NEW YORK STATE | Office of Children and Family Services

Adoption Services Guide
for Caseworkers

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Introduction

The purpose of this practice guide

This guide is designed to support you in your practice as an adoptive services caseworker or supervisor. It is a resource that can be used by those who are new to this area of child welfare, as well as by those with years of experience. Here you will find the relevant laws, regulations, policies, and practice guidance that govern how adoptive services are provided in New York State (NYS).

The guide does not replace training, supervision, and legal guidance from agency trainers, supervisors, or attorneys. Using this guide will help you to become familiar with the laws, regulations, and policies that govern adoption practice, supplemented by ongoing supervision and case-specific legal consultation from agency attorneys.

The guide focuses on adoption services for children from the public foster care system and children who are surrendered directly to NYS authorized voluntary agencies (VAs). Some of the material in the guide may be relevant to other types of adoptions, such as the domestic adoption of infants through private adoption agencies or independently, or the international adoption of infants and children from other countries by United States (U.S.) citizens. These types of adoptions are not the guide's focus, however, and its contents should not be used to guide practice in those areas.

The *Adoption Services Practice Guide* is one of a series of manuals that are designed to guide the practice of caseworkers across the continuum of child welfare services. These include:

- Preventive Services Practice Guidance Manual
- Child Protective Services Manual
- Home Finding Practice Guide
- Foster Care Practice Guide for Caseworkers and Supervisors
- KinGAP Guardianship Assistance Program

You will find links to these publications throughout this guide that can be used as sources of more detailed and comprehensive information.

Terminology used in this guide

The New York State Office of Children and Family Services (OCFS) honors the life experiences of the people it serves and recognizes the importance of using the preferred terms self-designated by members of diverse communities, cultures, and abilities.

Some terminology used in this guide is not representative of current, person-centered language that has evolved to better meet the needs of various communities. For example, the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) refers to a "handicapped child" rather than a "child with a disability." Another area refers to "Indian fathers" as cited in the Indian Child Welfare Act of 1978 [P.L. 95–608] (ICWA), while the preferred identifier is "Indigenous/First Nation parent." The guide also cites terminology used in Domestic Relations Law, such as "unwed fathers" and "children born out of wedlock," which some users may find to not represent all families and custodial situations.

While preservation of the terminology used in law and in legal proceedings is necessary to maintain legal relevance and clarity, OCFS acknowledges that these terms may no longer be used by agencies providing adoption services. For the purposes of this guide, the terminology used will reflect the language used in the federal and state laws and regulations, forms, and policies cited. Users of this guide should reference applicable entries in the **Glossary** for maximum clarity and for further information if an identifying term is in question.

Online resources

New York State Laws

In this guide, references to state laws are highlighted in color but cannot be accessed through a direct link. Use this link to access a list of the Laws of New York State. From there, navigate to specific statutes. Those cited in this guide include:

	Abbreviation Online	Abbreviation in Guide
Social Services Law	SOS	SSL
Family Court Act	FCT	FCA
Domestic Relations Law	DOM	DRL
Penal Law	PEN	PL
Public Health Law	PBH	PHL

Codes, Rules & Regulations

The abbreviation “18 NYCRR” used in this guide refers to Title 18 of New York Codes, Rules, and Regulations and citations are highlighted in color. Use this link to access Title 18 and then navigate to Chapter II (Regulations), Subchapter C (Social Services), and Article 2 (Family and Children’s Services). Select the Part Number for the citation you wish to review.

Practice Guides

OCFS practice guides provide detailed information on areas other than adoption services that may be helpful to caseworkers. These include:

- *Child Protective Services Manual*
- *Foster Care Practice Guide for Caseworkers and Supervisors*
- *Home-Finding Practice Guide*
- *KinGAP Guardianship Assistance Program*
- *Preventive Services Practice Guidance Manual*

Other Manuals

These resources are designed to assist caseworkers in the online documentation required in child welfare cases.

- *Adoption Album Training Manual*
- *CONNECTIONS Activities Window Reference Manual*
- *Eligibility Manual for Child Welfare Programs*

OCFS Policy Directives

OCFS policy directives, including Administrative Directives (ADM), Information Letters (INF) and Local Commissioners Memorandums (LCM) are organized by year at: http://ocfs.ny.gov/main/policies/external/.

Direct links to specific OCFS policy directives and publications appear as underlined text in this guide.

Sections of the Guide

Direct links to other chapters, sections, and appendices in this practice guide will appear in **bold text**.

Chapter 1

Chapter 1
Overview of Adoption Services

Child welfare professionals who provide adoption services are responsible for placing children with families and providing services to support the permanency of these placements.

In recent decades, the emphasis of adoption practice has shifted from helping families find children to finding safe and permanent families for children in foster care. Adoption caseworkers are expected to have extensive knowledge and understanding of the recruitment and assessment of adoptive families, preparation of children and families for adoption, placement of children with a variety of strengths and needs, and supportive post-adoption services to promote attachment and permanency for children.[1]

A. Definitions of adoption services

In New York State (NYS), **adoption** is defined by Domestic Relations Law (DRL) as "the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person." (NYS DRL, §110).

Adoption services are defined in both law and regulation in NYS. There are some differences between the two definitions:

Social Services Law (SSL) requires local departments of social services (LDSSs) to provide adoption services, either directly or through a purchase of service, to each child in their care who has been freed for adoption [SSL §372-b(1)(b)]. The SSL defines adoption services to include the following:

- evaluation of a child's placement needs and pre-placement planning;
- recruitment of and home study for prospective adoptive parents;
- training of adoptive parents;
- placement planning and supervision; and
- post-adoption services.

Prospective adoptive parents have a right to a fair hearing if they are not provided with adoption services included in the statute [SSL §372-b(1)(a)] and in the state's consolidated services plan [SSL §407].

State regulation expands upon the definition of adoption services in the law [18 NYCRR 421.1(b)]. It defines adoption services as assisting a child to secure an adoptive home through:

- counseling with a child's birth parent or legal guardian concerning surrender of, or legal termination of, parental rights with regard to the child;
- evaluation of the child's placement needs;
- pre-placement planning;

[1] Child Welfare Information Gateway (2006). *The Basics of Adoption Practice: A Bulletin for Professionals*. Washington, DC: U.S. Department of Health and Human Services. Retrieved from https://www.childwelfare.gov/pubpdfs/f_basicsbulletin.pdf.

- recruitment, study, and evaluation of interested prospective adoptive parents;
- counseling for families after placement (including birth families under certain circumstances);
- supervision of the child in the adoptive home until legal adoption; and
- counseling of the adoptive family after legal adoption.

See **Appendix 1** for summaries of federal legislation that affects the provision of adoption services in NYS.

B. Who provides adoption services?

In general, the provision of adoption services in NYS is supervised at the state level and administered at the local level. This means that adoption services are the responsibility of 58 LDSSs and the St. Regis Mohawk tribe. The five boroughs of New York City comprise one LDSS, which is administered by the city's Administration for Children's Services (ACS).

LDSSs may contract with authorized voluntary adoption agencies to provide services in their area. Their adoption programs must be approved by OCFS. A comprehensive list of approved agencies is located here on the OCFS website.

1. Case planning and management

Every child welfare case in NYS must have an assigned case manager and a case planner. There can be only one case manager and one case planner for each case, although one person can be assigned both roles. There may be additional caseworkers assigned to a case who are neither the case manager nor the case planner. This usually occurs when there is more than one agency and/or multiple programs within an agency providing services to the same family. Ongoing coordination and communication keep everyone informed of roles, responsibilities, and progress on the case and helps avoid duplication of efforts.

2. Case manager responsibilities

The case manager is an employee of an LDSS (or a VA in New York City) who is responsible for authorizing the provision of services, approving the client eligibility determination, and approving each Family Assessment and Service Plan (FASP) [18 NYCRR 428.2(a)(b)].

State regulations require the case manager to:

- Determine eligibility for services.
- Develop a plan of service, on the basis of an evaluation or reevaluation of the family's situation, for the purpose of achieving an identified service goal.
- Authorize the scope, type, and duration of services to be provided.
- Assess the quality and appropriateness of services provided.
- Maintain recipient and services information.
- Submit reports as required [18 NYCRR 403.4(a)].

In general, the case manager supervises case planning and makes sure that all participants in the case are actively involved in the assessment and service planning functions. This is especially important when services overlap or when a case is being transferred from one

service area to another. The use of Service Plan Review conferences is an excellent way to facilitate communication and coordination among service providers.

3. Case planner responsibilities

The case planner has the primary responsibility for providing, coordinating, and evaluating the provision of services to the family [NYCRR 18 428.2(c)]. The case planner will:

- Refer the child and family to providers of services as needed.
- Delineate the roles of the various service providers.
- Document client progress and adherence to the service plan by recording in the uniform case record that such services are provided.
- Make casework contacts or arrange for casework contacts.

The case planner is responsible for the contents of the FASP and the timeliness of its submission for approval by the case manager. This means the case planner must coordinate all documented work done by other workers who contribute to the FASP, and either approve or revise it, as needed.

There may be more than one individual performing case planning activities for a family. For example, a contracted preventive services provider may be working with the family, or child protective services (CPS) may have its own case planner or CPS monitor. There can be only one case planner assigned to the case in CONNECTIONS (CONNX) at any given time. If no case planner role has been assigned, the case manager assumes the duties of the case planner.

4. Caseworker responsibilities

In general, caseworkers are assigned to carry out specific functions in a child welfare case. One case may require preventive services, child protective services, the provision of foster care, and adoptive services. In smaller agencies, caseworkers may be required to provide all of these services, while larger agencies often have “specialists” in each area. In these situations, caseworkers must be able to work as a team and maintain effective communication to achieve an outcome that is in the child’s best interests.

C. Role of the Family Court

If the child has been in foster care, the Family Court has been involved since the time they were removed from the home. As much as possible, the court will keep the case before the same judge as proceedings continue.

1. Permanency hearings

Federal and state law require that the family courts conduct permanency hearings to review the status of a child in foster care, to consult with them in an age-appropriate manner, and to endorse or amend their permanency planning goal (PPG). Permanency hearings continue when a child’s PPG is adoption and for a child who has been:

- Surrendered for adoption [SSL §§383-c and 384].

- Surrendered for adoption [SSL §383-c] and determined by a court to be completely legally free for adoption, including children placed in foster care pursuant to FCA Article 3 (juvenile delinquent) or Article 7 (Person in Need of Supervision [PINS]).
- Placed in foster care as juvenile delinquents or PINS [FCA §§355.5 and 756-a] and have not been freed for adoption.

The initial permanency hearing for children who have been placed in foster care and are not completely freed for adoption must begin no later than eight months after their removal from home. The hearing must conclude within 30 days [FCA §1089(a)(2)]. If a child has been completely freed for adoption, the initial hearing must be held immediately following court approval of a surrender or termination of parental rights (TPR) [FCA §1089(a)(1)].

Subsequent permanency hearings for both freed and non-freed children who remain in foster care must be held at least every six months thereafter on a date set by the court at the completion of the previous permanency hearing [FCA 1089(a)(3)].

See **Chapter 2** for detailed information on permanency hearings and reports.

2. Surrender of parental rights

In a surrender, parents voluntarily give up guardianship and custody of a child for the purpose of placement for adoption. A non-adversarial process, it is generally the simplest method of freeing a child for adoption. A signed and notarized surrender document transfers guardianship and custody of the child to an authorized agency. The parent who signs the surrender no longer has consent to, or veto over, the child's adoption.

If the child is in foster care, guardianship and custody of the child is transferred to the LDSS commissioner, who is then empowered to consent to adoption. The LDSS may provide physical care of the child and adoption services directly, or the commissioner may transfer physical care of the child to a voluntary agency (VA) authorized to provide adoption services.

In a judicial surrender, the surrender must be executed and acknowledged before a judge of the Family Court or the Surrogate's Court.

See **Chapter 4** for more information on surrender of parental rights.

3. Petition to terminate parental rights

When an authorized agency has decided that adoption is in the best interests of a child and a surrender is not appropriate or possible, the agency petitions the court to terminate parental rights (TPR) (SSL §384-b). Sometimes, the court may order the agency to file a petition to terminate parental rights.

The decision to file a TPR petition must be evaluated on a child-specific basis and be made in accordance with a child's best interests. Whenever an LDSS determines that a TPR petition should be filed, it must also make reasonable efforts to identify, recruit, process, and approve a qualified family for the adoption of the child, if these steps have not already taken place [18 NYCRR 431.9(e)(3)].

The LDSS must also follow certain standards that are included in law and regulations for filing a petition for termination of parental rights [SSL §384-b(3)(1); 18 NYCRR 431.9(e)(1&(2)]. The LDSS *is required* to file a TPR petition when:

- The child has been in foster care for 15 of the most recent 22 months; or
- A court has determined the child to be an abandoned child; or
- A court has made a determination that the parent has been convicted of the murder or voluntary manslaughter of another child of the parent; the attempt, facilitation, conspiracy, or solicitation to commit such a murder or manslaughter; or a felony assault that resulted in serious bodily injury to the child or to another child of the parent.

See **Chapter 5** for more information on termination of parental rights.

4. Transfer of guardianship and custody

Once the parental rights of all of the parents whose consent to the child's adoption is otherwise required have been surrendered or involuntarily terminated, the court will order the transfer of guardianship and custody of the child to the agency and the child is legally free for adoption.

The court will ask if there are foster parent(s) with whom the child lives, a relative of the child, or another person who is seeking to adopt the child. If there is such a person, the court is required to accept petition(s) for the adoption of the child, together with an adoption home study, if one has been completed by an authorized agency. If the parents appeal the court's decision to terminate parental rights, however, the adoption cannot be finalized until that appeal is resolved.

In New York State, most adoption petitions are filed in the county where the adoptive parents live. Depending on the county, the Family Court or the Surrogate's Court approves all adoptions. This is done by signing an Order of Adoption.[2] The court is responsible for establishing a schedule for concluding other inquiries and investigations necessary to complete a review before finalization of the adoption.

See **Chapter 4** for details on adoption proceedings.

D. Structure of the NYS child welfare system

1. Office of Children and Family Services

The New York State Office of Children and Family Services (OCFS) is responsible for programs and services involving foster care, adoption, child protective services, preventive services for children and families, services for pregnant adolescents, and protective programs for vulnerable adults. The office also is responsible for:

- Functions performed by the State Commission for the Blind.
- State government response to the needs of Native Americans on reservations and in communities.
- Regulated child care (family day care, group family day care, school-age child care and day care centers outside of NYC), legally exempt child care, child care subsidies, child care resource and referrals, and a range of services and programs for infants, toddlers, preschoolers, and school-age children and their families.
- The state's juvenile justice programs, including the administration and management of programs for juvenile delinquents and juvenile offenders placed in the custody of OCFS.

[2] NYS Unified Court System, "Adoption Basics" Retrieved from https://www.nycourts.gov/courthelp/family/adoptionBasics.shtml.

- The provision of services to youth and their families, working closely with LDSSs and county youth bureaus. OCFS also serves as the Title IV-E single state agency responsible for the foster care assistance, adoption assistance, and KinGAP in New York [SSL §406].

2. OCFS Regional Offices

There are seven regional offices (RO) that provide administrative and technical support related to child welfare to LDSSs and VAs in their geographic areas (Albany, Buffalo, New York City, Long Island, Rochester, Westchester, and Syracuse). Regional Office contact information is available on the OCFS website at https://ocfs.ny.gov/directories/regional-offices.php. Some of their duties include:

Oversight and monitoring

Regional offices play the lead role for OCFS in providing the oversight necessary so statewide standards are maintained in child welfare services. RO staff conduct periodic reviews of LDSSs and VAs with a focus on regulatory and statutory compliance, as well as best practice. The RO also investigates case-specific complaints involving children in foster care.

The results these of reviews culminate in the development of a Practice Improvement Plan (PIP) by the regional office and the agencies. PIPs help inform the work of all agencies involved in the improvement in the safety, permanency, and well-being of children in New York.

Technical assistance for LDSSs and VAs

RO staff serve as liaisons between the home office and the LDSSs and VAs in their areas. Each LDSS and VA is assigned a designated RO staff person, referred to as county or agency leads. The leads offer support and technical assistance such as:

- Reviewing performance data and assisting with the continuous quality improvement/county planning process.
- Answering specific technical assistance requests from LDSSs and VAs.
- Approving adoption programs offered by voluntary agencies.
- Identifying specific training needs and forwarding training requests to the home office.
- Answering questions related to federal and state laws, regulations, and policies.
- Disseminating pertinent child welfare information from appropriate sources.
- Addressing local questions/concerns related to adoption policy and accessing adoption-related resources.
- Review of county child welfare plans and county recruitment and retention plans.
- Provide oversight and technical assistance for fatality reports and reports of abuse and maltreatment in foster boarding homes.

3. Role of Local Departments of Social Services (LDSSs)

The functions and responsibilities outlined in this practice guide are carried out by an LDSS or a VA. Some of the responsibilities related to foster care and adoptive services include [SSL §§395, 397 and 398]:

- Investigating complaints of child abuse and maltreatment.
- Removing a child from their home if it is deemed necessary.
- Bringing cases of alleged child abuse and neglect before Family Court for adjudication and instituting proceedings against a parent or adult, when necessary.
- Offering preventive services in an effort to avoid the placement of a child into foster care.
- Petitioning the Family Court for custody of the child if they cannot be safely cared for in the family home.
- Placing a child in the least restrictive, most homelike foster care setting that is appropriate for the child.
- Returning a child to their home when it is safe for the child.
- Commencing a proceeding to free a child for adoption.
- Consenting to the adoption of a child whose custody and guardianship has been transferred to the LDSS.

Appendix 1.1: Federal Legislation

Adoption and Safe Families Act of 1997 (P.L. 105-89)

This federal law emphasized that the health and safety of children is the paramount concern that must guide all child welfare services [42 USC 671 (a)(15)]. The Adoption and Safe Families Act (ASFA) also strengthened the time limits within which children in foster care should be placed with permanent families and enacted a system of accountability for child welfare services.

ASFA emphasized adoption by establishing criteria when termination of parental rights had to be sought except for specific circumstances. This included shortening the time frame for initiating proceedings for the termination of parental rights and identifying the circumstances under which reasonable efforts to reunify children with their birth families are not required. In addition, ASFA provided incentive payments to states to provide resources to support adoption of children from foster care.

ASFA amended Title IV-E of the federal Social Security Act, federal law that governs child welfare. The amendment required a focus on permanency for the child and stressed that in making reasonable efforts to prevent removal or to finalize a child's permanency plan, the child's health and safety must be the paramount concern.

Some of the major provisions of ASFA are summarized as follows:

- affirmation that permanency planning includes reunification, as long as it can be established that it is consistent with the health and safety of the child;
- identification of concurrent planning as a means to hasten permanency for children;
- requirements for reasonable efforts to be made to achieve permanency for children and to finalize a permanency plan;
- allowance for "no reasonable efforts" to be made in relation to reunification under certain circumstances;
- specific time frames to achieve permanency for children; and
- requirements for the filing of petitions to terminate parental rights for children who have been in foster care for 15 of the last 22 months; for children who have been abandoned; and for children whose parents have committed certain specified serious crimes against the child or another child in the family, except under specified circumstances.

Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351)

Among the many provisions of this Act:

- amendment of the Social Security Act to extend and expand adoption incentives to states;
- creation of an option to extend eligibility for Title IV-E foster care, adoption assistance, and kinship guardianship payments to age 21;
- the de-linking of adoption assistance from Aid to Families with Dependent Children (AFDC) eligibility; and
- the provision that federally recognized Indian tribes may operate a Title IV-E child welfare program.

A summary of major federal legislation related to child welfare is available at: https://www.childwelfare.gov/topics/systemwide/laws-policies/federal.

Chapter 2

Chapter 2
Permanency Planning

Permanency planning is intended to provide a safe, permanent family for children by preventing their placement into foster care when possible and, when they must be placed, limiting the time they spend in foster care.

Separation, loss, and unresolved grief, as well as the uncertain and potential long-term nature of the foster care experience, can have a negative effect on children's overall sense of belonging, identify formation, and emotional well-being.[1] Placement of a child in foster care is meant to be temporary, with an emphasis on immediate, ongoing, and effective permanency planning for the child.

A. Permanency planning goals

The child's permanency planning goal (PPG) identifies their permanent living arrangement upon their discharge from foster care. The PPG for nearly all children entering foster care is, at least initially, reunification with their family. When safe reunification is not possible, other permanent living arrangements, including adoption, are sought.

Depending upon local protocol, the local department of social services (LDSS) or a voluntary authorized agency (VA) under contract with the LDSS establishes the child's PPG. This goal is recorded on the "Tracked Child" page in CONNECTIONS (CONNX) and in Permanency Hearing Reports (PHRs) prepared for the Family Court. The court is required to review the child's PPG at each permanency hearing.

