



ADMINISTRATION FOR CHILDREN'S SERVICES
150 WILLIAM STREET - 18TH FLOOR
NEW YORK, N.Y. 10038

NICHOLAS SCOPPETTA
Commissioner

MEMORANDUM

To: Executive Directors – Contract Agencies
ACS Staff

From: Commissioner Nicholas Scoppetta

Re: ACS Permanency Review Guidelines

Date: March 12, 1999

As part of New York City's implementation of the Adoption and Safe Families Act, I am pleased to forward to you the Administration for Children's Services new Guidelines for Permanency Reviews.

ASFA puts into place the most extensive changes in federal child welfare policy since the Adoption Assistance and Child Welfare Act of 1980 and reflects a growing national concern that there are too many foster children who linger in care. These Guidelines provide a framework to enable agencies to make decisions about children's permanent placement within a time frame consistent with the new federal and state ASFA mandates.

In addition, the Guidelines are designed to inform you of the broad outlines of ASFA's permanency planning requirements and to provide interim guidance to you in your planning activities, especially in your assessment of permanency planning goals for all children in foster care.

As the legal and regulatory environment affecting child welfare continues to change, and as we develop greater experience with case practice under ASFA, these Permanency Review Guidelines may need to be refined. We also plan to issue further guidelines on other facets of ASFA compliance in the coming months.

In the meantime, I look forward to working with you to achieve ASFA's goals and I welcome your suggestions and thoughts.



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IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT

Part I – GUIDELINES FOR PERMANENCY REVIEWS

I. Introduction

The Adoption and Safe Families Act (ASFA) was signed into law by President Clinton on November 19, 1997. On February 11, 1999, Governor Pataki signed legislation enacted by the New York State legislature to implement ASFA in New York State. That legislation took effect immediately.

In addition, the New York State Office of Children and Family Services (OCFS) has issued several ASFA-related documents, including an informational letter dated November 17, 1998 (98 OCFS INF -3) and implementing regulations, copies of which can be downloaded from the OCFS Public Folder in CONNECTIONS. **Agency staff should regularly check the OCFS ASFA Policy/PracticeFolder in CONNECTIONS for updated ASFA implementation information from OCFS.**

To comply with the Adoption and Safe Families Act, with the New York implementing legislation, and with related state regulations, ACS and its contract agencies must take steps to review the permanency plans for all children in ACS' care.

These guidelines are intended to inform you of the broad outlines of the requirements of ASFA's permanency planning requirements. It is also designed to provide guidance to you in your planning activities, especially in your assessment of permanency planning goals for all children in foster care, in order to ensure that all children receive the permanency determinations mandated by federal and state law.

ASFA puts into place the most extensive changes in federal child welfare policy since the Adoption Assistance and Child Welfare Act of 1980 and reflects a growing national

concern that there are too many foster children who linger in care when a permanency outcome of return home is no longer appropriate . It amends sections of Title IV-E of the Social Security Act, the federal law that sets standards for the operation of state foster care programs, and requires states to pass legislation of their own to conform with the new federal standards.

ASFA requires child welfare agencies to pay heightened attention to children’s health and safety and to their need for permanent families. ASFA is structured around five key concepts:

1. The child’s health and safety “shall be the paramount concern” in determining what efforts should be made to reunify families;
2. In “aggravated circumstances” as defined in State law (e.g., in cases of severe or repeated abuse, including certain serious sexual abuse cases), reunification services to families are not required;
3. When no reunification services to families are required, the child needs a quick, alternative permanent placement;
4. In all other cases, services to families need to be improved and accelerated;
5. In all cases, permanency – whether the goal is return home, adoption, legal guardianship, or legal custody with a fit and willing relative -- needs to be expedited.

Under the Adoption and Safe Families Act, a permanency hearing must be held in Family Court 12 months after the child enters foster care and at 12-month intervals thereafter.¹ At that hearing, the Family Court judge must determine whether and when the child will either be returned to the birth parents, placed for adoption, referred for legal guardianship, placed with a fit and willing relative, or placed in another planned permanent living arrangement.

