

Foster Parent Liability

Issues and Options Paper

Prepared for the Children and Families Interim Committee
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ISSUE: The issue of foster parent liability was raised at the June meeting. Foster parents are often the recipients of damages or loss to property by acts of foster children and may be subject to claims by third parties for the acts of foster children.

CURRENT PRACTICE: Currently the state has a self-insurance program for personal and real property damage by children in the traditional family foster care licensed by the department, but not for children in therapeutic foster care. Families who provide therapeutic foster care work under a licensed child-placing agency to provide specialized services to children with higher needs because of emotional disturbances.

The current policy is carried under the larger DPHHS insurance policy and provides coverage limited to \$2,500 per occurrence with a \$100 deductible paid for by the department. The coverage is secondary to any other coverage, such as a homeowner's policy, and covers damages or losses to property of foster parents caused by the intentional acts of foster children or claims made by third parties against foster parents because of the intentional acts of foster children. Over 600 families are covered in the current program.

Foster parents are considered to be volunteers who are provided stipends for the child's care and needs. They are not considered state employees or independent contractors.

PROPOSAL: To provide insurance for foster parents for liability and for property damage for youth under the age of 18 placed by a state agency with a licensed foster parent or a foster parent providing therapeutic foster care services under the auspices of a licensed child-placing agency. The state would pay the cost of the premium for each family. It is estimated that the new program would cover approximately 720 families at a cost of approximately \$70,000 a year.

This proposal is based upon an offering by the Foster Parent Professionals in Pennsylvania. The department would work with the Department of Administration to follow the state's procurement laws and the insurance that may be eventually purchased may differ, but the characteristics of this product are what the proposal seeks.

This proposal would have a \$300,000 cap on damages and is also secondary to any other coverage. If an optional property damage endorsement is included, there is a \$5,000 per claim limit and a \$200,000 aggregate limit on liability. There would be a deductible on property damage that would be the foster parent's responsibility. It is believed this would be an attractive recruitment and retention device for foster parents and would provide the following:

- (1) protection in the event a foster child is injured in the foster parent's care and is sued

by the child's natural parents or guardians.

(2) protection from claims for bodily injury or property damage to the person or property of another because of an act of the foster child

(3) personal injury liability coverage for things such as libel, slander, false arrest, wrongful eviction, and alienation of affection

(4) incidental malpractice liability coverage for failure to provide needed medical care, therapy, diet or other special needs.

Claims against the foster parents for harm to a foster child would also be covered under this policy. Arkansas states that parents are not liable for injuries to foster children caused by acts or omissions of the family foster parents unless by malicious, will, wanton, or grossly negligent conduct.

OTHER STATES: A document from The National Resource Center for Family-Centered Practices and Permanency Planning reviews many states that address the issue of liability and damage claims for foster parents.

OTHER OPTIONS:

Coverage by State Tort Claims Act: Amend 2-9-101, MCA, to include a foster parent within the definition of "employee". The effect of this amendment would be to cover a foster parent with the state self insurance program up to the maximum provided by statute (2-9-108, MCA, \$750,000 per person and \$1.5 million per occurrence. Beyond that amount both the state and the foster parent would be immune). This type of coverage is not dependent on the foster parent actually being an employee. The only purpose of the definition is for coverage by the state self-insurance program. Under this type of protection for foster parents, the protection could apply to a claim by a third party against the foster parent for an injury by the foster child and to a claim by the foster child against a foster parent for an injury to the child. A bill providing this coverage will have a fiscal note. There is no clear guidance in the Constitution or elsewhere whether the extraordinary vote requirements of Article II, section 18, of the Montana Constitution, would apply to such a bill. Conservative advice would be that a two-thirds vote section should be included in the bill draft. A bill of this type would not be unconstitutional under the Article II, section 16, Mont. Const. requirement that courts be open to the public to provide a speedy remedy and full legal redress if a rational relationship between the bill and encouraging parents to become foster parents is shown to exist.

Statutory Immunity: Provide civil and possibly criminal immunity from liability for foster parents on account of acts by the foster child. Numerous statutes provide for immunity of nongovernmental individuals for liability to third parties. See, for example, 27-1-727, MCA (persons participating in equine activities), 27-6-106, MCA (members of med/mal panel), 37-1-308, MCA (persons complaining of licensee violations), 37-2-203, MCA (health care specialists making reports required by law), 41-3-203, MCA (persons reporting child abuse or neglect), 46-4-404, MCA (persons assisting police officers by wearing a "wire"), 46-23-511, MCA (persons releasing information on sex offenders), and 61-8-909, MCA (Good Samaritan

law). Most immunity statutes work like good Samaritan laws by raising from simple negligence to gross negligence the level of negligence required for an adverse judgment. This type of immunity could apply to claims by a third party against a foster parent for an injury by the foster child and a claim by a foster child against a foster parent for an injury to the child. Immunity from both civil and criminal liability could be provided for. A bill providing for immunity would not have a fiscal note. An extraordinary vote of the Legislature would not be required. A bill of this type would not be unconstitutional under the Article II, section 16, Mont. Const. requirement that courts be open to the public to provide a speedy remedy and full legal redress if a rational relationship between the bill and encouraging parents to become foster parents is shown to exist.

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