By law, the Family Court has oversight responsibility for many child welfare cases, including all cases of children placed in foster care. Like LDSSs and VAs, the Family Court is also charged with expediting permanency for children in foster care. Unless there is an appeal, the Family Court judge is the final decision-maker in many key child welfare decisions, including but not limited to, terminating parental rights, and finalizing adoptions. Caseworkers, in consultation with supervisors and agency attorneys, need to work closely with their Family Court to facilitate this process.

Possible PPGs for children in foster care are [FCA§355.5(7)(d); §756-a(d)(iv); §1089(d)(2)(i); 18 NYCRR 430.12]:

- Return to parents (reunification)
- Adoption
- Permanent placement with a fit and willing relative
- Guardianship
- Placement in another planned living arrangement with a permanency resource (APPLA)

Permanency planning for older youth

The PPG of placement in another planned living arrangement with a permanency resource (APPLA) may be selected only for youth who are 16 years of age or older, and only if the LDSS

[1] G. Mallon, & B. Leashore, eds. (2002). *Contemporary Issues in Permanency Planning*. Washington, DC: CWLA Press.

has documented a compelling reason why none of the other PPGs are in the youth's best interest (FCA §§355.5, 756-a and 1089).

If APPLA is selected as the appropriate PPG, the LDSS or VA must document intensive, ongoing, and unsuccessful efforts it has made to return the youth to their home or to secure a placement with kin, a legal guardian or custodian, or an adoptive parent. These efforts must include the use of technology, including social media, to locate family members [18 NYCRR 428.5(c)(13)].

RESOURCES

For more information on permanency and transition planning for older youth who are leaving foster care, see:

OCFS Foster Care Practice Guide for Caseworkers and Supervisors, Chapter 13, Section D.

"Transition Planning with Youth for a Successful Discharge," (15-OCFS-ADM-20).

"Providing Foster Care Placement Verification to Youth 18 Years of Age or Older Exiting Foster Care," (18-OCFS-ADM-16).

Planning for a Successful Adulthood — Another Planned Permanent Living Arrangement with a Permanency Resource (APPLA) for Youth 16 Years of Age and Older (15-OCFS-ADM-19)

B. Concurrent planning

The Adoption and Safe Families Act of 1997 (ASFA) allows caseworkers to make reasonable efforts to safely return a child to their home while *at the same time* making efforts to pursue another permanency option for the child. Concurrent planning is developed and implemented in tandem with the reunification plan, not instead of it.

This differs from a sequential planning approach, in which caseworkers do not pursue permanency alternatives until all reunification efforts have been exhausted or the court has ordered termination of parental rights. The sequential approach may result in delays in achieving permanency, in part because of missed opportunities to engage parents, relatives, foster parents, or others in identifying alternative paths to permanency.

Concurrent planning is a tool to help achieve:

- Safety for the child
- Timely permanency decisions for the child
- A shorter period of time for the child in foster care
- Fewer moves and relationship disruptions for the child in foster care

For concurrent planning to be effective, the caseworker must engage all members of the child's significant network, including foster parents, in the process. The LDSS or VA team, including the caseworker, supervisor, and legal staff, should interact frequently regarding case plans, progress, and decisions.

Judges, attorneys for the child, and parents should be helped to understand that concurrent planning activities are diligent efforts in the child's best interest, and not a way to circumvent the need to work diligently with parents in pursuit of permanency through reunification.[2] Due to lack of understanding, some courts have been reluctant to approve concurrent plans of reunification and adoption because the court may have to make a future determination on the termination of parental rights.

Although concurrent planning is not a requirement under federal or state law, it is recommended for the majority of cases. Caseworkers should consider the specific circumstances of each case in deciding whether concurrent planning is appropriate for that child and family.

RESOURCES

Child Welfare Information Gateway. *Concurrent Planning to Attain Permanency*.

National Center for Child Welfare Excellence. A Web-Based Concurrent Planning Toolkit. Silberman School of Social Work, Hunter College.

1. Communication with parents

Successful concurrent planning includes a full disclosure discussion with parents regarding the impact of foster care on children; the child's need for safety and permanency; and the roles of both the agency and the parents in securing a safe, permanent home for the child as quickly as possible.

Often this discussion means asking parents to identify individuals who might raise their children in the event they are unable to do so. The caseworker also may ask the child, if the child is old enough, to identify alternate caretakers. This discussion can be a way of helping parents understand what needs to occur if their children are to be returned to them and what will occur if they do not follow through.

All good casework includes the family in assessment and planning, addressing the specific conditions and behaviors that must change to reunify the family and to achieve parenting that is positive and lasting.

2. Communication with foster parents

When a decision has been made to use concurrent planning, the ideal placement for a child is with a foster family that has made a commitment to provide foster care for as long as a child needs it and to adopt the child if the child is legally freed. This has been called a legal risk placement, which means there is some degree of risk that a child will not be freed for adoption and will be returned to home. For more information, see **Chapter 8** of this guide.

Legal risk placements can provide a framework for stability and security, even if the child is not immediately available for adoption. The child's permanency is planned and structured as part of the placement. Foster parents who can make a specific commitment to the child typically have been certified as both foster and adoptive parents and have adopted foster children in the past.[3]

[2] OCFS, "ASFA Safety and Permanency" (00-OCFS-INF-05).

[3] OCFS. "Guidelines for 'At Risk' Placement of Certain Foster Children" (85-OCFS-INF-05).

Relatives who are providing foster care or serving as guardians through KinGAP are also likely candidates for concurrent planning. See **Chapter 3** of this guide for more information.

Foster parents should be encouraged to attend service plan reviews and participate in frank discussions of permanency progress and options. They should be able to say to the child, "You will either be going home or remaining here with us." At the same time, they have an obligation to encourage reunification with the birth parents. This is a challenging role. When foster parents are involved in a concurrent planning case, caseworkers must keep them informed on the progress of the case and assist them in dealing with the ups and downs of the permanency planning process.[4]

C. Service Plan Reviews

The collaboration between workers and families is reflected in the Family Assessment and Service Plan (FASP) that addresses problems/concerns, outcomes, family strengths to be utilized, and activities designed to create a safe, permanent living environment for children.

Both state and federal laws require Service Plan Reviews (SPRs) at regular intervals for children placed in foster care. The SPR is an opportunity to review the facts of the case as well as the progress, or lack of progress, toward achieving the child's permanency planning goal. During this process, the PPG may change due to the ongoing assessment of the family and child. The panel may determine that is appropriate to seek guardianship, a voluntary surrender of parental rights, or an involuntary termination of parental rights to free the child for adoption [SSL §409-e; 18 NYCRR 428.9; 430.12(c)(2)]. The SPR occurs every six months, corresponding to the completion of the Reassessment FASP.

A significant focus of the SPR is the status of, and progress toward, the child's permanency plan, including the appropriateness of the child's PPG. If concurrent planning is being used, progress on both the permanency plan associated with the child's PPG and the alternative permanency plan should be evaluated and adjustments made, as appropriate.

For details on creating and updating a FASP in CONNX, refer to the OCFS publication, *Family Assessment Service Plan (FASP) Guide*.

1. SPR panels

The SPR panel must develop a written statement of the conclusions and recommendations and must identify barriers to permanency and any other issues that must be addressed, including a recommendation as to whether the child needs to continue in placement or be discharged from care [18 NYCRR 428.9 and 430.12].

Efforts must be made to involve the following persons as participants in the development and review of the service plan:

- the child, if the child is at least 10 but less than 14 years of age, unless there is a documented reason related to the current necessity of placement why the child should not be involved;
- the child, if 14 years of age or older [18 NYCRR 428.3(i)];

[4] OCFS, "ASFA Safety and Permanency" (00-OCFS-INF-05).

- two individuals selected by the child, if the child is 14 years of age or older, who are not the child's foster parent, caseworker, case planner, or case manager [FCA §1089(d)(2)(vii)(G)];
- the parents, unless their rights to the child have been terminated; guardians; or, in the case of a child whose permanency planning goal is other than discharge to a parent, the person to whom the child will be discharged;
- a tribal representative and an expert witness if the child is a Native American and the child's tribe is known [18 NYCRR 431.18(a)(5)];
- the child's current foster parent, caretaker relative, or pre-adoptive parent;
- any person identified as the permanency resource for a child with APPLA as a PPG;
- the case manager, the case planner's supervisor, and the CPS monitor, if applicable;
- key providers of services to the child and family;
- members of the case planning team chosen by the child in foster care who is 14 years of age or older [18 NYCRR 428.3(i)];
- the attorney for the child; and
- any other person identified by the child's parents [18 NYCRR 428.9(b)(1); 430.12(c)(2)(i)(a)].

For detailed information on preparing for Service Plan Reviews, see the OCFS *Foster Care Practice Guide for Caseworkers and Supervisors*, Chapter 3.

2. SPR considerations and actions

If adoption has been determined to be the most appropriate PPG for the child, the SPR will include a thorough assessment of progress toward that goal. There should be a discussion of the steps that will be taken, and by whom, to progress from the current status to adoption finalization, rather than focusing only on the next step in the process.

If neither reunification nor adoption is an appropriate PPG and the child is in foster care, the option of guardianship, including discharge to a relative guardian with KinGAP support, should be considered.

If the child is not legally free for adoption, the steps being taken toward surrender or termination of parental rights are assessed. The discussion should include whether an adoptive resource has been identified and, if not, how efforts will be made to accomplish this while steps toward legally freeing the child are moving forward. Waiting for each step to be completed before planning for the next steps wastes valuable time in finalizing the child's permanency plan.

If a child has been freed for adoption and is in an adoptive placement, the SPR panel reviews the status of each adoption milestone and assesses progress made toward finalization. If the child is legally free for adoption but is not yet in an adoptive placement, the SPR includes a detailed discussion of the reasons for this and how obstacles will be overcome. Creative strategies for identifying potential adoptive resources for the child should be explored with a clear plan developed by the end of the SPR. These may include an evaluation or reevaluation of:

- The willingness of the foster parents to adopt.
- The availability of relatives (both related persons and fictive kin) especially if some time has passed since an original contact.

- The child's identification of potential adoptive resources.

The SPR should conclude with a clear plan of action for each participant. Another SPR may be scheduled in less than six months if that is a helpful strategy for moving the permanency plan forward for the child.

A written statement of the conclusions and recommendations must be developed by the SPR panel, identifying barriers to permanency and any other issues that must be addressed in the next service plan. The statement must document the names and, where appropriate, the titles of the panel members, the names of the invited participants who attended the Service Plan Review, and the date of the review. When the invited participants do not attend the review, the efforts made to involve them in the review must be documented [18 NYCRR 430.12(c)(2)(ii)].

For more information about Service Plan Reviews, see "Strengthening Service Plan Reviews: A Practice Paper" (04-OCFS-INF-09).

D. Permanency hearings

Federal and state law require that the Family Courts conduct permanency hearings to review the foster care status of a child and to consult with each child in an age-appropriate manner (See **Appendix 2.1**). State law requires that permanency hearings be held for children in foster care who have been:

- Placed as abused or neglected children (FCA §§1022, 1027 and 1052).
- Placed through a voluntary placement agreement (SSL §384-A).
- Surrendered for adoption (SSL §§383-c and 384).
- Surrendered for adoption (SSL §383-c) and have been determined by a court to be completely legally free for adoption, whether in foster care pursuant to FCA Article 3 (juvenile delinquent), Article 7 (PINS), Article 10 (abused/neglected), or by voluntary surrender.
- Placed by the court directly with a relative or other suitable person as an outcome of an Article 10 proceeding (FCA §§1017 and 1055).
- Placed after being determined by the court to be destitute (FCA §1095).

Unless a service plan review will occur within 60 days before each permanency hearing, the caseworker is required to conduct a case consultation with persons otherwise involved in a service plan review to gather information. Often this consultation will be a group meeting of all those whose input is necessary, but it may be an individual meeting [18 NYCRR 428.9(b)].

1. Permanency hearing dates

Each permanency hearing has a "date certain," or a specific day set by the court when a permanency hearing will be held. The date certain for the initial permanency hearing is the first removal hearing, the hearing to approve a voluntary placement agreement, or surrender of parental rights. The date for each subsequent permanency hearing is set at the completion of the previous permanency hearing [FCA §1089(a)].

When a child is freed for adoption at a court hearing, the date certain for the freed child's initial permanency hearing must be within 30 days of the freeing, unless it is held immediately after

the hearing at which the child was freed, provided notice was given to all parties. Subsequent permanency hearings are held every six months.

2. Permanency hearing reports

State law requires the LDSS to file a Permanency Hearing Report (PHR) with the court no later than 14 days before each permanency hearing [FCA §1089(c)]. The contents of the Permanency Hearing Report must include up-to-date, accurate information regarding a range of factors that affect the child's future, such as:

- The child's current permanency planning goal (PPG) and the anticipated date for meeting the goal.
- A description of intensive, ongoing efforts to return the child home or secure a placement for the child with a fit and willing relative, a legal guardian, or an adoptive parent. These efforts may utilize search technology, including social media, to find biological family members.
- The health, well-being, and status of the child since the last hearing. A description of the reasonable efforts to achieve the child's permanency goal that have been taken since the last permanency hearing.
- In the case of a child freed for adoption:
  - A description of services and assistance that will be provided to the child and the prospective adoptive parent to expedite the adoption of the child;
  - Information regarding the child's eligibility for adoption subsidy; and
- If the child is over age 14 and has voluntarily withheld their consent to an adoption, the facts, circumstances, and reasons for the child's decision.

For a full description of the material to be included in the Permanency Hearing Report and how to enter that information in CONNX, see the CONNECTIONS Tip Sheets "Permanency Hearing Report Process" and "PHR System-Populated Fields Required for Submission."

3. Reasonable efforts to achieve permanency

In the Permanency Hearing Report, the LDSS or VA must describe reasonable efforts that have been taken to achieve the child's permanency plan since the last permanency hearing.

If the child's return home is not likely, the report must document reasonable efforts made by the LDSS or VA to evaluate and plan for another permanency plan, including consideration of appropriate in-state and out-of-state placements, and any steps taken to further a permanent plan other than return to the child's parent.

When the permanency plan is adoption, guardianship, placement with a fit and willing relative, or another planned permanent living arrangement other than return to parent, the report must include reasonable efforts to make and finalize such an alternate permanent placement, including descriptions of any services that have been provided and consideration of appropriate in-state and out-of-state placements.

Where a child has been freed for adoption, the report must describe reasonable efforts that have been or will be taken to facilitate the adoption of the child.

Under some circumstances, the Family Court can make a finding that reasonable efforts are *not* required [FCA §1039-b(b)(1)-(6)]. See **Chapter 3**, **Appendix 2**.

4. Permanency hearing notices

The agency must mail the notice of the permanency hearing and a copy of the Permanency Hearing Report to the following parties no later than 14 days before the date certain for the permanency hearing [FCA §1089(b)(1)&(2)]:

- The child's parent, including any non-respondent parent, unless the parental rights of the parent have been terminated or surrendered.
- The parent(s) or other persons legally responsible for the child's care at the most recent address or addresses known to the LDSS or VA.
- The foster parent in whose home the child currently resides, if applicable.
- The agency supervising the care of the child on behalf of the LDSS.
- The attorney for the respondent parent.
- The attorney for the child.
- Any pre-adoptive parent.
- Any relative providing care for the child.

Only the notice of the permanency hearing must be sent by mail no later than 14 days before the hearing to the following:

- The child if age 10 or older [FCA §1089(b)(1-a)].
- A former foster parent, if any, in whose home the child previously had resided for a continuous period of 12 months in foster care, unless the court dispenses with such notice on the basis that it would not be in the child's best interests [FCA §1089(b)(2)].

5. Children's participation in permanency hearings

State law outlines specific requirements for agencies regarding the notification and participation of a child in foster care in their permanency hearings. The law also lists specific steps that the attorney for the child and the court must take prior to and during the permanency hearing [FCA §1090-a(b) to (d)].

During the permanency hearing, the court must include an age-appropriate consultation with the child. If the child is age 16 or older and the requested permanency plan for the child is placement in another planned permanent living arrangement with a permanency resource (APPLA), the court must ask the child about their desired permanency outcome [FCA §1089(d)].

For detailed information on legal requirements and exceptions for involving children in permanency hearings, please see the OCFS *Foster Care Practice Guide for Caseworkers and Supervisors*, Chapter 3, Section C.

6. Permanency hearing order

At the conclusion of each permanency hearing, the court must determine and issue its findings, and enter a permanency hearing order in writing. Findings are based on the proof introduced at the hearing, including age-appropriate consultation with the child and in accordance with the

best interests and safety of the child; this includes whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible [FCA §1089(d)].

The order can direct the LDSS to file a petition for termination of parental rights. Thus, the court's disposition in a permanency hearing can be the initiating force for an agency to seek termination of parental rights in order to free a child for adoption.

A copy of the court order, which includes the date certain for the next permanency hearing and the permanency hearing report as approved, adjusted, or modified by the court, must be given to the parent or other person legally responsible for the child [FCA §1089(e)].

In reviewing the foster care status of the child, the court must consider, among other things, whether the child should be returned home and, if not, whether the permanency goal should be approved or modified [FCA §1089(d)(2)(i)]. It also must determine whether reasonable efforts have been made to finalize the child's permanency plan [FCA §1089(d)].

Where a child has been freed for adoption but has not been placed for adoption, and the court had ordered the child be placed or directed the provision of services or assistance, the court may, in the best interests of the child, enter an order committing guardianship and custody of the child to another authorized agency [FCA §1089(d)(viii)(H)].

See **Appendix 2.2** for more information on Orders of Disposition.

Appendix 2.1: Legislation Related to Permanency Hearings

In 2005, New York State enacted significant legislation that focused on expediting permanency for children in foster care (Chapter 3 of the Laws of 2005). Among its many provisions is a requirement for more frequent permanency hearings for abused, neglected, or voluntarily placed children in foster care, completely freed children, destitute children as defined under FCA Article 10-C, former foster youth who returned to foster care pursuant to FCA §1091, and children directly placed in the legal custody of relatives under FCA Article 10.

The Chapter established time periods that were more frequent than those required by Title IV-E of the SSA. When the court places the child in foster care or approves the voluntary placement agreement, it must set a "date certain" for the initial permanency hearing. In addition, upon completion of the permanency hearing, the court must establish a "date certain" for the next permanency hearing. Chapter 3 of the Laws of 2005 created a new FCA Article 10-A pertaining to all such permanency hearings. FCA Article 10-A also includes youth who entered foster care under one of these categories who are between the ages of 18 and 21 and who consent to remain in foster care [FCA §§1086—1090].

Children who are in foster care as Persons in Need of Supervision (PINS) or juvenile delinquency (JDs) and not completely freed for adoption have different time frames for permanency hearings. These time frames are reflective of the Title IV-E standards. The Family Court does not have continuing jurisdiction over these children; petitions must be filed to schedule a hearing to consider the child's continuation in foster care.

Among the provisions of FCA Article 10-A relating to permanency hearings are the following requirements:

The initial permanency hearing for a child who is not completely freed for adoption, and for children in foster care as an abused, neglected, destitute or voluntarily placed child, must begin no later than eight months (six months plus 60 days from the date of removal) after the child's removal from home. The permanency hearing must be completed within 30 days of the scheduled date certain. Provided that, if a sibling or a half-sibling of the child has previously been removed from the home and has a permanency hearing date certain scheduled within the next eight months, the permanency hearing for each child subsequently removed from the home shall be shall be scheduled on the same date certain that has been set for the first child removed from the home, unless such sibling or half-sibling has been removed from the home pursuant to FCA Article 3 (JD) or FCA Article 7 (PINS) [FCA §1089(a)(2)].

An initial permanency hearing for a child that is completely freed for adoption must be held immediately following an approval of a surrender or TPR disposition or no later than 30 days after the court hearing completely freeing the child. It must be completed within 30 days after it begins [FCA §1089(a)(1)(i)].

Where, in accordance with FCA §1091, the Family Court approves a petition allowing a former foster youth who was discharged from foster care due to the youth's failure to consent to remain in foster care upon reaching the age of 18 to return to foster care, the Family Court must set a date certain for the initial permanency hearing which must be commenced no later than 30 days from the date the youth returned to foster care [FCA §1089(a)(1)(ii)]. Subsequent permanency hearings for both freed and non-freed children who remain in foster care must begin at least every six

months thereafter on a date certain set by the court at the completion of the previous permanency hearing. The hearing must be completed within 30 days after it begins [FCA §1089(a)(3)].

Appendix 2.2: Orders of Disposition

At the end of the permanency hearing, the court will enter one of the following orders of disposition:

- that the child be discharged and returned to the parent or other person legally responsible, if appropriate; or
- that the placement be extended and the child not be returned to the parent or other person legally responsible.

