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 | OCFs INFORMATIONAL LETTER |  
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TRANSMITTAL: 98 OCFs INF-3

TO: Commissioners of Social Services  
 Directors of Voluntary Child Care Agencies

OFFICE: Strategic Planning and Policy Development

DATE: November 17, 1998

SUBJECT: Adoption and Safe Families Act:  
 Information on the Act's Implementation  
 Timeframes and Preliminary Guidance  
 Concerning its Termination Requirements

SUGGESTED DISTRIBUTION: Directors of Services  
 Child Welfare Supervisors  
 Child Welfare Attorneys  
 Staff Development Coordinators

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ATTACHMENTS: None

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
93 ADM-34			P.L. 105- 89, ASFA		

The purpose of this informational letter is to: a) inform you of the date that the State has informed HHS that we will be in compliance with all the provisions of Public Law 105-89, the Adoption and Safe Families Act of 1997 (ASFA); b) provide preliminary guidance about ASFA termination of parental rights requirements, including circumstances in which the case planner might conclude that there is a compelling reason not to file a termination petition; and c) remind you of the importance of reviewing all of your long term foster children to determine if a child has been in care for 15 of the most recent 22 months and whether filing a petition to terminate parental rights is warranted.

Generally, ASFA was effective on November 19, 1997, the day it was signed into law. However, an explicit provision allowed States additional time to enact those ASFA provisions for which State statutory amendment was necessary. Additionally, HHS recognized that those provisions that didn't require statutory change, but needed the promulgation of written administrative instruction (e.g., regulations), could not be accomplished immediately upon passage of ASFA. In relation to New York's deadline for when needed laws would have to be enacted, it was first necessary to determine the last official day of this year's State legislative session. In that the last day of this year's legislative session is 12/31/98, we must be in compliance with all ASFA provisions by 1/1/99.

There are several ASFA provisions that can be implemented immediately. One such provision that we urge you to pursue is the termination petition requirements contained in Section 475(5)(E) of the Social Security Act, as amended by ASFA, particularly in relation to children in foster care for 15 of the most recent 22 months. This new section of federal law reads as follows:

(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired or solicited to commit such murder or voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition) and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless--

(i) at the option of the State, the child is being cared for by a relative;

(ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

(iii) 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 of the type described in section 471(a)(15)(B)(ii) are required to be made with respect to the child.

This new section of law presumably was developed to respond to the 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. Please note that there are three categories of foster children for whom this provision of ASFA creates a presumption that a termination proceeding and steps to complete an adoptive placement be initiated: a child in foster care for 15 of the most recent 22 months; an infant who has been abandoned; and a child whose parent has committed murder or other serious crime against a child of such parent.

In relation to the children whose parents have committed one of the enumerated crimes, except for the provisions of Section 384-b(8) of the Social Services Law, pertaining to severely abused children, there are no State statutory grounds available now that specifically are applicable. New York's termination laws will need to be amended prior to our fully complying with this requirement. Alternatively, as it applies to abandoned infants, in that the State's legal termination framework includes abandonment, there already exist unambiguous statutory grounds to comply with the termination requirements for this category of foster children.

Concerning the foster children who have been in care for 15 of the most recent 22 months (as well as the aforementioned two categories as applicable and when State statutory grounds exist), we want to emphasize three facets. First, significant attention has been placed on the requirement of filing a termination petition, while less attention has been focused on the connected phrase, "and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption." Legally freeing a child but failing to find a legally permanent home for such child cannot be considered acceptable public policy, nor would it be in the best interest of the large majority of children who are unable to be safely returned to their families of origin. Therefore, it is crucial that filing the termination proceeding be accompanied by the additionally required steps to locate an adoptive home and begin to prepare

for the adoptive placement. District and agency-wide recruitment of available adoptive homes may well be a key factor in whether you will be able to adequately comply with the 15 of 22 month requirement.

A second facet to recognize, which really addresses technical compliance but perhaps not the spirit of the law, is that ASFA requires that the termination petition be filed, not that the hearing be held. As a result, while extended delays and continued extensions in the family court proceedings should not be viewed as routine and acceptable, they will not put the State out of compliance with ASFA. Additionally, there is no requirement to continue to file termination petitions if the petition is denied, although that might be an appropriate case activity to undertake at some point in the future.

The third area needing emphasis is that although ASFA creates the presumption that certain categories of foster children should be legally freed and adopted quickly, it creates three grounds for exceptions to such presumption. The specifying of exception criteria probably should be viewed as recognizing that every child in foster care is unique with individualized family, psycho-social and situational characteristics. As a result, any guidance provided herein concerning the circumstances in which it may be appropriate not to file a termination petition should not be taken as hard and fast rules. Rather, each situation requires the professional judgement that experienced, well trained child welfare casework and supervisory staff are able to employ.

The first exception criteria outlined in Section 475(5)(E) is for a child in the care of a relative. This 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 when the relatives prefer not to adopt their kin. This is consistent with the Office's long-standing policy in relation to relative foster care, as outlined in 92 LCM-27. However, ASFA does not in any way prevent or discourage filing a petition to terminate parental rights and concurrently pursue adoption of the child by the relative in circumstances when that is the agreed upon case plan.