As explained in the November 17 OCFS Informational Letter, in order to ensure that children do not linger indefinitely in foster care, ASFA creates a presumption that a petition to terminate parental rights must be filed and concurrently steps to finalize an adoptive placement must be initiated in the following three circumstances:

- where a child has been in foster care for 15 of the last 22 months, OR
- where a court has determined a child to be an abandoned infant, OR
- where a parent has committed certain crimes against the child or a sibling (i.e. murder, manslaughter, attempted murder or manslaughter, or a felony assault resulting in serious bodily injury to the child or another child of the parent)

¹ For purposes of ASFA, the date that a child enters foster care is defined as either 60 days after the child is removed from the home, or the date that the child is found by a court to be an abused or neglected child, whichever is earlier.

Although ASFA creates the presumption that certain categories of foster children should be legally freed and adopted quickly, it also creates three grounds for exceptions to that presumption:

1. at the option of the State, the child is being cared for by a relative;
2. a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing a TPR petition would not be in the best interests of the child, or
3. the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home if reasonable efforts to reunify the family are required.

II. Timing of Permanency Reviews

All children need permanent, safe, stable, nurturing families. For many foster children, the need for permanence can be met by their birth families if they promptly receive the services they need to help them care for their children. For other children, the need for permanence will be met by placement through adoption, legal guardianship, or legal custody with a fit and willing relative.

In either case, children cannot wait indefinitely for permanence. Children need stable, long-term relationships with caring and committed adults, and they need those relationships sooner rather than later. Foster care is intended to be a short, temporary service, not a place where children grow up.

A. Reviews of the Permanency Planning Goal Required for Children in Care For More Than 12 of the Last 22 Months

For children who have already been in care for 12 months or more, the review of the child's permanency planning goal described in this memorandum must occur as part of the next regularly scheduled service plan review ("SPR"). At that time, the agency must decide whether the child can safely return home, whether a petition to terminate parental rights should be filed, or whether one of the compelling reasons established by New York State's implementing legislation applies. For a reminder of who must be invited to participate in the SPR, please see section II(B) below.

For children who already have a permanency planning goal of adoption, the agency must act promptly to file a petition to terminate parental rights. State regulations require that the TPR petition be "presented to the proper court as soon as possible but in no case more than 30 days following a determination that it is in the best interests of the child to terminate parental

rights, unless there are serious extenuating circumstances which in the opinion of the local commissioner justify a special extension.” *See* 18 NYCRR 431.9(c)(3).

Please note that children with a goal of independent living or adult residential care are NOT exempt from ASFA’s mandates regarding permanency. All children need permanent families. It should not be presumed that older children or seriously disabled children are incapable of being reunited with their birth families or finding permanent families through adoption. Thus, the permanency needs of children with these goals must be reviewed periodically, but no less frequently than at their service plan reviews or when a court permanency hearing is due.

Similarly, this permanency review process applies to all children in foster care, including children placed under FCA Article 7 (PINS) and FCA Article 3 (JD), regardless of the level of care. Children placed in residential treatment centers, residential treatment facilities or other group settings are entitled to ASFA’s permanency safeguards. A group home setting does not exempt the agency from making concrete efforts to find a permanent family for the child and to provide services to the child to allow the child either to return home or to become adoption-ready.

Finally, it should be noted that the time frames set forth in this permanency review process apply equally to children who have been transferred from one agency to another. It is incumbent on the sending agency to forward all pertinent documentation to the receiving agency and to provide the receiving agency with a briefing and a written summary of their efforts to work with the birth parents for reunification, along with their recommendations on permanency for the child. It would be inconsistent with ASFA to re-start the permanency planning clock based on a child’s date of transfer.

B. Permanency Reviews Required For Children In Care for Fewer Than 12 of the Last 22 Months

In order to assure early permanency for children who have been in foster care fewer than 12 months, the child’s case planner must schedule a “permanency review” within 90 days of the anticipated date of the 12-month permanency hearing in Family Court. Since the permanency hearing will be scheduled to occur after the child has been in care for 14 months (i.e. 12 months plus 60 days), the permanency review must take place during the preceding 90 days.