When the court orders an extension of placement, the findings and order must include, among other things:

- whether the child's permanency goal should be approved or amended and the anticipated date for achieving the goal;
- where the child does not remain in foster care, placement of the child in the custody of a fit and willing relative or other suitable person or continuation of the current placement until the completion of the next permanency hearing;
- whether reasonable efforts have been made to achieve the child's permanency plan;
- what efforts should be made to effectuate another permanency plan if return of the child home is not likely;
- when return home of the child is not likely, what efforts should be made to assess or plan for another permanent plan, including consideration of appropriate in-state and out-of-state placements;
- the steps that must be taken by the local LDSS or VA to implement the educational and vocational program components of the permanency hearing report and any modifications that should be made to the plan;
- a description of the visitation plan or plans;
- when the child is not freed for adoption, a direction that the child's parent or parents, including any non-respondent parent or other person legally responsible for the child's care, must be notified of the planning conference or conferences to be held and of their right to attend and their right to have counsel or another representative with them;
- when the child is not freed for adoption, a direction that the parent or other person legally responsible for the child's care keep the LDSS or VA apprised of their current whereabouts and a current mailing address;
- when the child is not freed for adoption, a notice that if the child remains in foster care for 15 of the most recent 22 months, the LDSS or VA may be required by law to file a petition to terminate parental rights;
- when a child has been freed for adoption and is over age 14 and has voluntarily withheld their consent to an adoption, the facts, and circumstances with regard to the child's decision to withhold consent and the reasons;
- when a child has been placed outside of this state, whether the out-of-state placement continues to be appropriate, necessary, and in the best interests of the child;

- when a child has, or will, before the next permanency hearing, reach the age of 14, the services and assistance necessary to assist the child in learning independent living skills to make the transition from foster care to adulthood;
- that the permanency plan for a child in foster care who is 14 years of age or older was developed in consultation with the child and, at the option of the child, with two members of the child's permanency planning team selected by the child; and
- the date certain for the next permanency hearing, and other findings and orders the court deems appropriate [FCA §1089(d)].

No placement may continue beyond the child's 18th birthday without the child's consent and in no event past the child's 21st birthday.

When a child has been freed for adoption, the order:

- may direct that the child be placed for adoption in the foster family home where the child resides, or has resided, or with any other suitable person or persons;
- may direct the LDSS to provide services or assistance to the child and the prospective adoptive parent (these must be services that are available and included in the LDSS's Consolidated Annual Services Program Plan);
- must include, when appropriate, the evaluation of eligibility for adoption subsidy but will not require the provision of such subsidy;
- may recommend that OCFS investigate the facts and circumstances concerning the discharge of responsibilities for the care and welfare of such child by the LDSS pursuant to SSL §395; and
- may recommend that the attorney for the child, the LDSS or VA file a petition to restore the parental rights of a child who has been freed for adoption [FCA §1089(d)(2)(viii)(B)(IV); FCA §635].

Chapter 3

Chapter 3
Setting the Goal of Adoption

When a child is removed from their home and placed in foster care, the LDSS must demonstrate to the court that reasonable efforts were made to prevent or eliminate the need for removal or that no efforts were reasonable, given the circumstances. The court may determine that reasonable efforts were not required. Once a child is placed, if the PPG is reunification, the LDSS must make reasonable efforts to enable the child to return home safely. When the child cannot return home safely, another PPG must be established and the LDSS must then make reasonable efforts to finalize that goal.

For the majority of children and youth who are unable to return home, adoption is the preferred PPG because it offers a lifetime commitment and the sense of belonging and stability that a child or youth needs to flourish. Having stable attachments is a crucial building block in a child's development.[1] When the agency has determined that the child's parent(s) are unable or unwilling to provide a safe, permanent home for the child in a timely manner consistent with the needs of the child, consideration should be given to the appropriateness of adoption as the child's permanency goal.

A. Steps and time frames

OCFS regulations have defined steps and time frames related to establishing a PPG of adoption [18 NYCRR 430.12(e)].

For children who have not been legally freed for adoption, the LDSS must initiate an action in court to free the child within 30 days of establishing the PPG of adoption. The child must be freed within 12 months after establishing the PPG of adoption. The LDSS will not be held to this standard if the delay was solely caused by the court or if the court refused to terminate parental rights.

For a legally free child not living in an adoptive home, placement in an adoptive home must occur within six months after they were freed for adoption. There are exceptions to this requirement for children who have been placed in facilities operated or supervised by the NYS Office of Mental Health (OMH) or the NYS Office for People With Developmental Disabilities (OPWDD) [18 NYCRR 430.12(e)(2)].

Practice Tip

Some judges will only allow the termination of parental rights when prospective adoptive parent(s) have been identified. One reason given for this practice is the desire to avoid legally freeing a child if they do not have a new, permanent family. Children with this status are sometimes referred to as "legal orphans" because legally they have no parents. Caseworkers should seek guidance from supervisors and agency attorneys to become familiar with preferred procedures in their counties.

The decisions to change a child's permanency planning goal to adoption and seek a surrender or file a petition for termination of parental rights are among the most critical decisions made in child welfare. They will have a lifelong impact on the child and their family. These decisions must always be made carefully and deliberately, in consultation with supervisors and an agency attorney, and be based on what is in the best interests of the child.

[1] Annie E. Casey Foundation (2023). "What is Permanence?"

B. The child's perspective on adoption

All children in foster care have been exposed to some form of trauma. Being placed in foster care is traumatic in itself, as it often means the loss of family, friends, schoolmates, teachers, and everything that is familiar. The lasting effects of more than one form of trauma or repeated trauma should be acknowledged and understood by caseworkers and by families considering foster care and adoption.[2]

Most of the children who become available for adoption have a history of maltreatment or abuse. The caseworker must provide intensive casework services to help children work out their feelings of grief and loss over their past life experiences while helping them to fully understand the options available to them in the future. It is imperative that caseworkers understand the impact of trauma on children in the child welfare system and be prepared to help them or find resources for them. This difficult work can make caseworkers uncomfortable if they have unresolved grief and loss issues of their own. In these cases, caseworkers should seek guidance and support from their supervisors so they can effectively provide adoption services.

Some children are eager to explore the adoption option and, despite their past experiences, are ready to commit to a new family. Some youth resist forming new attachments because it is difficult for them to trust adults. An older child may be reluctant to transfer allegiance from their parents to an adoptive family. For some children and youth, finding adoptive families is exceptionally challenging because of the impact of trauma on their current behavior.

1. Working with children and youth

While adoption may be the most appropriate PPG for the child, it is important to recognize that children develop differently, have different experiences and reactions to their experiences, and require different degrees of help in dealing with their feelings about adoption.

Caseworkers working with children and youth can use approaches such as engaging the child in the process, listening to the child's words, speaking the truth, validating the child and the child's life story, creating a safe place for the child to do their grief and preparation work, and acknowledging that pain is part of the process.[3]

Some of the methods of communicating with children of all ages about adoption include:[4]

Building rapport: Put the child at ease in order to communicate effectively. Demonstrating respect, empathy, honesty, and understanding as methods for building rapport.

Keeping the child/youth informed: Be honest with the child by informing them of what you do or do not know about their present situation. Children need to know the truth and be told in developmentally appropriate terms, regardless of how difficult it may be.

Discussing events in age-appropriate terms: A child's development may not match their chronological age. Assess where the child is developmentally and make sure you share information with the child in a way that is appropriate for their developmental age.

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[2] AdoptUSKids. "Understanding Trauma." Retrieved on June 19, 2023 from https://www.adoptuskids.org/meet-the-children/children-in-foster-care/about-the-children/understanding-trauma.

[3] National Resource Center for Adoption. (2012). *Adoption Competency Curriculum*, "Child/Youth Assessment and Preparation," Spaulding for Children.

[4] Ibid.

Acknowledging and normalizing the child's feelings: Encourage children to express their feelings and concerns. Let the child know they are not alone in their present situation and that many other children share the same experiences. Children want to be taken seriously when they share their feelings and thoughts.

2. When a child resists adoption

In most cases, a child over the age of 14 must consent to adoption [DRL §111(1)(a)]. While many youth welcome becoming part of a new family through adoption, it is not uncommon for an older youth to be ambivalent, or even negative, about adoption. Adolescence is a developmental stage during which people form their own identity, work toward gaining independence, conform with peers, and reject parental values.

For youth in foster care, these normal developmental challenges are compounded by histories of maltreatment, abuse, abandonment, and overall instability in their lives. Some suffer from attachment disorders and have difficulty forming healthy relationships and trust because of their life experiences. It is not surprising that the idea of bonding with a new family may be met with a lukewarm reaction, at best.

Although a youth initially may have a negative response to adoption, that discussion is just the beginning of a series of developmentally appropriate discussions about the youth's need to be connected to caring adults throughout their life. Ongoing casework services should be provided to youth who cannot return home and express ambivalent or negative feelings about adoption. They also may be able to provide information about potential permanency resources, such as relatives and adults who have been important in their lives.

3. When a child refuses to be adopted

If, after multiple discussions about adoption, the youth still does not wish to be adopted, the foster parent may be able to become a legal guardian or legal custodian of the child.

The Family Court has the authority to appoint a permanent guardian for a child as an alternative to adoption when the permanency goals of reunification or adoption have been ruled out. This legal status can continue until the child's 18th birthday or their 21st birthday, with their consent. The permanent guardian has all the necessary rights and responsibilities to care for the child, including those relating to the child's protection, education, care and control, health, and education, and can consent to the child's adoption [FCA §661(b)].

Permanent guardianship may be an appropriate permanency plan for the child when, for example, a kinship foster parent is reluctant to be part of a TPR proceeding. The benefits of keeping a child with a kinship guardian may outweigh the permanency of a legal adoption by non-relatives.

Permanent guardianship might also be an option when relatives do not want to become foster parents but do want to provide permanency for the child. Again, the standard for making such a decision is always in the best interests of the child. Caseworkers must explain to the family that, as guardians, they may receive limited or no supports and resources from the state. The definition of a prospective relative guardian was expanded in 2017 to include an adult with a positive relationship with the child, such as a stepparent, godparent, neighbor, or family friend [SSL §458-a(3)(e); 18 NYCRR 436.1(d)(3)].

If the guardian is kin to the child, they may be entitled to participate in the NYS Kinship Guardianship Assistance Program (KinGAP). KinGAP provides a monthly payment and other

benefits to qualified relatives who are legal guardians of children who have been discharged from foster care. The relative guardian must have been the child's fully certified or fully approved foster parent for at least six months.

KinGAP participants also may name a prospective successor guardian in either the original KinGAP agreement or in an amendment to the original agreement. A successor guardian, under certain conditions, is able to receive KinGAP payments upon the death or incapacity of the original relative guardian (SSL §§458-a to 458-f; 18 NYCRR Part 436).

For more information on KinGAP, see:

"New Statutes Affecting Kinship Care: Chapters 404 and 519 of Laws of 2008" (09-OCFS-ADM-05)

"Kinship Guardianship Assistance Program (KinGAP)" (11-OCFS-ADM-03)

"Continuation of the Kinship Guardianship Assistance Program (KinGAP) to a Successor Guardian" (16-OCFS-ADM-10)

Know Your Permanency Options: The Kinship Guardianship Assistance Program (KinGAP), OCFS Publication 5108

"Expansion of the Kinship Guardianship Assistance Program (KinGAP)" (18-OCFS-ADM-03)

C. Reasonable efforts toward a permanency plan

The term *diligent efforts*, or *diligence of efforts*, is sometimes used synonymously with reasonable efforts, although there are differences between the two terms. *Diligence of efforts* applies to children in foster care and their families, not to the provision of preventive services. *Diligent efforts* are defined in state law as reasonable attempts by an authorized agency to assist, develop, and encourage a meaningful relationship between a parent and child [SSL§384-b(7)(e)].

Federal and state law, regulations, and policy have long required that LDSSs and VAs make *reasonable efforts* to preserve and reunify families in the child welfare system. The child's safety is the paramount concern in determining the extent to which reasonable efforts should be made [FCA §1052].

Reasonable efforts must be made at two distinct points in time in nearly all child welfare cases:

1. Reasonable efforts must be made to prevent the removal of a child from their home, unless the court makes a finding that reasonable efforts are not required. The court can make such a finding, based on certain grounds specified in the law (see **Appendix 1**). It is also possible for the court to make a finding that no efforts were reasonable or appropriate given the circumstances of the case.
2. When a child is placed in foster care and the PPG is reunification, reasonable efforts must be made toward that goal. When the permanency plan is adoption, guardianship, or another permanent living arrangement, reasonable efforts must be made to finalize the child's permanency plan. Court orders must specify that for each child in placement, reasonable efforts must be made to achieve whatever PPG has been chosen.

OCFS regulations require the LDSS to exercise reasonable efforts to achieve permanent discharge of a child from foster care. The caseworker also must document reasonable efforts to finalize the child's permanency plan [18 NYCRR 428.5]. The initial Family Assessment and Service Plan (FASP) must address reasonable efforts to prevent or eliminate the need for placement in foster care [18 NYCRR 428.6]. The subsequent service plan reviews must document reasonable efforts that have been made toward achieving the child's PPG [18 NYCRR 428.9].

For children placed into foster care as abused, neglected, destitute or voluntarily placed, the initial determination of reasonable efforts must be made within six months of the child entering foster care, which is defined as the either the date of the fact finding of abuse/maltreatment or 60 days after removal of the child from their home, whichever is earlier [FCA §1089(a)(2)].

Once a child has been placed in foster care, there must be a periodic, case-specific finding by the court, documented in the court order, that reasonable efforts were made to enable the child to return home safely or to finalize the child's permanency plan. At permanency hearings, the Family Court judge will determine whether reasonable efforts have been made by the LDSS to enable the child to return home safely or to finalize the child's permanency plan if the discharge goal is other than return to parent.

The LDSS bears the burden of proving that these efforts have been made [FCA §1089(d)]. The caseworker's testimony, input from family members and service providers, and timely and thorough documentation make it possible for the judge to make a determination of reasonable efforts. This is one of several reasons why it is critical that the caseworker accurately document all information relevant to the case in a timely manner. This includes, but is not limited to, progress notes, periodic FASPs or Child Assessment and Service Plans for children freed for adoption, plan amendments for significant status changes in the case, and permanency hearing reports.

A failure to provide evidence that the requirements have been met is considered to be a failure to make diligent efforts to achieve the permanent discharge of the child [18 NYCRR 430.12(b)]. Failure to secure a timely court determination of reasonable efforts will also impact availability of federal reimbursement for an otherwise Title IV-E eligible foster child. The OCFS Eligibility Manual has additional information on Title IV-E eligibility.

All of the documentation required by the regulatory standards set forth above must be recorded in CONNECTIONS (CONNX). See **Appendix 2** for detailed information on standards and documentation required related to preventive services and foster care. **The following sections apply to standards for cases when a child's PPG is adoption or is likely to be changed to adoption.**

1. Lack of progress in discharge to parent

There are certain minimum requirements in diligent efforts for a child whose permanency plan is discharge to parents, including visits between the child and the family [18 NYCRR 430.12(d)]. If there is a lack of progress toward the PPG, the following sections are relevant in considering whether to file a petition to terminate parental rights:

Abandonment

If the parent fails to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency, so that the child is considered abandoned (SSL §384-b), and no mitigating circumstances exist, then an action to

terminate parental rights must be initiated within 60 days of the completion of the FASP documenting these circumstances.

Careful documentation of these circumstances in the FASP is required as evidence of the parent's intent to forgo parental rights and obligations. The progress notes must indicate the date that the petition to terminate parental rights is filed.

Permanent neglect

Permanent neglect involves the parent's failure to maintain contact with or plan for the future of the child for a period of one year. The parent must have been physically and financially able to do so. If there are no mitigating circumstances, and in spite of the agency's diligent efforts to encourage and strengthen the parental relationship (when such efforts will not be detrimental to the child), then an action to terminate parental rights must be initiated within 60 days of the completion of the FASP that documents these circumstances.

The FASP must document the lack of contact or the parents' failure to plan for the child, as well as the agency's attempts to encourage and strengthen the parental relationship or the reasons why such efforts would have been detrimental to the child and were therefore not made. The progress notes must indicate the date that the petition to terminate parental rights was filed.

Time in foster care

Every child with a PPG of return to parents or relatives who has been in care for 15 of the most recent 22 months must either be discharged from care or the LDSS must file a petition to terminate parental rights (18 NYCRR 431.9). This is required unless the FASP indicates that:

- the child is in care in the home of a relative; or
- services have not been provided to the family of the child that are necessary for the safe return of the child to their family; or
- there is a compelling reason why it would not be in the child's best interest to initiate a termination proceeding.

2. Child with a PPG of discharge to adoption

OCFS regulations establish the time frames within which milestones associated with finalizing an adoption for children with a PPG of adoption must be achieved. These milestones include legally freeing the child, placement in an adoptive home, and legal finalization of the adoption.

Although the practice in most counties is to change the child's PPG to adoption before legally freeing the child, in some counties the practice is to change the child's PPG to adoption at the time the child is legally free. In addition, some judges will not legally free a child unless there is an identified prospective adoptive parent [18 NYCRR 430.12(e)].

Child has not been freed for adoption

For a child who is not legally free for adoption, an action to legally free the child must be initiated within 30 days of the establishment of the PPG of adoption. The child must be freed within 12 months after the establishment of the PPG of adoption.

Documentation: The FASP must document when the action to legally free the child is initiated. Copies of the petition and any documents submitted in support of the petition or descriptions of the content of the documents must be kept in the case record. Documentation also must include the date when the child is legally freed.

If the case does not meet the standard for freeing the child within 12 months, the LDSS will be out of compliance with the standard unless, at the time of the first PPR, a petition to terminate parental rights was filed within 120 days of the date the PPG of adoption was chosen and the delay was caused solely by the court and not by the LDSS or VA caring for the child, or that the court refuses to terminate parental rights.

Child is legally free but is not in an adoptive home

Most children must be placed in an adoptive home within six months of being freed for adoption. There are exceptions for children who are legally freed for adoption but have been placed in facilities operated or supervised by the NYS Office of Mental Health (OMH) or the NYS Office for People With Developmental Disabilities (OPWDD). The LDSS is considered to be in compliance with this standard during the time the child remains in such a facility. If the child is discharged from the facility to a foster care placement, the time in the facility during which the child was legally free is considered to be part of the total time the child is legally free but not in an adoptive home.

Native American children who are legally free for adoption must be placed in adoptive homes in accordance with the specific order of preference specified by law and regulations [18 NYCRR 431.18(g)]. The placement of Native American children for adoption, including the required order of preference for placement, is discussed in **Chapter 12**.

Documentation: The FASP progress notes must indicate either when the child was placed in an adoptive home or that the child was not placed in an adoptive home within the required time frame.

If a hard-to-place child was not placed in an adoptive home within six months, the progress notes must indicate that an inquiry was made to the Adoptive Family Registry within three months of the date the child became legally free and the results of the inquiry. See **Chapter 9** for additional requirements for the placement of handicapped and hard-to-place children into adoptive homes.

Child has been placed in an adoptive home, but adoption has not been finalized

Adoptions must be finalized within 12 months of placement in an adoptive home.

When an American Indian/Alaskan Native child is placed in an adoptive home, the case record must document efforts made by the LDSS to comply with the order of placement preference. This documentation must be made available to the child's tribe and the Secretary of Interior upon request.

Documentation: The progress notes must indicate the date of finalization. If the child’s adoption is not finalized within 12 months, the LDSS is considered to be out of compliance unless there is documentation that the delay was caused solely by the court or by the adoptive parents.

See **Appendix 3** for details on documentation of reasonable efforts toward finalizing an adoption.

Appendix 3.1: When Reasonable Efforts Are Not Required

Although reasonable efforts to preserve and reunify families are required for almost every child welfare case, under some specific case circumstances, the LDSS may seek an order from the Family Court to obtain a finding that reasonable efforts are not required in a particular case. Reasonable efforts are not required when the court determines that:

1. The parent has subjected the child to aggravated circumstances [FCA §1012(j)]. These include:
    - Severe abuse, as defined in SSL §384-b(8)(a) and (b), repeated abuse, or post-placement abuse.
    - Failure to plan for or to engage in services necessary to eliminate the risk of abuse or neglect that caused the child's removal from the home, over a period of at least six months from the date of removal, and has failed to secure services on their own and, after being informed by the court that such admission could eliminate the requirement that the LDSS provide reunification services, the parent has stated in court under oath that the parent intends to continue to refuse such necessary services and is unwilling to secure such services.
    - Abandonment of a newborn (30 days old or younger) in a safe place, as defined in the New York State Abandoned Infant Protection Act.
2. The parent of the child has one or more prior criminal convictions. These include:
    - Murder or voluntary manslaughter of another one of the parent's children.
    - Attempting, soliciting, conspiring, or facilitating murder or manslaughter, and the intended victim was the child or another child of the parent.
    - Assault (aggravated, first-, or second-degree) upon the child or another child of the parent when the child was less than 11 years old and sustained serious physical injury.
3. The parent of such child has been convicted in another jurisdiction of an offense that includes all of the elements of any of the crimes noted above and the victim of such offense was the child or another child of the parent.
4. There has been a prior involuntary termination of parental rights to a sibling of the child, unless the court determines that providing reasonable efforts would be in the best interests of the child [FCA §1039-b].