The second, and most widely discussed, exception criteria is when it is "...documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child." Prior to listing some possible conditions when there may (but not necessarily) exist compelling reason for determining that filing a termination petition would not be in the best interests of the child, a couple of general points should be highlighted. The federal requirement is that the compelling reason should be documented in the case record and available for review by the court. It is not required that a court order explicitly acknowledge or endorse the compelling reason

exception, although it might be reasonable to expect that the reasons why adoption is not being pursued would be discussed at a permanency hearing (new ASFA requirement needing State statutory amendment, which would replace existing foster care review or extension hearings). As it concerns documenting the compelling reason in the case record, we agree with the recommendation of the American Bar Association's Center on Children and the Law when they assert that the case record should not contain standardized phrases and paragraphs. Rather, well thought out individualized explanations should be documented. The clarity and the specificity of the compelling reason documentation is what's key, not the length of the explanation.

On September 18, 1998, the Administration for Children and Families (ACF) of HHS published a Notice of Proposed Rulemaking (NPRM) in which it proposed regulations to implement portions of ASFA. In the NPRM, ACF chose not to be prescriptive about when compelling reason for not filing a petition exists. However the NPRM offers two "examples of compelling reasons": A) that adoption is not the appropriate permanency goal for the child; or B) insufficient grounds for filing a petition to terminate parental rights exist. These examples are contained within proposed HHS regulations so they may or may not eventually become incorporated in the final federal rules. The proposed federal examples of compelling reason seem to provide considerable leeway. However, the examples' broadness, while possibly beneficial from an audit perspective, may not provide the extent of program guidance that some might seek. We have developed additional program guidance concerning compelling reasons when a worker might conclude that filing a termination petition would not be in the best interests of the child. The list, which was developed after reviewing other sources' proposed compelling reasons, is not meant to be all inclusive. No doubt, other specific case circumstances might result in a reasoned assessment that there is compelling reason not to file a termination petition.

1. The child is 14 years or older and does not want to be adopted.
2. A family setting will not currently meet the child's needs because of the child's severe emotional, behavioral or psychiatric problems.
3. At least one parent is actively being considered as a discharge resource for the child, and it is anticipated that such discharge is likely to occur within 6 months.
4. The child is in placement with a sibling(s) and the sibling(s) is not being freed for adoption.
5. The parent makes regular contact with the child and maintaining their relationship benefits the child.
6. The child is in care for a child-related problem, at least in part, and there would be little or no benefit to the child in ending the child's relationship with the child's parent(s).

In relation to the above "compelling reasons," every case (i.e., child and family) should receive ongoing individualized assessments. The factors that might constitute compelling reason must be weighed along with other known child and family circumstances. For example, in certain circumstances proceeding to file a petition to terminate the parental rights of parents of one sibling, may be appropriate. Here, considering the feasibility of an open adoption, or whether one successful termination may more readily lead to a subsequent termination needs to be factored into the decision-making process. Additionally, determining that a compelling reason exists that the best interests of the child would not be served by filing a termination petition does not preclude revisiting this decision several months later. As an example, a 14 year old may well change her/his mind about being adopted. The decision at 15 months not to file a termination petition should not be viewed as the only point in time that thought is given to filing a termination petition and finalizing an adoptive placement.

The third exception criteria pertains to when the family has not been provided with the necessary services to permit the child's safe return to the child's home, consistent with the time period in the case plan. It is not clear when this situation would arise, but conceivably could apply when you are unable to link the family up with the needed services as quickly as anticipated in the service plan. Hopefully this would not occur very often, and, when it did arise, would be for lack of treatment slots and not agency diligence.

For the purpose of calculating whether a child has been in care for 15 of the most recent 22 months, ASFA operationally defines (for this purpose only) when a foster care placement is considered to have begun. It states that it is the earlier date of a) the first judicial finding that the child has been subjected to child abuse or neglect or b) 60 days after the date on which the child was removed from the home. The aforementioned NPRM (therefor not official policy as of yet) further states that "when a child enters foster care on the basis of a voluntary foster care agreement, the 'date a child enters foster care' means the date on which the voluntary placement agreement is signed." Presumably, for a child entering foster care pursuant to an order under Article 3 or 7, the date a child enters foster care would be 60 days after the child's custody is assigned to the local commissioner.

ASFA contains transition rules that are intended to provide some flexibility to States for complying with the 15 of the most recent 22 month rule for foster children who were in care prior to ASFA's effective date of 11/19/97. However, we strongly urge that you not take advantage of such flexibility. The transition rule applied in New York would result in 1/3 of the children in care on 11/19/97 having petitions filed (or exceptions documented in the case record) by 7/99, the second third by 1/00, and the

last third by 7/00. Given the length of time these children have already been in foster care, we see no rationale for not having already filed a termination petition, if appropriate, or documenting the pertinent exception criterion as to why it was not appropriate. While there will continue to exist the federal flexibility from an audit disallowance perspective, there is no programmatic basis for delaying applying the 15 of 22 month rule. As you are hopefully aware, you now have access to a roster of all of your foster children who have been in care for 12 of the most recent 22 months in CONNECTIONS in the public folders. This list, which also includes the number of months each of these children have been in continuous care, will be updated quarterly.

This letter is intended to communicate with you about the status of ASFA implementation and provide guidance on ASFA's termination of parental rights requirements. We encourage you to provide feedback on this form of communication, as well as the specific content, to the contact persons listed on the first page. We will try to use that feedback in future communication on ASFA as subsequent implementation steps, most compellingly State statutory and regulatory amendments, occur.

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and Policy Development