Ideally, this permanency review will take place at the regular service plan review (“SPR”), if the SPR is scheduled to occur during the 11th, 12th or 13th month after the child actually entered foster care. However, if no SPR is scheduled to occur in the 11th, 12th or 13th month after the child comes into care, the case planner must hold a special case conference in the 12th month after the child has come into care to address the child’s permanency needs and to prepare for the permanency hearing in Family Court.

Like the service plan review case conference, invitees to the special permanency case conference must include the birth parents, the foster parents, the child's case planner, the case manager (if the child is in the care of a contract agency), the child (if he or she is 10 years or older), an independent third party reviewer and any other persons who can help the case planner reach a decision on permanency which gives "paramount concern" to the child's health and safety.

ACS believes that an important prerequisite to successful service planning is the participation of parents in the service planning process. In accordance with New York's ASFA implementing legislation, birth parents must be informed of their right to attend the case conference and of their right to have counsel or other representative or companion with them.

However, agencies must do more than simply send a letter inviting the family to attend a case conference. Agencies must take affirmative steps to ensure that there is a consistent practice of families actually attending SPR's and permanency review case conferences. It is critical that agencies make meaningful efforts to assure that the birth parent(s) and children over 10 are not only aware of the permanency review but are actually able to participate, accompanied (if they wish) by a supportive person. Agencies should also attempt to consult with incarcerated parents in appropriate cases.

Agencies should also be mindful of their obligation under ASFA to invite foster parents, pre-adoptive parents and relatives caring for foster children to SPR's and permanency review case conferences.

If the parent is currently attending a substance abuse treatment program, a representative from the treatment program should be invited to attend the case conference. At a minimum, there should be a documented pattern of interaction between the case planner and the treatment program that attests to coordinated planning. In this regard, agencies must be mindful of applicable confidentiality regulations and should obtain appropriate releases from parents in order to permit the disclosure of otherwise confidential substance abuse treatment information.

A similar permanency review must take place at any subsequent six-month service plan review until the child is discharged from care. Ideally, this should occur not more than once after the first permanency review, since by the time of the subsequent permanency review, a decision should be made in most cases either to return the child home or to implement an alternative permanency plan for the child. The implementation of these guidelines by ACS and the contract agencies is designed to insure that the time frames set forth in ASFA for achieving permanency will be met.

III. Guidelines for Permanency Review Case Conferences

As part of the review of the child's permanency planning goal, the agency must decide whether and when the child should be reunited with his or her birth parents or whether it is appropriate to file a TPR petition at that time.

The permanency review case conferences will have one of several possible outcomes:

- 1) TPR filing necessary
- 2) TPR filing not necessary because the goal remains return to parent due to the determination that there is a strong likelihood that the child will be able to return home safely within the next six (6) months (as set forth in section VII(A)(2) below)
- 3) TPR filing not necessary because another "compelling" reason" has been documented (as set forth in sections VI and VII below)
- 4) A TPR cannot be filed because the agency has not provided or arranged services necessary for the child's safe return, where such services are legally required (as set forth in section VIII below).

IV. Legal Consultation

In preparing for the permanency review, caseworkers who are unsure whether or not there are legal grounds to terminate parental rights should request a legal consultation. Contract agency caseworkers should consult with their attorneys. ACS staff should consult with the attorney from the Division of Legal Services who is assigned to their case.

V. Timeframe for Filing TPR

If it is determined at the permanency review case conference that a TPR filing is necessary, the child's permanency planning goal must be changed to adoption, and, pursuant to New York State Regulations (18 NYCRR 431.9 (c)), the petition must be filed within 30 days unless there are serious extenuating circumstances which in the opinion of the local commissioner justify an exception. This process will work most expeditiously where ACS case managers receive adequate advance notice of the case conference and are able to participate.