If the court rules that no reasonable efforts are required due to one of the circumstances above, the court must hold a permanency hearing within 30 days of the finding and determine the appropriateness of the permanency plan for the child. The LDSS or VA must take steps to finalize the permanency plan, including filing a termination petition, in accordance with SSL §384-b.

Appendix 3.2: Documenting Diligent / Reasonable Efforts

The term *diligent efforts*, or *diligence of efforts*, is sometimes used synonymously with reasonable efforts, although there are differences between the two terms. *Diligence of efforts* applies to children in foster care and their families; not to preventive services. *Diligent efforts* are defined in state law as reasonable attempts by an authorized agency to assist, develop, and encourage a meaningful relationship between a parent and child [SSL§384-b(7)(e)].

Where the removal of a child from their home is contemplated or has already taken place, federal Title IV-E standards require a case-specific court determination within 60 days of removal whether reasonable efforts were made to prevent removal or were not required [45 CFR 1356.21(b)(1)(i)]. If the determination concerning reasonable efforts is not made as described above, the child is not eligible for Title IV-E foster care maintenance payments for the duration of the child's stay in foster care [45 CFR 1356.21(b)(1)(ii)].

Diligence of effort to reunify families when a child has been placed in foster care must occur for a local district to be able to demonstrate that the reasonable efforts requirements have been satisfied. For the purpose of a termination of parental rights proceeding on the ground of permanent neglect, diligent efforts in a case include, but are not limited to:

- consulting and cooperating with the parent(s) in developing a plan for appropriate services to the child and family;
- making suitable arrangements for the parent(s) to visit the child;
- providing services and other assistance to the parent(s); and
- informing the parent(s) at appropriate intervals of the child's progress, development, and health.

Diligence of Efforts Checklist:

Being able to confirm completion of each of the items on the checklist below should help caseworkers determine if they are making diligent efforts:

- ❑ I have consulted and cooperated with the parent(s) in developing a plan for appropriate services to the child and family.
- ❑ I have made suitable arrangements for the parent(s) to visit the child.
- ❑ I have provided services and other assistance to the parent(s).
- ❑ I have informed the parent(s) at the appropriate intervals of the child's progress, development, and health.
- ❑ Given the specific case circumstances, do any of the exceptions to diligence of efforts standards apply? *(See **Appendix 1**.)*

OCFS regulations establish standards to be used by agencies in determining the appropriateness and diligence of efforts at each stage of a child welfare case. These standards require that family relationships be sustained, whenever possible; that each child's interests for sound and permanent relationships are protected; and that appropriate services are provided to every client (18 NYCRR 430.8). To achieve these outcomes, regulations require that:

- Every family with a child at clear risk of foster care placement receives preventive services to improve family relationships and prevent placement.
- Only children who must be removed from their families to be provided proper care, nurturance, or treatment are placed in foster care.
- Children in foster care are placed in the least restrictive, most home-like setting possible.
- Every possible effort is undertaken to prepare each child and the child's family for the discharge of the child.

Appendix 3.3: Reasonable Efforts to Achieve Adoption

When the child's PPG is adoption, the agency must show that reasonable efforts have been made toward a finalized adoption.

For a child who has been freed for adoption but not yet placed in a prospective adoptive home, the agency must provide documentation of its recruitment efforts to find an adoptive family. This must include consideration of out-of-state resources.

For a child that has been freed for adoption and placed in a pre-adoptive home, the agency must document the progress toward finalization in these areas:

- Signed adoptive placement agreement.
- Adoptive parents have retained an attorney.
- Adoptive parents have applied for adoption subsidy and the status of the application.
- Criminal history check had been submitted and completed.
- Child abuse and maltreatment history has been submitted and completed.
- Application to the Interstate Compact on Placement of Children has been submitted and completed, if applicable.
- Completed home study.
- Certified copy of TPR order, surrender, consent, or death certificate.
- Efforts made to locate putative father.
- Child's birth certificate, medical report, and consent if child is age 14 or older.
- Adoptive parents' financial disclosure affidavit, medical report, and evidence of marital status.
- Attorney's documents, including the submission and scheduling of petition for adoption.

Source: New York State Unified Court System Form PH-6 (Permanency Hearing Order Regarding Child Freed for Adoption), September 2021.

Chapter 4

Chapter 4
Freeing a Child for Adoption Through a Surrender

A child's PPG is usually changed to adoption after reasonable efforts to safely reunite them with their family have been unsuccessful or the Family Court has determined that no reasonable efforts are required. The first step toward adoption is to legally free the child.

One avenue to consider is a voluntary surrender of rights by the child's parents. Before initiating proceedings to terminate parental rights, the LDSS or VA should discuss with the parents the possibility of voluntary surrender, if appropriate and consistent with the health and safety of the child (SSL 383-c).

A. *What is a surrender?*

When a parent executes a surrender, they voluntarily give up guardianship and custody so a child can be freed for adoption. A non-adversarial process, it is generally the simplest method of freeing a child for adoption. A signed and notarized surrender document transfers guardianship and custody of the child to an authorized agency. The parent who signs the surrender is no longer required to consent to the child's adoption and does not have the power to veto the child's adoption.

When a child is in foster care, guardianship and custody are transferred to the commissioner of the local social services district (LDSS), which, is then empowered to consent to an adoption. The LDSS may provide physical care of the child and adoption services directly or may transfer physical care of the child to a voluntary authorized agency (VA) that is authorized to provide adoption services.

When responsibility for the care of the child is transferred from the LDSS to a VA, legal guardianship and custody of the child remains with the LDSS commissioner. The transfer of physical care of the child from the LDSS to a VA is more common in some counties than in others.

If a parent or guardian of a child in foster care wishes to surrender the child, the LDSS must determine, after appropriate consultation, that the surrender will be in the best interests of the child, regardless of the likelihood that the child will be placed in an adoptive home [SSL §398(6)(f); 18 NYCRR 421.6(a)]. If the official determines that the surrender is in the best interests of the child, the agency must arrange for either a judicial or extra-judicial surrender of the guardianship and custody of the child to the agency [18 NYCRR 421.6(a)]. If a voluntary surrender is not possible or appropriate, and adoption is the appropriate permanency goal, termination of parental rights (TPR) should be sought through the court.

A child who is not in foster care can be surrendered and admitted into foster care through a voluntary surrender agreement [SSL §384]. This is not the same as a voluntary foster care placement agreement when a parent or guardian transfers care and custody to the commissioner of an LDSS (SSL §384-a).

VAs may directly accept the surrender of a child at their discretion. When this occurs, the child is not considered to be in publicly funded foster care because the LDSS does not have legal custody or guardianship of the child [18 NYCRR 421.6(g)]. The child is in the guardianship and care of the VA and that agency is responsible for providing care and permanency planning for the child. The LDSS is not obligated to provide support, care, or services, although it may agree to do so for otherwise eligible children.

B. *Types of surrenders*

The caseworker, in close consultation with the supervisor and the agency attorney, must first decide which type of surrender should be used for a particular case.

- **SSL §383-c** surrenders apply to children who are in foster care at the time of the surrender.
- **SSL §384** surrenders apply to children who are *not* in foster care at the time of the surrender.

The caseworker, again in consultation with the supervisor and the agency attorney, then must decide whether to seek a judicial or extra-judicial surrender. Each of these types of surrenders is described briefly, and in more detail later in this chapter. It is important for caseworkers to consult with their supervisor and the agency attorney about how surrenders are executed and handled by their agency and courts and, in particular, the circumstances under which extra-judicial surrenders are used.

- A **judicial surrender** is executed before a judge of the Family Court or Surrogate's Court.
- An **extra-judicial surrender** is signed by the parent, in the presence of at least two witnesses, and before a notary public or other officer authorized to "take proof of deeds." Not before a judge.

The surrender of a child in foster care (SSL §383-c) may be either a judicial or extra-judicial surrender. Please see **Appendix 4.1** for detailed information.

Practice Tip: Required surrender forms for a child in foster care

The OCFS form OCFS-5315 is to be used for the judicial surrender of a child in foster care (SSL§383-c). This document is also called a surrender instrument. The child's parents must sign the form and choose whether the surrender is conditional or non-conditional (see **Section C** of this chapter). The form is also available in Spanish (OCFS-4315S).

The OCFS form OCFS-4316 is to be used for the extra-judicial surrender of a child in foster care that must be signed by the child's parents and two witnesses before a notary public or other officer authorized to "take proof of deeds." The form also is available in Spanish (OCFS-4316S).

There are no required forms for surrender of a child who is not in foster care.

C. *General requirements for surrenders*

1. Who may sign a surrender?

NYS Social Services law authorizes the following people to sign the surrender instrument:

- Both parents, if living, or the surviving parent if one parent is dead.
- The remaining parent, if one of the parents has abandoned the child for the immediately preceding period of six months. For a child in foster care, abandonment must be in

accordance with the abandonment provisions that apply to termination of parental rights (TPR) proceedings (SSL §384-b). See **Chapter 5**.

- The mother, if the child was born out of wedlock, and by the father, if the father's consent would be required for the child's adoption by state law (DRL §111) and applicable case law. See **Chapter 7** for more information on the rights of out-of-wedlock fathers.
- The child's guardian, with the approval of the court or official who appointed the guardian, if both parents are deceased or if the mother of a child born out of wedlock is deceased. In addition, the putative father's rights regarding consent and notice to the adoption must be considered [SSL §§383-c(1) and 384(1)].
- The child's permanent guardian, as authorized in FCA §661.

2. When only one parent is willing to sign a surrender

If both parents are known but only one is willing to execute a surrender for a child with the PPG of adoption, the surrender should be executed with that parent. In the case of a parent who is unwilling to surrender, determinations must be made as to whether:

- that parent's agreement to a surrender is needed; or
- there is a possibility that the parent will sign a surrender in the near future; or
- there are grounds on which that parent's rights can and should be terminated.

It is not necessary to obtain the signature of a parent when the agency can prove that the parent has abandoned the child for the preceding six months. The caseworker should consider the surrender to be incomplete, however, until attempts have been made to obtain a surrender from the absent parent, provided that such attempts would not unduly delay the adoption process. If successful, these efforts would avoid the need to initiate court proceedings to terminate the rights of an abandoning parent and also prevent future claims on the child by such parent.

3. Voluntary and informed consent

It is absolutely essential that the parent sign the surrender instrument voluntarily, with a complete understanding of the consequences of this action. The parent *cannot* be:

- forced to sign the surrender instrument;
- punished if they don't sign the surrender; or
- be penalized for refusing to sign the surrender.

No parent should sign the surrender instrument unless the agency has completely informed them of the personal, emotional, and legal effects of the document. In an extra-judicial surrender, a parent's lack of understanding of the legal consequences of signing the surrender could be the basis for a future challenge to the validity of the surrender. Some agencies are reluctant to use extra-judicial surrenders for this reason.

In discussions with the parents, the caseworker should make sure that the parent's consent is fully informed. With effective counseling, parents may realize that surrendering their rights is in the best interests of both themselves and their child. On the other hand, parents may decide that they are not willing to sign the surrender. That decision must be respected. The agency must then consider other ways to achieve the child's PPG, such as filing a TPR petition or

kinship guardianship. The agency must maintain timely and complete records of the counseling it has provided to the parent.

4. Language barriers

In some cases, the caseworker may have reason to believe that a language barrier is preventing parents from fully understanding the surrender instrument or their rights as surrendering parents. These issues must be fully explained to parents or guardians in their principal language and documented. Spanish-language surrender forms should be used when the child or the parent is in foster care and their principal language is Spanish. In an extra-judicial §383-c surrender, it is the responsibility of the agency employee who is one of the two required witnesses to make certain that the surrender instrument is read in full to the parents or guardians in their principal language and that they are given the opportunity to ask questions and to have those questions answered. The agency accepting an SSL §384 surrender has a similar responsibility. In all situations, the agency must ensure that the parents or guardians fully understand the purpose and consequences of signing the surrender.

5. Religious preferences

Before accepting a surrender, the agency must ascertain that the parent or guardian understand the meaning of the religious faith requirements set forth in statute [SSL §373]. The caseworker must inform parents that the child will be placed for adoption with parents of the same religious faith as that of the child when practicable and consistent with the child's best interests. Agencies must comply with the parents' wishes if they are consistent with the best interests of the child and if feasible [SSL §373, 18 NYCRR 421.6(h)]. See **Chapter 7, Section A** for more information.

6. Adoption Information Registry

The NYS Department of Health (DOH) maintains the Adoption Information Registry. A person aged 18 and older who was born and adopted in NYS, the birth parents, and the adult biological siblings of an adult adoptee can register to receive non-identifying information or, with corresponding registration and mutual consents from the parties, exchange identifying information (PHL §4138-c).

Birth parents are allowed to register at any time and may update their medical information as needed. Parents must complete and submit a Birth Parent Registration Form (DOH-4455) when they sign the surrender. See **Chapter 7, Section C** for detailed information.

7. Right to long-form birth certificate

An adopted person 18 years of age or older who was born or adopted in NYS has the right to obtain a certified copy of their original long-form birth certificate [PHL §4138-e]. Other persons who are legally entitled to obtain the certificate include the adoptee's lawful representative or, if the adoptee is deceased, the adoptee's direct line descendant or their lawful representative.

When designated officials are not able to provide a certified copy of the original long-form birth certificate, the adult adoptee is legally entitled to information that would otherwise appear on the adult adoptee's original long-form birth certificate from any authorized agency. LDSSs and VAs are required to inform birth parents, applicants for approval as adoptive parents, approved adoptive parents, and adult adoptees of these rights [18 NYCRR 421.4(g)].

Authorized agencies providing adoption services are required to inform birth parents that an adult adoptee 18 years of age or older has the right to receive a certified copy of their original

long-form birth certificate, including any changes attached to such certificate. The authorized agency must also inform birth parents that, if it is impossible for the designated official to provide a copy of the original long-form birth certificate, the adult adoptee or their descendant may receive the identifying information that would otherwise appear on the original long-form birth certificate from an authorized agency.

For more information, see "Adoptee's Right to Original Birth Certificate" (21-OCFS-ADM-11).

D. *Conditional surrenders*

The surrender instrument may include terms and conditions that are mutually agreed upon by the parent and the agency. In determining whether to accept a particular term or condition, the agency must decide that it is in the best interests of the child. These conditional surrenders generally involve continued contact between the parent and child, adoption by a specific individual, and other conditions related to the child's adoption. Terms and conditions can be added to either judicial or extra-judicial surrenders.

1. Is a conditional surrender in the child's best interests?

When deciding whether a conditional surrender is in a child's best interests, the caseworker should consider the following circumstances:[1]

- The child is older, knows their birth parents and other family members, and has a positive connection to them.
- A therapist has recommended ongoing contact with the birth parents and other members of the family.
- In a transracial adoption, ongoing contact with family members may enable the child to more easily retain their racial and cultural identity.
- The birth parents and foster/adoptive parents have a good relationship.
- This is an adoption by relatives or kin.

To further assess the possible benefit of conditional surrender to a given child, the caseworker should determine if a conditional surrender will:

- Spare the child and the parent the trauma of a contested or protracted termination proceeding.
- Shorten the time required for the child to achieve permanency.
- Reassure the birth parents that their rights are being protected and are not being terminated against their will.
- Allow birth parents to take responsibility and participate in the permanency plan.
- Allow ongoing contact between the birth parents and the child, recognizing the importance of the birth parents in the child's life.
- Allow exchange of important information, such as medical issues, between the birth parents and adoptive family (see note below).

[1] Center for Development of Human Services (2008). Journey Through Adoption Curriculum, pp. 19-20.

- Allow the child to have ongoing contact with other family members, such as their siblings and grandparents.
- Reduce financial, emotional, and time costs for all involved.

There are circumstances in which a conditional surrender may not be in the best interests of the child, such as:

- The child is very young and has little knowledge or contact with their parents/family members.
- Ongoing contact with the parent would pose a risk to the physical or emotional health and safety of the child.
- There have been serious problems during visitations between the child and their parents/family members.
- The child was seriously abused or maltreated by a parent, whose behavior or attitude toward the child did not change during reunification attempts.
- The child does not want contact with their parents.
- The adoptive parents do not want contact with the child's parents.

2. Conditions that may be included in a surrender instrument

Several types of conditions may be added to a surrender instrument. They must be specifically included in the instrument; there are no conditions to the surrender unless the parties specify any conditions that have been agreed upon. A form outlining conditions must be included as an attachment to the surrender instrument. Use the OCFS-4315A form for SSL §383-c judicial surrenders and OCFS-4316A for SSL §383-c extra-judicial surrenders. These forms are also available in Spanish (OCFS-4315A-S and OCFS-4316A-S).

If the agency believes that a conditional surrender may be in the best interests of the child, possible terms and conditions with the birth parents might help to engage them in the adoption process. The following are possible conditions that could be discussed with the birth parent and included in the surrender instrument.

- The parent identifies a specific person as the child's adoptive parent (who must be a certified or approved foster or adoptive parent) and the procedure to follow if the specified person cannot or will not adopt.
- The parent will receive ongoing information about the child, e.g., school, photos, reports.
- The parent will maintain contact with the child through a detailed visitation plan that includes frequency, structure, supervision, location, changes, what will happen if there is a failure to visit as planned.
- The child will continue to use the birth family's name.
- The parent will receive and provide ongoing health information.
- The parent will communicate with the child through phone calls, letters, and gifts.
- The child will maintain contact with their siblings.
- Grandparents will receive information and maintain contact with the child.

Continued contact with birth family members

Ongoing contact between the birth family and the child is a condition often requested by parents. This communication may include letters, emails, telephone calls, and/or visits.

The frequency of contact may range from every few years to several times a month or more, depending on the needs, wishes, and agreement of those involved. Other types of conditions may include periodic updates about the child and information about the prospective adoptive parents.

A contact agreement executed as part of a conditional surrender may provide for communication or contact between the child and the child's birth parent and their siblings, if any. The agreement is signed by the adoptive parent, the birth parent, the agency having care and custody of the child, and the attorney for the child, and must be incorporated into the court order in order for it to be enforceable. If the child's sibling is over the age of 14, the sibling must consent to the agreement, or it is not enforceable for that sibling.

The amount and type of communication among the birth family, the adoptive family, and the child ranges from open adoptions to semi-open adoptions that involve an intermediary, to confidential adoptions. Open, or fully disclosed, adoptions allow adoptive parents, and often the adopted child, to interact directly with birth parents. In semi-open or mediated adoptions, information is relayed through a mediator (e.g., an agency caseworker or attorney). In confidential adoptions, no identifying information is exchanged.

For more information about siblings and adoption, see "Keeping Siblings Connected: A White Paper on Siblings in Foster Care and Adoptive Placements in New York State" (07-OCFS-INF-04).

According to the Adoption and Foster Care Analysis and Reporting System (AFCARS) Report #29 published in November 2022, 89 percent of the children adopted in the United States from foster care in fiscal year 2021 were adopted either by their former foster parents (55 percent) or a relative (34 percent). These adoptions are often "open," either because of a relationship developed between the birth and adoptive parents when the children were in foster care, or because the children know their birth families, including their addresses and phone numbers, and may contact them whether or not the adoption was intended to be open.

Practice Tip: Benefits of continued contact with birth family

When a child who has been adopted stays in contact with their birth family, they may benefit in these ways:

1. Answers to the big questions.

   Because the child will have some contact with their birth family, they will not have the feeling of a "missing piece" in their life described by some children who are adopted. They will also have the opportunity to ask the big question, "Why was I placed for adoption?"

2. Link to heritage and ancestry.

   The child will have access to background on their heritage and ancestry. They will be able to claim that information as a piece of their identity.

3. Wider circle of family and support.

   The child may have more family members to provide love and support. The adoptive family may also be grateful for the extra support provided by others who love their child.

4. Availability of ongoing medical information.

   Many adopted children lack access to basic medical background information regarding physical, mental, and emotional health issues in their biological family. This information can be vital to helping medical personnel make informed decisions on behalf of their patients.

5. No need to search.

   Many children who have been adopted do not know the details of how their life began. Ongoing contact with family members means the child will have this information and will not have to attempt an adoption search. Adoption searches can exhaust a person, both emotionally and financially.

Source: Craft, C. (2022) “The Pros and Cons of an Open Adoption.” Retrieved from https://www.verywellfamily.com/why-choose-an-open-adoption-26609.

