a child in foster care to participate in age or developmentally appropriate extracurricular, enrichment,

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<sup>1</sup> 42 USC § 671(a)(24).

cultural, or social activities. When such decisions require input or permission from an LDSS or VA, such LDSS or VA must also apply the standard in its decision making.<sup>2</sup>

### III. Program Implications

Chapter 54 defined specific terms and conditions involved with the standard. The definitions are consistent with those set forth in the Act and in 18 NYCRR 441.25, and are as follows:

Caregiver: the following person or entity at the time that such person or entity was responsible for the care of the foster child or children:

- A foster parent who has been trained in the standard in accordance with federal statute and OCFS regulations;<sup>3</sup> or
- The employee of a child care facility operated by an LDSS or VA that is designated to apply the standard who has been trained in the standard in accordance with federal statute and OCFS regulations.<sup>4</sup>

Child: a child who is in foster care or who was in foster care at the time the standard was applied.

Child care facility: an institution, group residence, group home, agency operated boarding home, or supervised independent living program.

Reasonable and prudent parent standard: in accordance with federal statute, the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child that a caregiver shall use when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, or social activities.<sup>5</sup>

Age or developmentally-appropriate:

- activities or items that are generally accepted as suitable for children of the same chronological age or level of maturity or that are determined to be developmentally-appropriate for a child, based on the development of cognitive, emotional, physical, and behavioral capacities that are typical for an age or age group; and
- in the case of a specific child, activities or items that are suitable for the child based on the developmental stage attained by the child with respect to the cognitive, emotional, physical, and behavioral capacities of the child.

### Liability:

Subdivision (4) of section 383-a of the SSL addresses liability as follows:

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<sup>2</sup> SSL § 383-a(3).

<sup>3</sup> 42 U.S.C. § 671 and 18 NYCRR 441.25 and 443.2(e).

<sup>4</sup> 42 U.S.C. § 671 and 18 NYCRR 441.25.

<sup>5</sup> 42 U.S.C. § 675.

The determination of whether a caregiver<sup>6</sup> is liable for injuries to the child in foster care that occur as a result of participation in age or developmentally appropriate extracurricular, cultural, or social activities is based upon whether the decision to allow participation was made in compliance with the standard and any other factors as required by law.

If the child in foster care is injured as a result of the decision to allow participation in such activities, the caregiver is not liable for such injuries if the decision to allow such participation was made in compliance with the standard **and** the caregiver had completed the training on the standard that has been approved and issued by OCFS.

In the event that an LDSS or VA makes or is involved in making the decision to allow a youth in foster care to participate in age or developmentally appropriate activities, and the caregiver had been trained in the standard as noted above and made the decision in compliance with the standard, the same immunity from liability standard also applies to the LDSS or VA. If the caregiver had not completed the required training on the standard that has been approved and issued by OCFS, or did not apply the standard in conformance with the law, the LDSS or VA will not be afforded immunity under section 383-a of the SSL.

#### IV. Required Action

Required actions that result from Chapter 54 in regard to the standard and the availability of immunity for injuries arising from the application of the standard include:

##### **Current and Prospective Foster Parents:**

1. Foster parents must apply the standard when deciding whether or not to allow a child in foster care to participate in age or developmentally appropriate extracurricular, enrichment, cultural, or social activities.<sup>7</sup>
2. Foster parents who had been certified or approved prior to the effective date of the standard (September 1, 2015) must complete, in its entirety, a training on the standard that has been approved and issued by OCFS.<sup>8</sup>
3. Prior to receiving certification or approval as foster parents, prospective foster parents must complete, in its entirety, a training on the standard that has been approved and issued by OCFS.<sup>9</sup> This training must be completed once, unless otherwise instructed.
  - a. Such training must have been completed prior to the event that led to the injury of the child in order for the foster parent, VA or LDSS to apply the immunity protection set forth in Chapter 54. As such, documentation that OCFS approved and issued training on the standard was completed in its entirety and when such training was completed is highly important not only to the foster parent, but also to the LDSS or VA. Given statute of limitations standards involving injuries to minors, it could be years before litigation arises. As such, **OCFS strongly recommends the following:**

<sup>6</sup> For the purpose of this ADM, the term “caregivers” refers to foster parents or employees of a child care facility that are designated to apply the standard.

<sup>7</sup> SSL § 383-a (3).

<sup>8</sup> 18 NYCRR 443.2(e).

<sup>9</sup> 18 NYCRR 443.2(e).

- i. The LDSS or VA provide the prospective foster parent(s) with a certificate of completion of the training, maintain a copy of the certificate in the foster parent's file, and record the training in the Foster and Adoptive Home Development (FAD) part of CONNECTIONS. Specifically, on the F/A Home Member Training List/Detail window as "Applying the Reasonable and Prudent Parent Standard Training".
- ii. LDSSs and VAs maintain a record of which current and prospective foster parents have been trained to apply the standard.

**Designated Employee of a Child Care Facility operated by a LDSS or VA:**

1. LDSSs and VAs must designate at least one employee in each child care facility it operates to apply the standard.<sup>10</sup>
2. The designated employee(s) in each child care facility must apply the standard when deciding whether or not to allow a child in foster care to participate in age or developmentally appropriate extracurricular, enrichment, cultural, or social activities.<sup>11</sup>
3. The designated employee who applied the standard must document any information in regard to applying the standard, and must document the child's participation in normative experiences in the child's case record in CONNECTIONS.
4. The designated employee(s) must complete, in its entirety, a training on the standard that has been approved and issued by OCFS.<sup>12</sup> This training must be completed once, unless otherwise instructed.
  - a. Such training must have been completed prior to the event that led to the injury of the child in order for the designated employee, VA, or LDSS to apply the immunity protection set forth in Chapter 54. As such, documentation that OCFS approved and issued training on the standard was completed in its entirety and when such training was completed is highly important not only to the designated employee, but also to the LDSS or VA. Given statute of limitations standards involving injuries to minors, it could be years before litigation arises. As such, **OCFS strongly recommends the following:**
    - i. The LDSS or VA operating the child care facility provide the employee with a certificate of completion of the training and maintain a copy of the certificate in the designated employee's file.
    - ii. The LDSS or VA operating the child care facility maintain a record of who has been trained to apply the standard.

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<sup>10</sup> 18 NYCRR 441.25(c).

<sup>11</sup> SSL § 383-a(3).

<sup>12</sup> 18 NYCRR 441.25(c).

**LDSS and VA Staff:**

1. It is recommended that LDSSs and VA staff be trained in how to apply the standard if they are likely to be involved in discussions regarding the daily decisions and regular activities of a child in foster care which often take place during:
  - the completion of a Family Assessment Service Plan (FASP);
  - a service plan review (SPR);
  - a permanency hearing; or
  - interactions with caregivers, children in foster care, and parents/guardians.
  
2. If an LDSS or VA is involved in making the decision to allow a child in foster care to participate in an age or developmentally appropriate activity and the child in foster care is injured as a result, the LDSS or VA will be immune from liability **if**:
  - the child's caregiver had been trained in the standard prior to the injury as noted above, and
  - the decision was made by the caregiver in compliance with the standard.

**V. Contacts**

Any questions concerning this release should be directed to the appropriate regional office, Division of Child Welfare and Community Services:

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**VI. Effective Date**

This policy directive is effective immediately.

*/s/ Thomas R. Brooks*

**Issued By:**

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Title: Deputy Commissioner

Division/Office: Strategic Planning and Policy Development