For children with a pre-existing goal of adoption for whom a TPR has not yet been filed, the TPR petition must be filed promptly, in accordance with the requirements of 18 NYCRR 431.9(c).

VI. Kinship Care Cases

Under ASFA and NY's ASFA-implementing legislation, a TPR need not be filed when the child has been in care for 15 of the last 22 months if the child is in the care of a relative.

At the same time, both federal and state law require that, at 12-month intervals, a permanency hearing be held in court for all children in foster care. This is true for children placed in the homes of relatives as well as for children placed in non-relative homes or other settings.

The ASFA TPR exception for children in the care of relatives recognizes that there may be situations where children in foster care in their relatives' homes are in stable, safe settings, where the child perceives that this is permanent, even in circumstances where the relatives prefer not to adopt their kin. *See* OCFS Informational Letter (Nov. 17, 1998). This is consistent with OCFS' long-standing policy in relation to relative foster care, as outlined in 92 LCM-27.

However, ASFA's TPR exception for children in kinship care does not preclude an agency from filing a petition to terminate parental rights when such petition is in the best interests of the child. *See* 18 NYCRR 431.9(e)(2)(i).

This, too, is consistent with pre-existing state regulations. A child placed in the foster home of an approved relative may remain in foster care with a goal of independent living **ONLY** if "it is determined to be in the child's best interests that he or she remain in foster care and not return to his or her parents or be adopted until the child reaches the age of 18." 18 NYCRR 430.12(f). In other words, Discharge to Parent(s)/Caretaker or Discharge to Adoption must have been ruled out on the grounds that neither permanency goal is in the child's best interests. *See* CWA Bulletin No. 91-3, UR Requirements to Prepare Youths for Independent Living (June 7, 1991).

In short, the permanency needs of every child must be individually assessed to determine what permanency plan is in the child's best interest. Kinship foster care status is a factor to be considered in making an individualized assessment of the child's permanency needs. Although kinship care may be an exception to the mandate to file a TPR when the child has been in care for 15 out of 22 months, kinship care is **not** an automatic exception to the requirement to appropriately address the child's permanency needs. Rather, the guidelines set forth in section VII should be followed for all children.

VII. Compelling Reasons Not To File for TPR

New York's ASFA-implementing legislation includes a list of five illustrative "compelling reasons":

1. The child has a permanency goal other than adoption;
2. The child is 14 years or older and will not consent to an adoption;
3. There are insufficient grounds for filing a TPR petition;

4. The child is the subject of a pending Article 10 disposition;
5. The child was placed into foster care pursuant to Article 3 (JD's) or Article 7 (PINS) of the Family Court Act.

In deciding whether or not a compelling reason not to file a TPR applies, each child should receive an ongoing, individualized assessment. The factors which might constitute compelling reasons not to pursue a TPR must be weighed along with other known child and family circumstances. Additionally, the determination that a compelling reason not to file a TPR exists must be re-assessed at the subsequent service plan review and should be re-assessed sooner if there is a significant change in circumstances.

If it is determined that a compelling reason exists why it is not in the best interests of the child to file a TPR petition, the specifics of the compelling reason must be clearly documented in the progress notes, which must be kept in the case record available for court review.

The determination that a compelling reason exists not to file a TPR must be approved in writing by a staff member at least two levels above the case planner.

A. The Child Has A Permanency Goal Other Than Adoption

In preparing for a permanency hearing as well as for the critical decision that must be made on behalf of children in care for 15 of the most recent 22 months, the child's case planner must decide what is the appropriate permanency goal for the child.