Current research on so-called open adoptions gives less consideration to issues facing caseworkers when children are adopted from foster care. The profile of the children and their birth parents, as well as the quality of post-adoption contacts, vary considerably depending on the context in which the adoption takes place. Certain aspects and conditions should be taken into consideration when determining whether or how contact between the adopted child and the birth family should be maintained. There often are distinctive challenges and dilemmas when the adopted child came into foster care because of an abusive family.[2]

[2] Chateaunuef, D. (2018) “Issues Surrounding Post-Adoption Contact in Foster Adoption: The Perspective of Foster-to-Adopt Families and Child Welfare Workers,” *Journal of Public Child Welfare,* Vol. 12, Issue 4.

Contact plans should not be "cut and pasted," but should be personal to each child. This requires individual assessment, the starting point of which is thinking about who and what children need to know, both now and in the future. The overall conclusion is that staying in touch with birth relatives can be positive for adopted children when arrangements carry minimal conflict and where the child's place in their adoptive and birth family are both respected.[3]

Even when it is not safe for the child to maintain an open relationship with a birth parent, contact with a sibling or an extended family member may be able to provide a meaningful connection between the child and their birth family.

Practice Tip

More information on maintaining birth family connections after adoption can be found at the Child Welfare Information Gateway.

(https://www.childwelfare.gov/topics/adoption/preplacement/adoption-openness/ .)

Specifying the adoptive parent

The birth parent may specify who will adopt the child as part of a conditional surrender. The person named by the birth parent must be a certified or approved foster parent and the child's PPG is for them to be adopted by that person or the agency has fully investigated and approved such person as an approved adoptive parent in accordance with applicable statute and regulations [SSL §383-c(2)(a)].

There may be instances in which the birth parent names a person as the intended adoptive parent, but that person is not willing or able to adopt the child after the surrender instrument is signed. When this occurs, the caseworker must seek guidance from their supervisor and agency attorney. There are specific legal requirements that the agency must follow to notify the birth parents, the court, and the attorney for the child. The law requires that the agency promptly notify the birth parent unless the birth parent has signed a written statement expressly waiving the right to this notice and the statement is appended to or included in the surrender.

If the surrender document does not contain the name of the persons who will be adopting the child from foster care, the child will be adopted without the parent's consent by the persons chosen by the agency [SSL §383-c (5)(b)(iii)].

3. Discussions before accepting the conditional surrender

Before a conditional surrender is accepted, the agency must discuss the terms and conditions of the surrender with the parent. If the agency has determined who will be adopting the child, the agency should also discuss the terms and conditions with both the prospective adoptive parent and with the child, if the child is of an appropriate age, capacity, and maturity to determine if the terms are realistic, in their best interests, and mutually agreed upon. Views of the prospective adoptive parent must also be considered as the terms and conditions of the surrender must be consented to in writing by the adoptive parent, who also signs the surrender. Use of a trained, neutral, third-party mediator can be helpful in working through this process and resolving disputes.

If the agency determines that the conditions a parent wishes to have included in the surrender would not be in the best interests of the child, the agency should determine if the parent would execute the surrender without the terms and conditions. If the parent refuses, the agency should not agree to the surrender with the unacceptable conditions and must assess the

[3] Neil, E. (2019) "Planning and Supporting Birth Family Contact When Children are Adopted from Care," Rudd Adoption Research Program, UMASS Amherst. Retrieved from https://www.umass.edu/ruddchair/sites/default/files/rudd.neil.pdf.

appropriateness of filing a petition to terminate parental rights where adoption continues to be the actual or proposed permanency goal.

4. Substantial failure of a material (important) condition

If the surrender includes one or more conditions, the surrender document must state what will occur if there is a failure to follow the agreed-upon conditions. Specifically, the surrender document must state, in plain language, the following:

- The agency must notify the parent (unless the parent has expressly waived notice by a statement written by the parent and appended to or included in the surrender instrument), the attorney for the child, and the court that approved the surrender within 20 days of any substantial failure of a material (important) condition of the surrender, prior to the finalization of the adoption.
- The agency, except for good cause, must file a petition to the court within 30 days of any substantial failure of a material (important) condition of the surrender for the court to review the failure and, where necessary, to hold a hearing. Notice must be given to the parent (unless notice has been expressly waived in writing by the parent and appended to or included in the surrender instrument) and to the attorney for the child (FCA §1055-a). If the agency does not file a petition, the parent or the attorney for the child may file such a petition at any time up to 60 days after notification of the failure. The petition must be filed prior to the child's adoption.
- The parent must provide the agency with a designated mailing address and any subsequent changes to that address, at which the parent may receive notices regarding any substantial failure of a material (important) condition, unless the parent expressly waived such notice by a statement written by the parent and appended to or included in the surrender instrument [SSL §383-c (5)(c)].

E. *Judicial surrenders*

A judicial surrender of a child in foster care must be executed and acknowledged before a judge of the Family Court or the Surrogate's Court.

Many LDSSs and courts strongly prefer judicial surrenders over extra-judicial surrenders and many agencies will only accept judicial surrenders, although this is not a legal requirement with the exceptions noted below. This preference is because judicial surrenders are final immediately after they have been signed in front of the judge. Generally, a judicial surrender may not be revoked by the parent, unless the parent can prove that the surrender was obtained through fraud, coercion, or duress. The presence of the judge nearly eliminates the possibility of an exception, as the judge will question the parents about their intention and capacity to voluntarily surrender their parental rights.

Judicial surrenders are required when the surrendering parent is in foster care. Judicial surrenders are also required for the surrender of any child covered by the federal Indian Child Welfare Act (ICWA) (see **Chapter 12** for more information). The caseworker should work with the agency attorney to have the surrender proceeding scheduled on the court calendar. The court must appoint an attorney to represent the child who is being surrendered to an authorized agency. In making such an appointment, to the extent possible and appropriate, the court should appoint the same attorney who previously represented the child in foster care [FCA §249(a)].

1. Notifications to parents prior to the court proceeding

Before a judge or surrogate approves a judicial surrender, they must inform the parent that:

- The surrender is final and irrevocable immediately upon its execution and acknowledgment. The parent or guardian cannot bring a case in court to revoke a judicial surrender or regain custody of the child, although this does not prevent actions or proceedings claiming that fraud, duress, or coercion were used in the execution or inducement of the surrender.
- The parent has the right to be represented by legal counsel of their own choosing.
- The parent has the right to ask the court to appoint a lawyer free of charge if the parent cannot afford to hire one.
- The parent has the right to have supportive counseling. (The judge may adjourn the surrender proceeding until the parent has received counseling.)
- The parent is giving up their rights of custody and to visit, speak, write, or learn about the child forever unless the parties have agreed to different terms.
- If the surrender is conditional, the parent must provide the authorized agency with a designated mailing address at which the parents may receive notice of any failure of a material condition of the surrender, unless the parent expressly waives their right to receive notice in a written statement attached to or included in the surrender.
- If the parent registers with the Adoption Information Registry, as specified in PHL §4138-d, the parent may be contacted at any time after the child reaches the age of 18 years, but only if both the parent and the adult child so choose [SSL§ 383-c (3)(b)].

At the end of the proceeding, the judge or surrogate must give the parent a copy of the surrender [SSL §383-c (3)(b)].

2. Out-of-state judicial surrenders

A judicial surrender of a child in foster care executed and acknowledged before a court in another state satisfies New York State requirements as set forth in SSL §383-c (3) if it is executed by a resident of the other state. The court in the other state must be a court of record which has jurisdiction over adoption proceedings in the other state. A certified copy of the transcript of that proceeding, showing compliance with section 383- c(3)(b) of the SSL, must be filed as part of the adoption proceeding in New York State [SSL§383-c (3)(a); 18 NYCRR 421.6(d)(1)].

F. *Extra-judicial surrenders*

The parents of a child in foster care can, with some exceptions, surrender their parental rights without going to court. A SSL §383-c extra-judicial surrender is signed by the parents in the presence of at least two witnesses and in front of a notary public or other officer authorized to “take proof of deeds.”

If the child is in foster care and the caseworker is unsure of the parent’s capacity to comprehend the meaning of the surrender, a judicial surrender should be taken. A judicial surrender is required if the parent signing the surrender also is in foster care [SSL §§ 383-c(4); SSL 384(2) & (3); 18 NYCRR 421.6 (d), (e) & (k)].

Caseworkers should consult with their supervisor or agency attorney to learn about the agency's policies and practices regarding extra-judicial surrenders.

1. Required witnesses

Two persons must witness an SSL §383-c extra-judicial surrender for a child in foster care. At least one witness must be an employee of the authorized agency who has been trained in accordance with OCFS regulations to accept surrenders. The second witness must be either a social worker with a master's degree in social work, a licensed clinical social worker, or an attorney who is licensed to practice law in NYS and who is not an employee, volunteer, consultant, agent of, or attorney for, the authorized agency taking the surrender. A required witness may serve as the notary public at the surrender if the witness is licensed as a notary public.

Employee witness

The agency employee who will serve as a witness must have received in-service training and instruction in accepting SSL §383-c extra-judicial surrenders. At a minimum, the in-service training and instruction must cover the following requirements [18 NYCRR 421.6(e)(2)]:

- The surrender instrument must be read in full to the parents or guardians in their principal languages.
- The parents or guardians must be given the opportunity to ask questions about the surrender or its execution and to have these questions answered.
- The agency must make sure that the parents or guardians understand their rights and the consequences of signing the surrender, which is specified in bold print on the first page of the instrument.
- The agency must make sure that supportive counseling is offered to the parents or guardians.
- Affidavits are to be completed by the witnesses.
- The agency must make sure that the parents or guardians understand the procedures for revocation of the surrender.
- The parents or guardians must sign and receive copies of the surrender instrument.
- The witness must be aware of the required surrender forms and their content; the form for the required affidavits and their contents; the requirements for revoking the surrender; and the requirements for submitting the signed surrender to the court.

Non-employee witness

The following conditions must be met to ensure the impartial selection and independence of the non-employee witness:

- The witness must be a certified social worker, or an attorney duly admitted to the practice of law in NYS.
- One person may not serve exclusively as the only non-employee witness for an authorized agency.
- The witness cannot be an employee of an agency or organization contractually or financially responsible for, or involved with, the delivery of services to the child or their family.
- The witness may not be related within the second degree to the employee witness to the same surrender [18 NYCRR 421.6(e)(2)(ii)(b)]. This excludes first- or second-degree

relatives, including parents, siblings, children, grandparents, grandchildren, uncles, aunts, nephews, nieces, and half-siblings).[4]

Witnesses' affidavits

Both witnesses must complete affidavits attesting to the facts and circumstances of the execution of the surrender. The affidavits of the employee and non-employee witness must recite [SSL §383-c(4)(b); 18 NYCRR 421.6(f)(1)]:

- the date, time, and place where the surrender was executed;
- that a copy of the executed surrender was provided to the parents or guardians;
- that the surrender was read in full to the parents or guardians in their principal languages and the parents or guardians were given an opportunity to ask questions and obtain answers about the nature and consequences of the surrender;
- in the case of a conditional surrender, that parents or guardians were informed about the consequences of, and procedures to be followed in cases of a substantial failure of a material (important) condition contained in the surrender;
- that parents or guardians were informed of their obligation to provide the authorized agency with a designated mailing address, as well as any subsequent changes in the address at which the parent may receive notices about any substantial failure of a material condition (unless such notification is expressly waived by a statement written by the parent and appended to or included in the surrender); and
- that the parents or guardians executed and acknowledged the surrender.

The employee witness affidavit must also recite when supportive counseling was offered to the parents or guardians and whether the parents or guardians accepted the counseling; and if accepted, when the supportive counseling was provided and the nature of such counseling.

2. Parent's mental competency

To enter into a legally binding agreement, the parent must have sufficient mental competency to knowingly agree to the terms and conditions of the surrender. The term "mental competency" refers to both intellectual ability and any mental condition that might impair a person's understanding of the consequences of signing the agreement.

If the caseworker has reason to believe that a parent may not have sufficient mental competency to fully comprehend the surrender or its impact, they should consult the agency's attorney before allowing the parent to sign a surrender. The agency's attorney may decide to bring the matter to the attention of the court. Some courts will order that the parent be examined by a mental health professional immediately before the parent signs the surrender.

If the surrendering parent is under the treatment of mental health professional, it would be advisable to ask the mental health professional to interview the parent immediately before the surrender. If appropriate, the mental health professional should be asked to certify in writing that the parent understands the ramifications of signing the surrender and is therefore competent to do so. This statement should be kept in the agency file with the surrender.

[4] National Cancer Institute, "NCI Dictionaries of Genetic Terms," retrieved from https://www.cancer.gov/publications/dictionaries.

When the parent's mental competency is in question, it is recommended that the agency seek a judicial surrender. If there is evidence that the parent lacks the mental competency to sign a surrender, it is recommended that the agency initiate proceedings for the involuntary termination of parental rights.

3. Judicial approval of an extra-judicial surrender

No later than 15 days after parents sign the SSL §383-c extra-judicial surrender, the agency that received custody and guardianship of the child must file an application for approval of the extra-judicial surrender with the accompanying affidavits from all the witnesses. The affidavit must be filed with the court in which the adoption petition is expected to be filed. If that is not known, the application may be filed with the Family Court or Surrogate's Court in the county where the agency has its principal office. If the surrendered child is in foster care due to an Article 10, Article 10-A, or SSL §358-a proceeding, the application must be filed in the Family Court where that proceeding was held.

Notice of the proceeding to approve the extra-judicial surrender must be given to the following people:

- The parent or guardian who signed (executed) the surrender.
- An out-of-wedlock father who fits one of the categories specified in SSL §384-c(2). See **Chapter 7** for information on notices to unwed fathers.
- Other persons the judge or surrogate may, in their discretion, prescribe [SSL §383-c (4)(d)].

The law states that a person who receives notice of the surrender approval proceeding has been given the opportunity to be heard in court. They may not challenge the validity of the approved surrender at a later date in any other proceeding.

Notifying prospective adoptive parents of surrender approval

When the court approves the surrender, the attorney for the petitioning authorized agency must promptly serve notice of the approval to the persons who have been approved to adopt the child and advise that the adoptive parents may commence an adoption proceeding. Also, the petitioning authorized agency must advise the prospective adoptive parents of the procedures necessary for the adoption of the child and that the petitioning authorized agency will cooperate with the parents in the provision of necessary documentation to the court [SSL §383-c(8)(a)].

Recording the surrender instrument with county clerk

Once the SSL §383-c surrender is approved by the court, the authorized agency must take steps to make sure that the surrender is recorded in a book in the office of the county clerk where the surrender is executed, or where the principal office of such authorized agency is located. The book is maintained by the county clerk, must be kept under seal and is subject to inspection and examination only as provided for in SSL §§372(3) and (4) [SSL §383-c(5)(f)].

4. Disapproval of the surrender

If the court disapproves the surrender, the surrender is invalid and without force or effect. The court may direct that any subsequent surrender be a judicial surrender before the court [SSL §383-c (4)(f)]. In such a case, the child is returned to the care and custody of the authorized agency [SSL §383-c(6)(a)]. The caseworker, in consultation with the supervisor and authorized agency attorney, will inform the parents of the disapproval of the surrender and decide on the appropriate next steps to achieve permanency for the child.

5. Revocation of an SSL §383-c extra-judicial surrender

A parent may revoke an SSL §383-c extra-judicial surrender of a child in foster care if the revocation is in writing, is postmarked or otherwise delivered to the court named in the surrender within **45 days** of the signing of the surrender. Such a surrender will be invalid, and the child must be returned to the care and custody of the authorized adoption agency. The absence of judicial approval of an extra-judicial surrender does not affect the period for revocation of the surrender [SSL 383-c(6)(b)].

A revocation of the surrender more than 45 days after its signing will not be effective if the child has been placed in an adoptive home. For the purposes of the revocation of an extra-judicial surrender, a child will be considered to have been placed in the home of adoptive parents when the fact of such placement, the date of the placement, the date of the adoptive placement agreement, and the names and addresses of the adoptive parents have been recorded in a bound volume maintained by the authorized agency for the purpose of recording such information in chronological order [SSL§383-c (6)(b)].

If the authorized agency mails or delivers a revocation of an extra-judicial surrender to the court more than 45 days after its execution and the child has not been placed in an adoptive home, the surrender is invalid. A child is considered to be placed in an adoptive home only when there is a signed and recorded adoption placement agreement [SSL §383-c(6)(b)].

G. *Surrender by a minor parent or a parent in foster care*

1. Surrender by a minor parent

A parent who is a minor (under 18 years of age) may sign a legally valid surrender. The caseworker should, however, take special precautions when a minor parent wishes to sign a surrender because of the potential that a surrender signed by a minor may be challenged on the grounds of uninformed consent, fraud, duress, or coercion.

When a minor parent is involved, the caseworker should request that the minor be accompanied by a parent, attorney, or other person who can protect the minor's rights and help them to fully understand the consequences of their action. As noted above, the minor parent has a right to counsel. In some LDSSs, the court requires that parents of a minor parent also consent to a surrender.

When neither the surrendering minor parent nor the child being surrendered is in foster care, a judicial surrender is recommended. Where the surrendering minor parent is not in foster care, but the child being surrendered is in foster care, an SSL §383-c surrender must be taken and it is recommended that it be a judicial surrender.

2. Surrender by a parent in foster care

If the surrendering parent is in foster care, an SSL §383-c judicial surrender before a judge of the Family Court is required, regardless of their age. This applies whether or not the child is in foster care. When the surrendering parent is in foster care and the child is also in foster care, an SSL §383-c judicial surrender must be taken [SSL §§383-c(7) and 384(3)].

Consent to a private adoption executed by a person who is in foster care must only be executed before a judge of the Family Court [DRL §115-b (1)].

H. *Surrender when a child is not in foster care*

SSL §384 prescribes the surrender process where neither the parent nor the child is in foster care. This surrender process authorizes transfer of guardianship and custody of the child to either an LDSS or a VA.

Agencies are strongly encouraged to use judicial surrenders when the surrender involves a child of minor parents or a parent of any age with questionable capacity. If the LDSS or VA has any doubts about the surrendering parent's understanding of the instrument or their mental capacity to enter into a legally binding agreement, a judicial surrender should be sought.

There is no OCFS-prescribed surrender form for a child who is not in foster care (SSL §384). Many agencies have developed their own pre-printed surrender forms. Such forms must include at least the following provisions:

- The VA is authorized and empowered to consent to the adoption of the child in the place of the parent signing the instrument.
- Birth parents must complete the Adoption Information Registry Birth Parent Registration Form. The form records identifying information about the birth parents and allows them to indicate whether or not they consent to the release of their identifying information to the child when the child reaches the age of 18 and registers with the registry. This consent can be revoked by the birth parents at any time.
- Terms and conditions that have been agreed to by the parties. If terms and conditions have been agreed to by the parties and included in the surrender instrument, the surrender instrument must also contain the provisions regarding "substantial failure of a material condition of the surrender" as described in Section D of this chapter [SSL §384(2)(a)].

A copy of the surrender must be given to the surrendering parent after the parent has signed it. The surrender must include the following statement: "I, (name of surrendering parent), this _____ (date) day of _____(month), _____(year), have received a copy of this surrender (signature of surrendering parent)." The surrendering parent must acknowledge the delivery and date of the delivery in writing on the surrender instrument [SSL §383-c(3)].

The surrender form *may* also include the following provisions:

- The person signing the instrument waives the right to receive notice of the adoption [SSL §384(2)(a)].
- The parent will have no right to revoke the surrender after 30 days have elapsed from the date of the signing (execution) of the surrender *and* the child has been placed with adoptive parents. The standards for when a child is considered as having been placed for adoption are the same as for an SSL §383-c surrender [SSL 384(5)].

1. Children who are likely to remain in the care of the LDSS

The LDSS that accepts an SSL §384 surrender agreement for guardianship and custody of a child must determine if the child is likely to remain in the care of the LDSS for more than 30 consecutive days. If such is the case, within 30 days of such determination, the LDSS must petition the Family Court for approval of the surrender in either the county or city where the LDSS is located.

The court must determine, and state in the court order, that removal of the child from their home is in the best interests of the child and that it would not be in the child's best interests for them to

continue to live in their own home. The court must also find that reasonable efforts were made to prevent or eliminate the need for removal, that reasonable efforts were made to make it possible for the child to safely return home, or that reasonable efforts were not required. The requirements for filing this petition and the standards used by the Family Court are detailed in SSL §358-a. SSL §358-a also applies to children entering foster care pursuant a voluntary placement agreement executed pursuant to SSL §384-a.

2. Revocation of an SSL §384 surrender

The surrender instrument should contain a provision regulating a parent's ability to revoke the surrender. SSL §384 contains procedures for revoking signed (executed) surrenders that can be included in a provision or clause:

- The parent (except in cases of fraud, coercion, or duress) cannot revoke, or bring a court proceeding seeking to revoke, the surrender if more than 30 days have elapsed since its execution and the child has been placed in the home of the adoptive parents [SSL §385(5)].
- The child will not be considered to have been placed in the home of adoptive parents unless the fact of the placement, the date of placement, the date of the adoptive placement agreement, and the names and addresses of the adoptive parents are recorded in chronological order in a bound book kept by the authorized agency for this purpose (see **Chapter 7**) [SSL §384(5)].

An adoptive parent who has custody of a child for the purpose of adoption through an authorized agency, or any person who has provided foster care for a child for more than 12 months through an authorized agency, has the right to intervene in any proceeding to set aside an SSL §384 surrender [SSL §384(3)].

The provision regarding revocation of the surrender applies only if it is included in the surrender agreement. If this clause is included, the surrender cannot be revoked after the child has been placed in the home of adoptive parents, the facts of the placement have been recorded in a bound volume, and more than 30 days have elapsed since the execution of the surrender. If any of these conditions have not been satisfied, the parent is entitled to seek to revoke the surrender.

Even where these conditions are present, the parent still may seek to annul the surrender instrument on the grounds of "fraud, duress or coercion in the execution or inducement of the surrender" [SSL 384(5)].

3. Rights of adoptive parents in a revocation of an SSL §384 surrender

In an action or proceeding to determine the custody of a child who was surrendered for adoption under SSL §384 and placed in an adoptive home, or to revoke or annul a surrender of a child placed in an adoptive home, the birth parents' rights to custody of the child are not superior to those of the adoptive parents. This does not depend on whether the parents who surrendered their rights to the child are fit, competent and able to duly maintain, support, and educate the child. The custody of the child will be awarded solely on the basis of the best interests of the child and there shall be no presumption that such interests will be promoted by any particular disposition [SSL §384(6)].

Appendix 4.1: Four types of surrenders

1. SSL §383-c Surrender

The surrender of a child in foster care (383-c) may be either a judicial or extra- judicial surrender.

- **383-c Judicial surrender:** This surrender may be executed before any Family Court or Surrogate's Court in the state, unless the child being surrendered is in foster care as a result of an Article 10 or 10-A proceeding in Family Court. In this case, the surrender must be executed in the Family Court where the Article 10 or 10-A proceeding took place and the court should assign the case to the same judge, where practical.
- **383-c Extra-judicial surrender:** A surrender of a child in foster care may be signed in the presence of at least two witnesses and a notary public. The requirements for the witnesses, as well as the appropriate court in which the surrender may be reviewed, are discussed in more detail later in this chapter.

2. SSL §384 Surrender

This surrender of a child not in foster care may be either a judicial or extra-judicial surrender.

- **384 Judicial surrender:** May be executed before any judge or surrogate having jurisdiction over adoption proceedings, unless the child is being surrendered as a result of, or in connection with an Article 10 or 10-A proceeding in Family Court. In this case, the surrender must be executed in the Family Court that had jurisdiction over the Article 10 or 10-A proceeding, and with the judge who last presided over the proceeding, when practical.
- **384 Extra-judicial surrender:** Must be signed in the presence of one or more witnesses and before a notary public and recorded in the county clerk's office. Where the agency seeks court approval of an extra-judicial surrender, the agency must petition the Family Court or Surrogate's Court to approve an extra-judicial surrender. If the child is being surrendered as a result of, or in connection with an Article 10 or 10-A proceeding, the agency must petition the court in which that proceeding took place and, where practical, the surrender proceeding must be assigned to the same judge who heard the earlier proceeding.

Upon acceptance of a judicial surrender or approval of an extra-judicial surrender, the court must schedule an initial freed child permanency hearing.

Chapter 5

Chapter 5
Termination of Parental Rights

A child's PPG is usually changed to adoption after reasonable efforts to safely reunite the child with their family has been unsuccessful or the Family Court has determined that no reasonable efforts are required. The first step toward adoption is to legally free the child.

One avenue to consider is a voluntary surrender of rights by the child's parents. Before initiating proceedings to terminate parental rights, the local department of social services (LDSS) or voluntary authorized agency (VA) should discuss with the parents the possibility of voluntary surrender, if appropriate and consistent with the health and safety of the child (SSL 383-c). See **Chapter 4** of this guide.

A. *Overview*

When the LDSS has decided that adoption is in the best interests of a child and the parents will not sign a surrender, or a surrender is not appropriate given the case circumstances, the agency should petition the court to terminate parental rights (SSL §384-b). The court may also order the agency to file a petition to terminate parental rights (TPR).

The decision to file a termination of parental rights (TPR) petition must be made by the agency on a child-specific basis and in accordance with a child's best interests. Whenever a LDSS determines that a petition to terminate parental rights should be filed, the LDSS must also make reasonable efforts to identify, recruit, process, and approve a qualified family for the adoption of the child, if such steps have not already taken place [18 NYCRR 431.9(e)(3)].

The filing of the TPR petition must be initiated within 30 days of the establishment of the permanency planning goal (PPG) of adoption. The child must be freed for adoption within 12 months after the PPG of adoption is established, except where the delay is caused solely by the court and not by the LDSS or VA caring for the child, or that the court refuses to terminate parental rights [18 NYCRR 430.12(e)(1)(i)]. For all termination proceedings, a "child" is defined as a person under the age of 18 [SSL §384-b(2)].

The law specifies the grounds under which the court, acting on a petition from the agency, can terminate parental rights and commit the guardianship and custody of a child to the agency (SSL §384-b):

- Abandonment
- Permanent neglect
- Mental illness or intellectual disability
- Severe or repeated abuse
- Death of the parents

The caseworker, in consultation with their supervisor, should carefully consider which of the allowable grounds is the most appropriate for the TPR petition, based on the specific case circumstances.

The courts in New York State with jurisdiction to terminate parental rights and commit the guardianship and custody of a child to an authorized agency are the Family Court and, for some grounds for termination, the Surrogate's Court.

The Family Court has exclusive jurisdiction over any termination proceeding brought upon grounds of:

- Mental illness or intellectual disability
- Permanent neglect
- Severe or repeated abuse

The Family Court also has exclusive jurisdiction over:

- Cases in which a child was placed or continued in foster care pursuant to FCA Article 10, 10-A, or 10-C, or as a result of a voluntary placement by the parent/guardian (SSL §358-a).
- Multiple court proceedings involving a child and their siblings or half-siblings, all of whom were placed in foster care through the same LDSS commissioner.

Both the Family Court and Surrogate's Court have jurisdiction over termination proceedings brought on the grounds of abandonment or because of the death of the birth parent or parents whose consent to adoption otherwise would be required [SSL §384-b(3)(c) & (d)].

The evidence presented in support of one of the grounds listed above must meet a certain standard of proof before the court will grant an order terminating parental rights and committing the guardianship and custody of a child to the LDSS. For most TPR cases, that standard is "clear and convincing" evidence. For Native American children subject to the federal Indian Child Welfare Act (ICWA), the standard is "beyond a reasonable doubt."

Standards of Proof

Before the court can make a finding, the credibility and persuasiveness of evidence presented must rise to a specific level. There are three standards of proof. The type of proceeding determines which level of proof is required.

- ➔ The highest level of proof, "beyond a reasonable doubt," is used in criminal proceedings.
- ➔ An intermediate standard of proof, "clear and convincing," is used when special constitutional rights are involved, such as in the termination of parental rights (SSL §384-b).
- ➔ The lowest standard of proof is "preponderance of evidence," which is used in most civil cases. This standard is satisfied when, looking at all possibilities, one possibility is more than 50% likely. Allegations of abuse and/or neglect must be proven by a "preponderance of evidence."

If the court decides in favor of the authorized agency and terminates parental rights, the court is then authorized to commit guardianship and custody of the child to the agency and the child is legally free for adoption. There are specific steps the agency must take at this point. The agency must notify the prospective adoptive parents (if identified) that an adoption proceeding may be initiated.

The agency must notify the current foster parents that the child in their care has been freed for adoption and, if they want to adopt the child, assist them in completing an application to adopt, if they have not already done so [SSL §384-b(10); 18 NYCRR 421.19(a)].

Prospective adoptive parents may submit a petition to adopt a child to the court in which the TPR proceeding is being heard, even before that proceeding is concluded [DRL §112(8)]. There is a legal requirement that the child be placed with a pre-adoptive or foster family for at least three months before an order of adoption is issued. However, the court may dispense with this requirement if the judge cites the reason for doing so [DRL §112(6)].

1. Best interests determination

Unless one of the exceptions set forth in 18 NYCRR 431.9(e) applies, the LDSS is required to make a determination six months after the child is removed from the home and every six months thereafter as to whether the child's best interests would be served by the termination of their parents' parental rights [18 NYCRR 431.9(a)].

This determination is made by evaluating the status of the child's relationship with their parents. If it is determined that termination of parental rights would be in the child's best interests, or if the Family Court has directed that a TPR proceeding be started, the agency must take appropriate steps toward a TPR proceeding. There are exceptions to these requirements (see pg. 4).

In making the determination to terminate parental rights, the agency must consider the following [18 NYCRR 431.9(b)]:

Are there indications of parental rejection of the child?

These may include the failure of the parents since the child was removed, or since the most recent permanency hearing, to:

- Request visits with the child.
- Cooperate with the agency in planning and arranging visits with the child, although physically and financially able to do so.
- Communicate with the child regularly by phone or letter if there is a physical or financial inability to visit.
- Keep appointments to visit the child as arranged.
- Keep the agency informed as to their whereabouts.
- Keep appointments with agency staff that may have been arranged to assist the parent with problems that affect their ability to care for the child.
- Use community resources as arranged or suggested by the agency or other involved agencies, or ordered by the court, to resolve or correct the problems which impair parental ability to care for the child.
- Demonstrate a willingness and capacity to plan for the child's discharge, taking whatever steps are necessary to provide an adequate, safe, and stable home and parental care for the child within a reasonable period of time.

Are there indications that efforts to encourage and strengthen the parental relationship would not be in the child's best interests?

These may be evidenced by:

- Addiction to alcohol or drugs to such a degree that the parent's ability to function in a mature and reasonable manner is impaired.
- Antisocial behavior to a degree that the parent is frequently incarcerated.
- Consistent, expressed hostility toward the child or evidence of neglect and/or abuse during periods when the child has visited the parent.
- Consistent, expressed resistance on the part of a child, who is of sufficient maturity and intelligence to make such judgment, to accept visits from the parent; or resistance on the part of a small child without sufficient maturity or judgment who exhibits resistance or defensive behavior; e.g., continual crying when parents visit, bedwetting, compulsive scratching, or nervous habits, only evident when the child is with parents, but not evident in everyday behavior in the foster home.
- The parent's mental illness, manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if the child were returned to the custody of the parent, the child would be in danger of becoming a neglected child, as defined in the FCA.
- The parent's intellectual disability manifested by impairment in adaptive behavior to such an extent that if the child were returned to the custody of the parent, the child would be in danger of becoming a neglected child, as defined in the FCA. See **Section D** of this chapter for the regulatory definition and a discussion of a TPR proceeding based on a parent's mental illness or intellectual disability.

2. Standards for filing a TPR petition

In making the decision to file a TPR petition, the agency must follow standards set in law and regulation [SSL §384-b(3)(1); 18 NYCRR 431.9(e)(1)&(2)]:

- The child has been in foster care for 15 of the most recent 22 months; or
- a court has determined the child to be an abandoned child; or
- a court has determined that the parent has been convicted of the murder or voluntary manslaughter of another child of the parent; the attempt, facilitation, conspiracy, or solicitation to commit such a murder or manslaughter; or a felony assault that resulted in serious bodily injury to the child or to another child of the parent.

3. Compelling reasons not to file a TPR petition

A compelling reason is a reason that meets specific criteria not to file a TPR petition where the LDSS would otherwise be required to do so under state and federal law. For every child, a case-specific determination must be made to assess whether filing a TPR petition would be in the best interests of the child.

It is not acceptable to claim a compelling reason simply because the child is one of a broad class of children (e.g., juvenile delinquents, Persons In Need of Supervision, Native Americans). State law specifically requires a case-by-case determination.

The following case circumstances may constitute a compelling reason not to file a TPR for a particular child. These should not be considered an automatic justification not to file a TPR petition, nor is this list necessarily all-inclusive. It is important that the caseworker consult with both legal and supervisory program agency staff to determine the appropriate course of action for each case. Periodic case conferences are one mechanism for such consultation.

The following are compelling reasons not to file a TPR petition, as specified in regulation [18 NYCRR 431.9(e)(2)]:

- The child was placed into foster care through Article 3 (juvenile delinquency) or Article 7 (Person in Need of Supervision) of the Family Court Act, but the child's PPG is either return to their parent or guardian or discharge to another planned living arrangement with a permanency resource (APPLA).
- Adoption is not the appropriate permanency goal for the child.
- The child is 14 years old or older and will not consent to adoption, despite meaningful adoption counseling about the benefits of adoption and the child's awareness of possibility for continued contact with members of the child's birth family, if appropriate.
- The child is the subject of a pending disposition under FCA Article 10 (except when the child is already in the custody of the LDSS due to a proceeding other than the pending FCA Article 10 proceeding), and a review of the specific facts and circumstances of the child's placement demonstrates that the appropriate permanency goal for the child is discharge to their parent or guardian. This does not apply if the child has been in continuous foster care based on another type of legal authority such as a voluntary placement, PINS, or JD.
- There are insufficient legal grounds for TPR, based on a consultation with the agency's attorney.

In addition to compelling reasons not to file a TPR, there are other reasons allowed by law and regulation not to file a petition to terminate parental rights, again determined on a case-by-case basis [SSL §384-b(3)(1)(i)(A),(C)&(D); 18 NYCRR 431.9(e)(2)(i)&(iii)]:

- The child is being cared for by a relative; the LDSS is not precluded, however, from filing a TPR petition when such petition is in the best interests of the child.
- The family has not been given the necessary services for the safe return of the child, unless such services are not legally required. This may include cases in which the court has made a finding of "aggravated circumstances" and waived the requirement for reasonable efforts to reunify the family. The "necessary services" must have been documented in the FASP and must still be necessary to safely discharge the child.
- The parent or parents are incarcerated, in immigration detention or immigration removal proceedings, or participating in a residential substance abuse treatment program.
- The parents' prior incarceration, immigration detention or immigration removal proceedings, or participation of a parent or parents in a residential substance abuse treatment program is a significant factor in why the child has been in foster care for 15 of the last 22 months, provided that the parent maintains a significant role in the child's life based on criteria set forth in SSL §384-b(3)(l)(v) and the agency has not documented a reason why it would otherwise be appropriate to file a TPR petition.

B. *Abandonment*

State law allows for the termination of parental rights where the parent or person whose consent to the child's adoption would otherwise be required has abandoned the child for the period of six months immediately prior to the date on which the TPR petition is filed in court [SSL §384-b(4)(b)].

The parent's intention to maintain a relationship with the child, without supporting evidence of action by the parent, is not sufficient to outweigh other valid evidence that the parent has, in fact, abandoned the child. In making such a determination, the court will not require a showing of diligent efforts, if any, by the authorized agency to encourage the parent to visit and communicate with the child [SSL §384-b(5)(a) and (b)].

1. Legal elements of abandonment

The abandonment of the child by the parent must have occurred over a period of at least six months and must still be in effect at the time the TPR petition is filed with the court. The statute provides that abandonment occurs when a parent evinces (makes evident) an intent to forego their parental rights and obligations as manifested by failure to visit the child and communicate with the child or agency, even though they are able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, the parents' ability to visit and communicate is presumed [SSL §384-b (5)(a)].

Where there is some contact by the parent, but it is minimal or insubstantial, an LDSS may still be successful in terminating parental rights. Parental consent to adoption can be dispensed with on grounds of abandonment even when there has been some contact between parent and child, provided that contact is sporadic or insubstantial [DRL §111 (6)(b)].

The following terminology is used in SSL §384-b (4)(b) and (5) to describe the elements that must be proven in a TPR proceeding based on the ground of abandonment:

"Six months immediately before the date on which the TPR petition is filed in Court"

A termination proceeding is initiated when the petition is filed with the court. If a parent who has not been heard from for six months or more suddenly contacts the child or the agency before the TPR petition is filed with the court, the abandonment cause of action under SSL §384-b may be unsuccessful if the court determines that such contact was substantial. Therefore, in cases when parental abandonment exists and the agency has determined that the child's interests and welfare will best be served by severing the parent/child relationship, it is important that a termination proceeding be initiated without undue delay.

Caseworkers should be aware that FCA §1089 allows a child's foster parents to petition the court for termination of parental rights when the court has directed an authorized agency to file a TPR petition and the agency has failed to do so within 90 days of the court's direction. This is a non-reimbursable expense for foster parents.

"Failure to visit the child"

Proof that a parent failed to visit the child is most easily obtained when the caseworker, the foster parents, and the agency keep complete and accurate records of all visits, including missed visits. To prove a missed visit, there must be an entry in the child's case record, e.g., "the parent did not appear for the child's visit today." Leaving the record blank does not prove the visit did not take place. It only proves there is no entry.

"Failure to communicate with the child or agency"

Proof of abandonment requires that a parent has not only failed to visit the child but also failed to communicate with the child or the agency for six months before the filing of the

petition. Letters, e-mails, and phone calls by the parent may meet the standard of communication or contact.

For a successful defense in an abandonment proceeding, the parents, or persons acting on behalf of the parents, must have initiated communication with the agency and the child within the previous six months. The agency's case may be successful if the agency initiated written or verbal communication with the parent but received no response or expression of interest. The agency's case may also be successful if the parent initiated communication or contact with the child or the agency during the six-month period, as long as the communication or contact was sporadic or insubstantial. In such cases, the caseworker must consult with their supervisor and the agency attorney.

"Although they were able to do so"

For the agency's abandonment case to prevail, the parent must have had the ability to visit and communicate with the child at the time they failed to do so. According to law, the court may presume that the parent was able to visit or communicate with the child or the agency unless the parent provides evidence to the contrary [SSL §384-b(5)(a)].

A parent's incarceration generally is not viewed as a reason for a failure to communicate or maintain contact, as prison staff and the caseworker can help the parent maintain contact. In some cases, a parent may allege inability to visit the child on the basis of physical or "commuting" distance. Courts generally have discounted such an excuse, but it is possible that under certain circumstances the court might rule that, because of physical distance, the parent was genuinely unable to exercise their rights to visitation.

"Not prevented or discouraged from doing so by the agency"

The court must be satisfied that the agency has done nothing to contribute to the parents' failure to visit and communicate. If a parent is prohibited from exercising parental prerogative by circumstances beyond their control, an "intent to forego their parental rights" cannot be proven.

Even well-intended actions on the part of the agency could be interpreted as placing barriers between the parents and the child. For this reason, any decision to deny parental visits must be documented and supported in the case record as being in the best interests of the child.

It is likely that the parent and the parent's lawyer will be given access to portions of the case record. Entries by the caseworker that convey a hurried, impatient, or negative attitude toward the parents may give the impression that the parents were discouraged from contacting the child, even when this was not the case. Accordingly, caseworkers must be careful to record all events and communications accurately and objectively.

"Subjective intent of the parent … shall not preclude a determination"

The statute provides that the subjective intent of the parent (what they had in mind or intended to do regarding the child) may not prevent a finding of abandonment if their intent has not been acted upon and there is no evidence of substantial parental visitation or communication with the child during the relevant six-month period of time.

This provision makes clear that the parent's intention to maintain a relationship with the child, without supporting evidence of action, is not sufficient to outweigh other valid evidence that the parent has, in fact, abandoned the child.

"The court shall not require a showing of diligent efforts"

In supporting a determination of abandonment, the authorized agency is not required to prove that it made diligent efforts to encourage the parent to visit and communicate with the child [SSL §384-b (5)(b)]. The statutory elements of the definition of abandonment do not include a required finding that diligent or reasonable efforts were made to reunify the child with the parent or that supportive services must be made available to the parent. Diligent efforts are a statutorily mandated element in other grounds for TPR.

2. Burden of proof

In an abandonment case, the authorized agency must present "clear and convincing evidence" that the parents intend to forego their parental rights and obligations. For Native American children, the standard is "beyond a reasonable doubt," as required by the federal Indian Child Welfare Act (ICWA).

The agency's evidence must document the parents' failure to visit the child and communicate with the child or agency, even though they were able to do so and were not prevented or discouraged from doing so by the agency. In defense, the parents may introduce evidence in court to rebut the presumption of their ability to visit and communicate with the child. If the parent's ability to visit and communicate is questionable, the court will decide its validity. The agency may then be able to introduce additional evidence of the parent's ability to visit or communicate to rebut the parent's evidence and satisfy the burden of proof [SSL §384-b(3)(g)(i)].

3. Jurisdiction

A TPR petition on the grounds of abandonment may be filed in either Family Court or the Surrogate's Court. In some counties, it might be the practice to bring abandonment cases only in the Family Court or the Surrogate's Court. However, before hearing the proceeding, the court must determine if the child is under the jurisdiction of a Family Court in another county [SSL §384-b(3)(c-1)].