The following represents a list of scenarios that might suggest that adoption is not the appropriate goal for the child:

1. The child has been placed in a foster home with an approved relative and that relative will provide the best available care for the child. The relative strongly prefers that parental rights not be terminated but is committed to providing a non-adoptive but permanent and legally secure home for the child through legal guardianship or legal custody. Before this factor may be invoked, the relative and the birth parents must receive meaningful counseling about the potential benefits of adoption (along the lines suggested in 92 LCM-27), the option of a voluntary surrender (as described in 18 NYCRR 431.9(c)(1)) and, if appropriate, the availability of an adoption which allows for continued contact between the child and other members of his or her birth family.
2. The parent(s) have made substantial progress in eliminating the problems causing the child's continued placement in foster care and there is a strong likelihood that the child will be able to return home safely within the next six (6) months. For example, if a parent is attending a substance abuse treatment program, a compelling reason might be a favorable prognosis for completing treatment based on clear evidence of

substantial progress in the areas of abstinence and parenting. Unless justified by extenuating circumstances, this factor should not be invoked more than once.

3. A parent's death is imminent and the parent does not wish to surrender the child for adoption. The parent has designated, or is in the process of designating, an appropriate permanent caretaker for the child.
4. The parent is incarcerated but is scheduled to be released within the next 6 months and there is a strong likelihood that the child will be able to return home safely within a reasonable time period after the parent is released. Unless justified by extenuating circumstances, this factor should not be invoked more than once.
5. As the result of a current assessment, the agency has determined that a family setting will not meet the child's needs because of the child's severe emotional, behavioral or psychiatric problems. The agency must demonstrate that it has put in place services to address the problems that prevent the child from functioning in a family setting.
6. The child has a permanent disability which can be managed only with intensive assistance in a specialized setting (such as a residential group care setting, therapeutic foster board home, or medical foster boarding home) and
 - (a) the child's birth parent or other family member continues to be meaningfully involved in planning for the child, or
 - (b) the child's birth parent or other family members are no longer involved in planning for the child but no adoptive resource has yet been identified. In that case, the agency must make diligent efforts on all levels, including local, state and national adoption exchanges, to find a prospective adoptive family for the child.
7. The parent(s) has agreed either to surrender his or her parental rights or has agreed to consent to an appropriate legal guardianship arrangement for the child. In the event of an agreement to surrender, the birth parent's application for approval of a judicial surrender must be filed within 60 days of the permanency review case conference. If the plan is legal guardianship, judicial proceedings to effectuate the guardianship must be initiated within 60 days of the permanency review case conference. In either case, if the relevant documents are not filed in court within 60 days, or if the matters is dismissed or withdrawn, a referral for termination of parental rights must be made.
8. It is understood that every family's circumstances are unique and that not all situations can be anticipated. Therefore, we foresee that other serious, extenuating circumstances may exist that mandate the conclusion that it would be clearly

detrimental to the best interests of the child to file a petition to terminate parental rights. Such extenuating circumstances must be clearly documented in the case file.

B. The Child Is 14 Or Older And Will Not Consent To An Adoption

To help a foster child make an informed decision about adoption, the agency must make sure that the child has received meaningful counselling about the benefits of adoption and that the child is aware of the possibility (if appropriate) of an adoption which allows for continued contact with members of his or her birth family. This counselling must take place before this compelling reason is invoked.

C. Insufficient Grounds To File TPR Petition

If there is no legal basis for filing a TPR petition, the petition should not be filed. Plainly, agencies should not file frivolous TPR petitions which will be dismissed because they lack a legal basis.

Before reaching a conclusion as to whether or not there are sufficient grounds to file a TPR, agency staff should seek a legal consultation.

D. The Child Is Subject Of A Pending Article 10 Disposition

The fact that the disposition hearing on an abuse or neglect case has not been concluded may be a “compelling reason” not to file a TPR petition. However, this exception does not apply if the child was the subject of a prior abuse or neglect case and has not left foster care, or if the child is in placement as a result of a voluntary placement or other proceeding.

E. The Child Was Placed In Care As A PINS/JD

The fact that the child is in placement as a PINS or JD may constitute a compelling reason not to file a TPR petition. However, agencies must continue to engage in permanency planning for the child, and the child will also receive permanency hearings.

VIII. Necessary Services Not Provided

Both ASFA and the New York State implementing legislation include an exception to TPR requirement if the agency has failed to provide such services as it deems necessary for the safe return of the child to the parent(s).