If the child was placed in foster care under FCA Article 10, 10-A, or 10-C or under SSL §358-a, the proceeding must be heard in the Family Court in the county where the proceeding originated and, where practicable, by the judge who last heard the proceeding [SSL §384-b(3)(c)]. See **Appendix 5.1** for detailed information on the venue in which to file the petition.

Under some circumstances it may be advisable to allege two termination grounds in the same petition (e.g., abandonment or, as an alternative, permanent neglect), either because the evidence indicates more than one ground is appropriate, or because there is a fine line between the courses of action which may be taken.

4. Required allegations

The petition to initiate an abandonment proceeding must contain allegations sufficient to establish each element of the abandonment case [SSL §§384-b (4)(b); (5)(a); and (5)(b)]. Specific dates should be included in the petition to indicate that the six-month period has been satisfied. Statements in the petition must attest that the parent has abandoned the child:

- for a six-month period immediately before the date on which the TPR petition is filed in court; and
- has failed to visit the child and communicate with the child or the agency although able to do so; and
- has not been prevented or discouraged from doing so by the agency.

5. Notification requirements

In any termination proceeding, it is necessary that a parent be notified that the proceeding may result in their parental rights being terminated. Personal service of the summons or citation is generally required. Only in those cases when the court is satisfied that personal service is not feasible will the court permit an alternative form of service, such as notice in the newspaper most likely to be seen by the missing parent.

In most abandonment cases, however, parental whereabouts are unknown. The caseworker is required to conduct a diligent search for the absent parents before the court will allow service by publication. See **Chapter 6** for additional information about diligent searches for absent parents and service by publication. The caseworker's attempts to locate the missing parents should be detailed in an affidavit, which will be submitted to the court in support of the request for publication [SSL §384-b(3)(e)].

The parents, the parents' attorney, and other persons as the court may direct, must be given a copy of the petition and notice of the abandonment proceeding in advance of the court date. The notice must inform the parents:

- that the proceeding may result in an order freeing the child for adoption that would take place without further consent of or notice to the parent; and
- that the parents have the right to counsel and that the court will assign them a lawyer if they cannot afford one.

See **Chapter 7** for a discussion of the notice requirements for fathers of children born out of wedlock.

If the whereabouts of a parent remains unknown following diligent efforts to locate them, the court may dispense with personal service and authorize an alternative form of service, such as notice by publication [SSL §384-b(3)(e)].

6. The hearing

An abandonment proceeding is usually limited to a fact-finding hearing before a judge, without a jury. After reviewing the evidence presented during the hearing, the court will decide whether the child has or has not been abandoned. Although the statute requires only a "fact-finding hearing" in abandonment cases, some judges may also call for a "dispositional hearing" to determine whether termination would be in the child's best interests.

The agency presents witnesses who testify to facts relevant to the issue of abandonment. These witnesses typically are:

The case supervisor: This witness will be able to testify that the case records are kept in the ordinary course of the agency's business. This testimony is crucial when the agency wishes to introduce the records into evidence, as they otherwise fall under the hearsay exclusionary rule (see **Chapter 6**) and become admissible only under the "business record" exception.

The caseworker: The child's caseworker is an absolutely essential witness in an abandonment proceeding. The caseworker will answer questions about the child and the parents. Questions vary from case to case but normally will address information such as:

- The failure of the parent to make contact with the agency.
- The fact that the caseworker is unaware of any visit or communication by the parent with the child for the six-month period in question.
- The dates of the parent's last contacts with the child and the agency.
- Relevant communications between the parent and the caseworker.
- Facts about the parent's failure to support the child or send letters, cards, or gifts.
- Where appropriate, a detailed account of attempts to locate the missing parent.

The foster parents/agency employee: Depending on the circumstances of the case, the foster parents and/or an agency employee may testify about communications and/or visits by the parent with the child and communications by the parent with the agency.

The child: The child usually is not called as a witness at the hearing. A court-appointed attorney for the child represents the child if the child does not have an independent attorney. If the child has relevant information to share with the court related to their abandonment, the child may testify in court or the attorney may arrange to have the judge talk to the child, usually in the judge's chambers [FCA §249]. See **Chapter 6**, Section 2.

7. After the hearing

If the court determines that the child has been abandoned, it will sign an order committing the guardianship and custody of the child to the LDSS commissioner, a VA, or the child's foster parent [SSL 384-b(3)(a)]. For Title IV-E eligibility purposes, guardianship and custody must be committed to the LDSS.

Prior to that determination, the child was in the LDSS commissioner's care and custody, but the commissioner did not have guardianship of the child. The order terminates the parents' rights and the guardianship, including the right to consent to adopt, is transferred from the parent to the LDSS.

C. *Permanent neglect*

State law allows the termination of parental rights when a child is "permanently neglected." A permanently neglected child is defined in SSL §384-b(7)(a) as a child:

- who is in the care of an authorized agency; and
- whose parent or custodian has failed to substantially and continuously or repeatedly to maintain contact with the child, or to plan for the future of the child although physically and financially able to do so, despite the authorized agency's diligent efforts to encourage and strengthen the parental relationship when such efforts would not be detrimental to the best interests of the child, for a period of either:
  - at least one year following the date the child came into the care of an authorized agency; or

- 15 out of the most recent 22 months following the date the child came into the care of the agency.

A petition to terminate parental rights on the grounds of permanent neglect may be filed even if an Article 10 proceeding is still pending, as long as the child has been in care for at least one year or 15 of the most recent 22 months.

1. Legal elements of permanent neglect

The following terminology is used in SSL §384-b (7) to describe the elements that must be proven in a TPR proceeding based on the ground of permanent neglect:

"Failure for a period of more than one year, or 15 out of the most recent 22 months following the date the child came into care"

The child must be in the care of the agency (which includes foster care) and have been subjected to permanent neglect for a one-year period or for 15 of the most recent 22 months. The one-year period may be any consecutive period following entry of the child into foster care.

Unlike a case of abandonment, however, the one-year or 22-month period does not have to immediately precede the filing of the TPR petition in court. Therefore, even if a parent has recently engaged in contact to plan for the child, the agency still may file a permanent neglect petition on the basis of the parent's conduct during an earlier 12-month period. In practice, it is preferable to file the petition promptly upon the accumulation of 12 months of conduct that constitutes permanent neglect. To delay and allow a resumption of contact after 12 months of such conduct may impact the disposition of the case and subject the child to further confusion and emotional trauma [18 NYCRR 430.12(d)(2)].

"Substantially, continuously, or repeatedly maintain contact with"

The permanent neglect cause of action emphasizes the quality of the parent's relationship with the child in addition to the number of contacts with the child.

Evidence of insubstantial or infrequent contact by a parent with the child does not, by itself and as a matter of law, prevent the court from making a determination of permanent neglect. The same section of the law makes clear that a "visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood will not be deemed a substantial contact." It is important to realize that a perception of what is "affectionate and concerned parenthood" may vary and that the agency and the court may differ on this issue, as may different judges [SSL §384-b(7)(b)].

Because the agency's burden of proof regarding the quality of the parental relationship involves subjective judgments, two important requirements for the preparation of permanent neglect cases are careful case record documentation and close consultation with the agency's attorney.

"Or plan for the future of the child"

The parent's failure to plan for the future of the child is a separate and distinct ground for a finding of permanent neglect. Even when a parent visits the child regularly, if they fail to make a realistic plan for the child's return home and to work constructively toward

implementation of that plan, the parent could lose custody and guardianship of the child under the permanent neglect statute.

The law broadly defines the elements that constitute a parent's failure to plan, including the failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent" [SSL §384-b(7)(c)].

The extent to which a parent participates with the caseworker in the development and implementation of the Family Assessment and Service Plan (FASP) is likely to become evidence in the court proceeding. The FASP details the supportive services necessary to facilitate the timely, safe reunification of the family. It must be periodically reviewed with the parents and their service needs must be continually reassessed by the agency. The caseworker must record information about the parents' cooperation in finalizing the child's permanency plan in the Permanency Hearing Report that is provided to the court.

The agency has responsibility for developing the FASP and for attempting to involve and consult with the child's parents in the process. The agency is required to provide the parents with a copy of the completed FASP, so both the agency and the parents are working from the same document that clearly outlines the goals for the family and the actions the parents and service providers are to take to achieve those goals. Parental cooperation is essential if the agency is to meet its responsibility to finalize the child's permanency plan and return the child home within a reasonable time.

In determining whether the parent has planned for the child's future, the court may consider whether the parent(s) made use of services that were available and offered to them, including [SSL §384-b (7)(c)]:

- Medical services
- Psychiatric services
- Psychological services
- Parenting skills training
- Drug and alcohol rehabilitative services
- Other necessary social and rehabilitative services
- Any material resources made available to the parent

Practice Tip: Keeping detailed records

As you enter information in the case record, keep in mind that it may eventually be presented in court as part of a TPR petition. When the standard of proof is "clear and convincing evidence," the more information the better.

- Document everything — all contacts and attempted contacts with parents, relatives, the child, foster parents, and service providers.
- Use direct quotes frequently.
- Keep records of phone contacts and messages.
- Every contact that you have with a parent should record that you mentioned to them some aspect of the current service plan.

Source: Burt, M. (2012). "Legal Grounds for Termination of Parental Rights in NYS," Retrieved from http://affcny.org/

The parents' failure to avail themselves of these services must be carefully documented by the caseworker in the FASP progress notes, referrals, and reports from service providers filed in CONNX. The determination of whether there has been a failure to plan will require careful consideration of almost every aspect of the parents' situation. Because there are so many elements involved in this determination, careful consultation with the agency's attorney will be necessary when the agency intends to rely on the parents' failure to plan as the basis for initiating a permanent neglect proceeding.

Whenever there are facts that may support a failure to plan or a failure to maintain contact with the child, the agency should include both elements in its petition. The combination may significantly strengthen the case for termination on the grounds of permanent neglect.

"Although physically and financially able to do so"

For a determination of permanent neglect, parents must have the physical and financial ability to maintain contact with the child and to plan for the child's future [SSL §384-b]. The law specifies how various situations will affect a parent's ability.

For example, a parent is considered to be physically able to maintain contact and participate in planning despite their use of drugs or alcohol. However, a parent who is "actually hospitalized or institutionalized" because of drug or alcohol use is deemed to be physically unable to maintain contact or to plan a child's future.

Hospitalized or institutionalized parents

If a parent is hospitalized or institutionalized as the result of a condition meeting the definition of "mental illness" or "intellectual disability" contained in SSL §384-b, the agency may consider seeking termination on the basis of one of those grounds and also seek termination on the basis of permanent neglect [SSL §384-b(7)(d)(1)].

The time during which a parent is actually hospitalized or institutionalized shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child [SSL §384-b(7)(d)].

Parents who are **incarcerated** are obliged to fulfill the requirements of visiting or communicating with the child. However, the law recognizes that an incarcerated parent will need assistance in maintaining contact with or planning for the future of their child.

In order to determine whether an exception to the requirement to file a TPR is warranted, the authorized agency must assess whether the parent maintains a meaningful role in the life of a child and, if so, whether the continued involvement of the parent in the child's life is in the best interests of the child. See **Appendix 5.2**, "Issues Involving Incarcerated Parents."

Under the law, the parent must be both financially and physically able to visit, plan, and maintain contact with their child. Financial ability has been interpreted as the possession of minimally adequate financial resources. Public assistance funds provided to the parent will usually qualify as sufficient financial ability. Some agencies offer financial assistance to parents to facilitate visits with children. It is important that the caseworker document efforts to financially assist parents to demonstrate to the court that the agency offered this assistance.

Finally, the statute provides that, if a parent fails to appear in court to defend the case after they have received proper notice of the proceeding, it is presumed that they have the physical and financial ability to do so. This means that the agency may not be required to prove the physical and financial ability of a parent whose location is unknown.

"Notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship"

The statute provides that the parent's failure to maintain contact or plan must be "notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship."

In most cases, the agency will have to prove that it exercised diligent efforts to assist the parent. In relation to permanent neglect, "diligent efforts" are defined to mean reasonable attempts by an authorized agency to assist, develop, and encourage a meaningful relationship between the parent and child, including but not limited to [SSL §384-b(7)(f)]:

- Consulting and cooperating with the parents in developing a plan for appropriate services to the child and the child's family.
- Making suitable arrangements for the parent to visit the child (except that with respect to an incarcerated parent; arrangements for the incarcerated parent to visit the child outside the correctional facility are not required unless reasonably feasible and in the best interests of the child).
- Providing services and other assistance to the parents, except incarcerated parents, so that problems preventing the discharge of the child from care may be resolved or ameliorated.
- Informing the parents at appropriate intervals of the child's progress, development, and health.

- If the parent is incarcerated, making suitable arrangements with a correctional facility and other appropriate persons for the parent to visit with the child within the correctional facility, if visitation is in the best interests of the child.
- Providing information obtained from OCFS outlining the legal rights and obligations of a parent who is incarcerated or in a residential substance abuse treatment program whose child is in custody of an authorized agency, and on social or rehabilitative services available in the community, including family visitation services to aid in the development of a meaningful relationship between the parent and the child.

Practice Tip: Information on parents' rights and obligations

These OCFS publications may be given to parents who are incarcerated or in a residential substance abuse treatment program:

- *You don't have to stop being a parent while you are incarcerated* (Pub. 5113 in English, Pub. 5113-S in Spanish)
- *You don't have to stop being a parent when you are in a residential substance abuse treatment facility* (Pub. 5114)

This list is not all-inclusive. In a given case, the court may consider whether the agency could have made other efforts or provided other services to reunite the family before it makes a finding of permanent neglect. Because of this possibility, the agency should provide every reasonable service available and appropriate to a particular case.

As the authorized agency may be called upon to prove in court the efforts that it has made, accurate and timely documentation in the case record is essential. An agency must be able to document what steps were necessary to develop a meaningful relationship between the parent and child, what the parent may have done or attempted to do to accomplish this goal, and what was done to identify the essential steps to the parent. It is particularly important to note whether the parent accepted and followed through on opportunities for counseling, medical or psychiatric care, or other services that were available and which were recommended as resources to strengthen the parent/child bond.

Examples of services that might be appropriate include:

- Drug or alcohol rehabilitation programs
- Assistance in obtaining employment
- Housing assistance
- Public assistance, if necessary
- Medical and psychiatric assistance
- Homemaker services
- Assistance from public health nurses
- Occupational rehabilitation

- Parent training or parent aide services
- Other available services appropriate to the particular case

The authorized agency must demonstrate that diligent efforts have been made to keep the parent informed of the child's whereabouts, progress, and problems; to encourage and cooperate with the parent in arranging frequent and meaningful visits; and to assist the parent, either directly through counseling or through arranging for other essential services, to take the steps necessary to reestablish the home and provide adequate care for the child. If the parent is unresponsive to these efforts over at least a one-year period, the agency should determine whether TPR is advisable.

Just as the court may require authorized agency efforts in addition to those listed in the statute, the court, in situations when warranted, may be satisfied with limited provision of services by the authorized agency.

Agencies do **not** have to present evidence of diligent efforts to encourage and strengthen the parental relationship in a permanent neglect proceeding when [SSL §384-b(7)(a)&(e)]:

- The parent has failed, for a period of six months, to keep the agency informed of their location, provided that the court may consider the particular delays and barriers experienced by an incarcerated parent or a parent participating in a residential substance use treatment program in keeping the agency apprised of the parent's location.
- An incarcerated parent has failed on more than one occasion while incarcerated to cooperate with a voluntary authorized agency in its efforts to assist the parent to plan for the future of the child or in such agency's efforts to plan and arrange visits with the child.
- A court has previously determined that reasonable efforts to make it possible for the child to return safely to their home are not required.

"When such efforts will not be detrimental to the best interests of the child"

The statute provides that the authorized agency will not be held accountable with respect to its diligent efforts to a parent when the circumstances in a particular case determine that such efforts would be detrimental to the best interests of the child, and also when the parents move and neglect to inform the agency of their whereabouts for a period of six months [SSL §384-b(7)(a)&(e)(i)].

Some indications that efforts to encourage and strengthen the parental relationship would not be in the child's best interests are [18 NYCRR 431.9 (b)(2)(i-v)]:

- The parent is addicted to alcohol or drugs to such a degree that the parent's ability to function in a mature and reasonable manner is impaired.
- The parent's anti-social behavior has resulted in frequent incarceration.
- The parent consistently expresses hostility toward the child or there is evidence of neglect and/or abuse during periods when the child has visited the parent.
- The child consistently expresses resistance to visits from the parent when the child is considered to be of sufficient maturity and intelligence to make such a judgment.

- A small child without sufficient maturity or judgment who exhibits resistance or defensive behavior, such as continual crying when parents visit, bedwetting, compulsive scratching, and nervous habits that are evident only when the child is with parents but not evident in everyday behavior in the foster home.
- The parent's mental illness, manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that if the child were returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the Family Court Act.
- The parent has a developmental disability with impaired adaptive behavior to such an extent that if such child were returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the Family Court Act.

The agency is not required to demonstrate diligent efforts if a judge has previously determined that reasonable efforts to make it possible for a child to return safely to their home were not required. See **Appendix 5.3**, "When Reasonable Efforts are Not Required."

Efforts for the family continue

When the Family Court determines that the agency is not required to make reasonable efforts to make it possible for the child to return safely to their home, this does not mean that the agency is prohibited from making such efforts. The agency should still assess what type of services are appropriate for the family and provide such services without delaying the permanency plan for the child. When the court issues an order that reasonable efforts to reunify the child with their parents are not required, the authorized agency is still required to make reasonable efforts to finalize the child's permanency plan.

2. Burden of proof

Permanent neglect proceedings are divided into two separate stages: the fact-finding hearing and the dispositional hearing.

The fact-finding hearing

During the fact-finding stage, the agency carries the burden of proving its case.

State law provides that only "competent, material and relevant evidence may be admitted in a fact-finding hearing." This rule conforms to the general rule in most civil cases and allows the introduction of any evidence that would qualify as competent, material, and relevant (see **Chapter 6**) (FCA §624).

Evidence of the parent contacting or failing to contact the child during the period of time following the filing of the petition is inadmissible at the fact-finding hearing. The authorized agency should file the petition without concern that its case might be unsuccessful if there is a sudden parental interest spurred by the initiation of the proceeding rather than by a genuine concern for the child. If, however, this sudden interest by the parent results in the denial of the petition, the agency may seek to appeal the decision (FCA §624). If the court determines that the child has been permanently neglected, the dispositional stage begins.

The dispositional hearing

At the dispositional hearing, the agency must prove that the termination of parental rights and freeing the child for adoption are in the best interests of the child (FCA §623). At the discretion of the court, the dispositional hearing may [FCA §625(a)]:

- begin immediately after the fact-finding hearing; or
- be dispensed with on the consent of all parties, and the court may make a disposition based on the competent evidence presented during the fact-finding stage.

Because the purpose of the dispositional hearing is not the adjudication of rights but determining a dispositional order that will best serve the welfare of the child, the court is afforded wider latitude to hear evidence than in the fact-finding stage. The only legal requirement is that the evidence be material and relevant (FCA §624). The dispositional hearing may include evidence such as written reports, evaluations, and opinions that relate to the background of the child and family, as well as expert recommendations regarding the proper disposition order for the child.

A foster parent who has had continuous care of the child for at least 12 months has the right to become a party to the dispositional hearing. At the dispositional hearing, both birth parents and foster parents are considered third parties, with one not favored over the other. Each case is decided solely on the basis of the child's best interests.

In addition, evidence of parental contact or lack of contact after the filing of the petition is permitted in a dispositional hearing. The court may consider this evidence, but it cannot be, by itself, a sufficient basis to determine the disposition of the case (FCA §624).

There also is no requirement for "competent" evidence in the dispositional hearing. This means the court may consider evidence that would be excluded from the fact-finding stage as inadmissible hearsay or opinion evidence. Examples of evidence that the court might consider at the dispositional stage include:

- Psychiatric and psychological evaluation
- Probation and police reports
- Social investigations that include recommendations by the agency or a court social worker
- Recommendations of the attorney for the child

Reports prepared by a probation officer, or the agency are considered to be confidential information for use by the court. The court has the discretion to disclose or withhold portions of the report, or the entire report, from the attorney for the child, other attorneys, the parties to the proceeding, or other appropriate person [FCA §625 (b)].

Jurisdiction

A permanent neglect cause of action may be brought only in Family Court, which possesses exclusive jurisdiction over this kind of proceeding. See **Appendix 5.1** for detailed information on the venue in which to file the petition.

3. Notification requirements

As in all termination proceedings, the parents, the parents' attorney, and other persons prescribed by the court must be given a copy of the petition and a notice of proceedings, preferably through personal service, before the hearing [SSL §§384-b(3) & 384-c]. See **Chapter 6** for more information.

4. The hearing

In both the fact-finding and the dispositional hearings, the court will hear evidence from witnesses presented by the parties. In a permanent neglect proceeding, the agency may use the following persons as witnesses:

The case supervisor: The supervisor often lays the foundation for introduction of the case record.