Critical to successful permanency planning under ASFA is the early engagement of parents and the front-loading of services to families. In the absence of a determination by the court that reunification efforts are not required, agencies have an obligation to make and document their diligent efforts to address the conditions which led to the child's placement in care and to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. Where diligent efforts are required, an agency's failure to make diligent efforts is a breach of its obligations under the Social Services Law and of its contract with ACS.

If it is determined that services which were identified in the case plan or ordered by the Family Court as necessary to permit the child to be safely returned home have not been provided, the specifics of what service or services were not provided must be documented in the progress notes.

The case plan developed at the service plan review conference must carefully document why the necessary services were not provided, (e.g. failure to refer, outside institutional resistance, unavailability of service, lack of treatment slots), and must include a plan to immediately put the necessary services in place. **The determination that necessary services were not provided, as well as the plan for immediately putting those services in place, must be approved by a staff member at least two (2) levels above the case planner.**

Please note that for this TPR exception to apply, two separate requirements must be met. First, the service must not have been delivered according to the schedule set forth in the child's case plan. Second, unless otherwise ordered by a court, the case planner must make a determination that these services are still necessary for the child's safe return.

IX. Tracking Permanency Requirements Compliance

As an aid to ASFA implementation, ACS, in conjunction with OCFS, will periodically issue to agencies child-specific lists identifying children in foster care for 12 or more of the most recent 22 months.

ACS plans to monitor ASFA compliance closely through a variety of mechanisms, including ACS attendance at service plan reviews and permanency reviews, case record readings, and data tracking on an agency-specific basis, with particular attention to parent and child participation in service planning, as well as permanency review outcomes.

X. Subsequent Reviews

After the initial permanency review has been completed, if a decision is made that there is a compelling reason not to file a TPR petition or take a voluntary surrender, the child's permanency needs must be carefully re-assessed at each subsequent service plan review and may be re-assessed sooner if circumstances warrant. Ideally, this should occur not more than

once after the first permanency review, since by the time of the subsequent permanency review, a decision should be made in most cases either to return the child home or to implement an alternative permanency plan for the child. Children must not be permitted to linger indefinitely in foster care without the benefit of a permanent, stable, safe, nurturing family.

XI. "Reasonable Efforts" To Achieve Permanency After TPR Is Filed

If a decision is made at any permanency review to file a TPR petition or to take a voluntary surrender, expeditious steps must be taken to complete the TPR or surrender process and to promptly finalize the child's adoption.

Once a decision has been made to discontinue reunification efforts, ASFA and New York's ASFA-implementing legislation require agencies to make "reasonable efforts" to complete all necessary steps to finalize the child's permanent placement. In completing such steps, casework staff should be mindful of their obligations under the federal Multi-Ethnic Placement Act ("MEPA"), related Inter-Ethnic Adoption Provisions and the implementing New York State Regulations (18 NYCRR 421.18). At the time the TPR is filed, ASFA requires agencies "concurrently to identify, recruit, process and approve a qualified family for adoption." The importance of this requirement is emphasized in the OCFS November 17, 1998 Informational Letter.

In the case of a child for whom the permanency plan is adoption, each subsequent service plan review must document what concrete steps the agency is taking to ensure that the child's adoption is promptly finalized. If the child is not going to be adopted by his or her foster parent, the case plan must document child-specific recruitment efforts, such as the use of local, state, regional and national adoption exchanges, including electronic exchange systems.

XII. Early Reunification

Nothing in these guidelines is intended to prevent a decision from being made to reunify a family at an earlier time period than is required by this process, if doing so is consistent with ASFA's "paramount concern" for a child's health and safety.

XIII. Early TPR's and Voluntary Surrenders of Parental Rights

Nothing in these guidelines is intended to prevent a decision from being made to file a TPR petition or to take a voluntary surrender of parental rights at an earlier time period than is required by this process, if it is the appropriate course of action in the child's best interests in a particular case.

XIV. Effective Date

These guidelines are effective immediately.