The caseworker: The child's caseworker will be an essential witness in a permanent neglect proceeding. The caseworker will answer questions about the child and the parent that normally will include inquiries related to the following:

- the date the child came into care and the circumstances surrounding the placement;
- the efforts made by the parent to reunite the family;
- contacts, visitation, and communications between the parent and child, including caseworker observations of the quality of such contacts;
- the efforts made by the agency to aid the parent in planning for the child's future and in rehabilitating the family unit;
- facts about a parent's failure to support the child, when relevant; and
- facts about a parent's physical and financial ability, when relevant.

The foster parents: The foster parents may testify to the child's current condition and functioning. They also may be needed to give evidence regarding any special care needs of the child. (See **Chapter 4**, Section A.)

The child: Generally, the child is not called as a witness at the hearing. An attorney for the child will be assigned by the court to represent the child if independent legal representation is not available to the child. To the extent practicable, this will be the same attorney for the child who participated in prior foster care proceedings. If the child has relevant information to share with the court, many judges prefer to talk informally with the child in the judge's chambers [FCA §249].

Other persons: Other persons may testify if they have relevant information about the parents' failure to maintain contact with the child or plan for the child. The identity of these witnesses will vary depending upon the circumstances of each case, but they must have firsthand knowledge of the parents and/or the child. These witnesses may include:

- School officials or teachers who have dealt with the parents.
- Relatives, neighbors, or employers of the parents.
- Persons who have observed parent/child contacts.

- Expert witnesses, such as psychologists, psychiatrists, other social workers, or therapists who have worked with or tested the parent (assuming this testimony is not inadmissible on the ground of confidentiality).
- Law enforcement officials who have been involved with the parent, when relevant.
- Medical witnesses, when relevant.
- A qualified expert witness for a Native American child in a case where the Indian Child Welfare Act (ICWA) applies. The expert will speak on whether continued custody by the parents of a Native American child or a Native American custodian is likely to result in serious physical or emotional harm to the child. See **Chapter 12** for more information regarding ICWA.

Certain witnesses may be required to testify in both the fact-finding and dispositional phases. The caseworker should give the agency's attorney a list of all possible witnesses who have first-hand knowledge of the parents and/or child so the attorney may decide which witnesses will be presented and in which phase they will be needed.

5. After the hearing

The court will make one of three dispositions at the conclusion of a permanent neglect proceeding (FCA §631). The sole criterion to be used in making the disposition is the "best interests of the child."

- Dismissal of the petition
- Suspended judgment
- Commitment of the guardianship and custody of the child to the agency

Dismissal of the petition

If the statutory elements of permanent neglect have not been established by clear and convincing evidence, the court must dismiss the petition. Even if the court dismisses the permanent neglect petition, it may choose to "reconsider an underlying order of placement or commitment." By such action, the court could conduct a permanency hearing and order either an extension of foster care or return of the child to the parent, for example (FCA §632).

Suspended judgment

When the judge finds that the parent has permanently neglected the child, the court may commit guardianship and custody of the child to the agency so the child can be freed for adoption.

The judge may determine, however, that the best interests of the child would be served by giving the parent/child relationship another chance. Suspended judgments are uncommon: in 2018 there were 167 court cases in NYS with suspended judgments, less than 7% of all TPR cases.[1] When they do occur, however, the child's adoption will be delayed. During the period of the suspended judgment, the child remains in foster care. Accordingly, the child's caseworker has a vital role in supervising and evaluating parental progress.

Judgment may be suspended for a maximum of one year "unless the court finds at the conclusion of that period that exceptional circumstances require an extension of that period for

[1] NYS Council on Children and Families, "Kids' Well-Being Indicators Clearing House." Retrieved from https://www.nyskwic.org/get_data/indicator_profile.cfm?subIndicatorID=85.

an additional year" [FCA §633(b)]. A suspended judgment may not extend beyond two years, regardless of the circumstances.

To make sure that all appropriate efforts are made by the parties involved and to minimize any misunderstanding regarding the responsibilities of the parent, the court's order must specify the parent's obligations regarding permissible terms and conditions of an order suspending judgment (22 NYCRR 205.50).

A suspended judgment must be related to the adjudicated acts or omissions of the parent and contain at least one of the following terms and conditions requiring the parent to:

- Sustain communication of a substantial nature with the child by letter or telephone at stated intervals.
- Maintain consistent contact with the child, including visits or outings, at stated intervals.
- Participate with the agency in developing and carrying out a plan for the future of the child.
- Cooperate with the agency's court approved plan for encouraging and strengthening the parental relationship.
- Contribute toward the cost of maintaining the child if the parent has sufficient means or is able to earn such means.
- Seek to obtain and provide proper housing for the child.
- Cooperate in seeking to obtain and accepting medical or psychiatric diagnosis or treatment, alcoholism or drug abuse treatment, employment or family counseling or child guidance, and permit information to be obtained by the court from any person or agency from whom the parent is receiving or was directed to receive such services.
- Satisfy all other reasonable terms and conditions that the court determines to be necessary or appropriate to ameliorate the acts or omissions that gave rise to the filing of the petition.

The order may contain other provisions and the procedures that must be followed if the parent fails to comply with the court's directions [22 NYCRR 205.50 (b) & (c)]:

- The order must include the duration, terms, and conditions of the suspended judgment. A copy of the order must be given to the respondent parent.
- The order must include a written statement in conspicuous print informing the parent that if the parent fails to obey an order, this may lead to revocation of the order and to the issuance of a new order for the commitment of the guardianship and custody of the child (FCA §633).

The court may set one or more times at which the respondent or the agency caring for the child must report to the court as to whether there is compliance with the terms and conditions of the suspended judgment. This must happen at least 30 days before the suspended judgment expires (FCA §633). If the suspended judgment is not revoked or extended, there can be no TPR based on the court's finding of permanent neglect. In such a case, a second permanent neglect petition will have to be filed and new fact-finding and dispositional hearings held.

Not later than 60 days before the expiration of the suspended judgment, the agency must file a report with the Family Court and all parties regarding the respondent's compliance with the terms of the suspended judgment. The court must review the report on the scheduled court

date. Unless a motion or order to show cause has been filed prior to the expiration of the suspended judgment alleging a violation or seeking an extension of the period of the suspended judgment, the terms of the disposition of the suspended judgment will be deemed satisfied and an order committing guardianship and custody of the child may not be entered [FCA §633(d)].

If a respondent parent fails to comply with the terms or conditions of an order suspending judgment, a motion, or an order to show cause for revocation of the order may be filed. Service of a summons and a copy of the petition must be made in accordance with FCA §617.

If, after a hearing, the court is satisfied that the allegations of the petition have been established, the court may modify, revise, or revoke the order of suspended judgment. The court may at any time, upon notice and opportunity to be heard to the parties, their attorneys, and the attorney for the child, revise, modify, or enlarge the terms and conditions of a suspended judgment previously imposed.

Practice Tip: Parent's noncompliance

If the parent fails to comply with the terms of the suspended judgment, the agency should not delay in filing a motion in court alleging the violation. Waiting until the final report date would make it too late to have the order revoked and a new TPR filing would be required. There should be clear statements of the acts or omissions alleged. The court will hold a hearing and may then modify, revise, or revoke the order of suspended judgment.

Source: Burt, M. (2010). "Caselaw on Suspended Judgments in TPRs." NYS Unified Court System. Retrieved from https://ww2.nycourts.gov/sites/default/files/document/files/2018-10/suspendcase.pdf

D. *Mental illness and intellectual disability*

A parent's mental illness or intellectual disability are two distinct grounds for terminating parental rights and freeing a child for adoption. Although they are separate grounds, the same statutory sections govern them and the evidentiary elements of each are essentially the same.

To determine whether the facts of a case support a TPR proceeding on these grounds, the case should be reviewed from two perspectives: the actual condition of the parent and the effect of that condition on the well-being of the child if they returned home. This determination is usually successful on the basis of the most convincing expert testimony.

1. Legal elements of a mental Illness or intellectual disability case

The elements of a mental illness or an intellectual disability cause of action are:

- The parent or parents are presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately before the date on which the petition has been filed in the court [SSL §384-b (4)(c)].
- The legal sufficiency of the proof in a proceeding will not be determined until the judge has taken the testimony of a psychologist or psychiatrist.

The judge must order the parent to be examined by, and take the testimony of, a qualified psychiatrist or a licensed psychologist appointed by the court pursuant to Judiciary Law §35. If the parent refuses to submit to the court-ordered examination or becomes unavailable, the

appointed psychologist or psychiatrist may testify without an examination of the parent. Their testimony would be based on other available information, such as agency, hospital, or clinic records, provided that such other information affords a reasonable basis for their opinion. The parent and the agency have the right to submit other psychiatric, psychological, or medical evidence [SSL §384-b(6)(c)-(e)].

The following terminology is used in SSL §384-b (6)(a) to describe the elements that must be proven in a TPR proceeding based on the ground of mental illness:

"An affliction with a mental disease or mental health condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the Family Court Act"

This definition is of limited practical help to a caseworker who must decide whether a parent's condition qualifies as mental illness. When the parent's behavior suggests a diagnosis of mental illness, the caseworker must seek the advice of a mental health professional, who should interview both the parent and the child to determine whether mental illness exists, the effect of the parent's condition on the child, and the prognosis for improvement. In certain situations, the diagnosis may be aided by the parent's psychiatric history or by an earlier diagnosis of, or hospitalization for, mental illness.

The caseworker should note, however, that the parent's condition must place the child in danger of becoming a neglected child, as defined in FCA §1012(f). If the child is not in danger of becoming a neglected child because of the parent's mental illness, the parent's mental health condition cannot be the basis of a TPR petition.

There are two basic considerations: the mental health of the parent, and how their condition affects their ability to care for a child. Both of these elements must also be present to file a TPR petition based on mental illness.

The following terminology is used in SSL §384-b (6)(b) to describe the elements that must be proven in a TPR proceeding based on the ground of intellectual disability:

"Sub-average intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child"

The parent's intellectual disability must place the child in danger of becoming a neglected child, as defined in the previous section.

The intellectual disability also must have originated "during the developmental period." Records indicating that the parents' intellectual disability was present during their childhood will be important in supporting the agency's position for the filing of the petition. If the intellectual disability developed later in the parent's life due to an injury, for example, the elements of the statute will not be satisfied. In such a case, the caseworker should determine whether a TPR petition might be filed on grounds other than intellectual disability.

The caseworker must rely only on mental health professionals for a clinical determination that the parent is, in fact, intellectually disabled. Although certain objective behavior patterns may indicate that the parent has neglected or is likely to neglect the child, the

mental health expert may also be able to determine whether the parent's condition indicates that the child is likely to be neglected in the future.

"Case law regarding use of the phrase 'mental retardation' under this section shall be applicable to the term 'intellectual disability'"

Determinations in previous cases that used the antiquated term "mental retardation" may be cited as applicable to a TPR proceeding based on intellectual disability.

The following terminology is used in SSL §384-b (6)(a) and (b) to describe the elements that must be proven in a TPR proceeding based on either mental illness or intellectual disability of the parent:

"The child would be in danger of becoming a neglected child"

A neglected child, as defined in FCA§1012 (f), is a child less than 18 years of age whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of the child's parent or other person legally responsible for the child's care to exercise a minimum degree of care by providing the child with:

- Adequate food, clothing, or shelter.
- An education, notwithstanding the efforts of the school or local education agency or child protective agency to ameliorate such alleged failure prior to the filing of a neglect petition.
- Medical, dental, optometric, or surgical care, though financially able to do so or offered financial or other reasonable means to do so.
- Proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm or a substantial risk thereof, including:
  - the infliction of excessive corporal punishment;
  - misuse of a drug or drugs;
  - misuse of alcoholic beverages to the extent that the parent loses control of their actions; or
  - any other acts of a similarly serious nature requiring the aid of the court.

A neglected child may also have been abandoned by their parents or other person legally responsible for their care, in accordance with SSL §384-b(5).

Parent's misuse of drugs or alcohol

When the parent or other person legally responsible for the child is voluntarily and regularly participating in a rehabilitative program, their misuse of drugs or alcohol will not establish that the child is a neglected child unless there is further evidence that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired.

"Presently and for the foreseeable future"

For both the grounds of mental illness and intellectual disability, the parent's condition must be the cause of their present inability to provide proper and adequate care for the child. It also must be the basis of the parent's future inability to provide care. Future inability to provide proper and adequate care is a key element in any proceeding to terminate parental rights on the basis of mental illness or intellectual disability.

The statute does not define the term "foreseeable future" and the subjective determination of what it means may vary from court to court. There is case law that addresses this issue. In any event, "presently and for the foreseeable future" refers to the parent's continuing inability to care adequately for the child, and not to the parent's continuing mental illness or intellectual disability. Therefore, the statutory criteria will not be satisfied when, for example, the parent's condition, although long-term, may improve sufficiently to allow them to care for the child properly within a reasonable period of time.

"Proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately before the initiation of the proceeding"

There are no statutory criteria in SSL §384-b to indicate what constitutes "proper and adequate care." However, if the level of parental care would place the child in danger of becoming a neglected child, a cause of action for TPR can be sustained.

For the authorized agency to satisfy the statutory elements of permanent neglect, the child must have been in the agency's care for a continuous year up to the date the petition is filed. The one-year requirement does not refer specifically to the period of the parent's mental disability. It is the time frame before an agency can consider termination of parental rights based on mental illness or intellectual disability.

There may be situations in which a parent's mental illness or intellectual disability is a partial cause of the parent's inability to care for a child. For example, the parent may also be disabled by a physical illness or drug or alcohol addiction. If the caseworker can establish that the parent's mental health condition, in and of itself, would place the child in danger of becoming a neglected child, it is possible that the parent's rights might be terminated on this ground.

It is more likely, however, that it will be difficult to clearly separate the parent's mental health condition from another disability. In this situation, it may be possible to file a petition alleging more than one ground for termination, such as intellectual disability and permanent neglect, depending upon the specific facts of the case.

2. Burden of proof

In a proceeding to terminate parental rights on the ground of mental illness or intellectual disability, the case must be proven by "clear and convincing evidence." In the case of a Native American child subject to the provisions of ICWA, the standard is "beyond a reasonable doubt."

The court will require the parent to be examined by a mental health professional. In many cases, it will be the caseworker's responsibility to make sure that the examination is scheduled and carried out.

In addition to the neutral expert ordered by the court, attorneys for both the parent and the agency have the right to submit other psychiatric, psychological, or medical evidence. Thus, each side has the opportunity to fully present its case. The agency normally will employ its own expert to examine the parent and testify in court. The caseworker and the agency's attorney should be careful to provide sufficient evidence through documentation and expert testimony about three aspects of the parent's condition:

Diagnosis: When and by whom was the condition of the parent diagnosed?

Prognosis: Show clearly that services and/or psychiatric treatment, counseling, or training will not enable the parent to provide adequate care for the child, either now or in the foreseeable future.

Evidence of incapacity: Expert testimony to explain the diagnosis and prognosis.

For TPR based on mental illness or intellectual disability, it is not necessary for the agency to prove diligent efforts to strengthen the parental relationship or to show that such efforts would have been detrimental to the child.

If a parent refuses to be examined

The parent may refuse to be examined by the court-ordered expert. In such a case, the statute allows the court-appointed expert to testify to their opinion of the parent's mental health condition based on other available information, as long as the information provides a reasonable basis for such opinion.

Information specifically authorized by statute for the expert's use includes agency, hospital, or clinic records. Other reliable sources may be used if they provide accurate and relevant information upon which the expert's opinion can be based. The caseworker should carefully review the case record for any reports or other sources of information that would be useful to the agency's attorney when the expert must state an opinion without the benefit of an examination of the parent [SSL §384-b(6)(e)].

Privileged matters

According to New York law, certain communications between persons in various capacities are confidential and not available for disclosure, even in a court of law. This is designed to encourage individuals to seek professional assistance without fear of public exposure.

Public policy, however, is always subject to multiple, and sometimes competing, considerations that may make a policy decision give way to a more important consideration. In a TPR case, the need for permanency in a child's life has been determined by the NYS Legislature to be of greater importance than the confidentiality of certain communications. Therefore, the following communications are admissible as evidence in a TPR proceeding based on mental illness or intellectual disability [CPLR Article 45, SSL §384-b(3)(h)]:

- Communications between spouses
- Communications between physician and patient
- Communications between psychologist and client
- Communications between certified social worker and client

Other confidential communications, such as those between clergy and penitent, and attorney and client, remain privileged.

3. Jurisdiction

A cause of action to terminate parental rights on the basis of mental illness or intellectual disability may be brought only in Family Court, which has exclusive jurisdiction over this kind of proceeding [SSL §384-b(3)(d)]. See **Appendix 5.1** for detailed information on the venue in which to file the petition.

4. Required allegations

The petition must allege each element of the cause of action. To satisfy a mental illness or intellectual disability cause of action, the law requires that the petition include the dates that indicate the child has been in the care of the authorized agency for at least one year immediately before the date the TPR petition is filed in court. Other information to include [SSL §384-b (4)(c)]:

- The parent(s) is presently and for the foreseeable future unable to provide proper and adequate care.
- The parent's mental illness and/or intellectual disability is the reason for such inability.
- The child has been in the care of the agency for the required one-year period.
- The child would be in danger of becoming a neglected child if they were placed in or returned to the custody of the parent.

5. Notification requirements

SSL §384-b outlines the notice procedures for all the causes of action that can be used to terminate parental rights outside of the adoption proceeding itself. See **Chapter 6** for specific requirements of notice and service applicable to Family Court and for a discussion of the notice requirements for fathers of children born out of wedlock.

6. The hearing

The hearing on a mental illness or intellectual disability cause of action is a one-stage proceeding in which the court determines first whether the elements of the cause of action have been proved by the agency by clear and convincing proof (or, in the case of Native American children subject to ICWA, the standard is beyond a reasonable doubt). Although not expressly required by SSL §384-b, the agency should provide proof that the best interests of the child will be served by terminating the parent's rights and committing the custody and guardianship of the child to the authorized agency for purposes of adoption.

The witnesses who may be presented are:

The case supervisor: This witness will testify that the agency's case record is kept in the ordinary course of the agency's business. This testimony is essential if the agency desires to introduce the case record into evidence.

The child's caseworker: Although the authorized agency will rely primarily on the testimony of experts, the caseworker may be asked to testify to facts about the parent's past child-care capabilities or other information relevant to the court.

Psychiatrist: When there is an allegation of mental illness, the agency should present its own psychiatrist to prove the diagnosis and prognosis of parental mental illness.

Psychologist: When there is an allegation of intellectual disability, the agency should present a psychologist of its own choosing in addition to those appointed by the court.

The foster parent(s): The foster parents may be needed to testify about the child's current condition and functioning and they may be needed to give evidence about any special care needs of the child. They also may give testimony relative to the issue of the best interests of the child.

The child: An attorney for the child will be assigned by the court to represent the child if independent legal representation is not available to the child. Although the child is not generally called as a witness at the hearing, if the child has relevant information to share with the court, the judge may speak to the child in the privacy of the judge's chambers (FCA §249).

Other persons: Other persons may testify if they can present evidence about either the parent's mental health condition or the best interests of the child.

7. After the hearing

In a mental illness/intellectual disability proceeding, the statute does not specifically provide for both a fact-finding and dispositional hearing. If the court finds that the agency has proved the elements sufficient to sustain a mental illness / intellectual disability petition, the parental rights may be terminated, and the custody and guardianship of the child committed to the agency for the purpose of adoption. Although the statute only requires a fact-finding hearing, the judge may decide to hold a dispositional hearing to determine the best interests of the child. It will be up to the agency's attorney to decide whether or not to challenge the judge's jurisdiction to hold a dispositional hearing.

E. *Severe abuse and repeated abuse*

The court may issue an order committing the guardianship and custody of a child to the agency when it finds that the parents severely or repeatedly abused the child. If the court has also determined that reasonable efforts are not required to reunite the child with their parents, a TPR petition on the ground of severe or repeated abuse may be filed immediately after the determination [SSL §384-b(4)(e)].

1. Severe abuse

This ground is most commonly used when a child has been seriously injured by a parent. The approach must be planned carefully, starting with the correct legal pleadings at the time of the abuse petition, but can result in the child being freed for adoption more quickly when it is unsafe to return them to the parents.

A child is considered to have been "severely abused" by their parent if any one of the following situations apply:

- The child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances showing a depraved indifference to human life, which resulted in serious physical injury to the child, as defined in NYS Penal Law (PL) §10.00(10).
- The child has been found in Family Court to be an abused child, as defined in FCA §1012(e)(iii), as a result of the parent's acts. The parent must have committed or knowingly have allowed to be committed a felony sex offense as defined in certain sections of the PL listed in SSL §384-b(8)(a)(ii).

- The parent has been convicted of murder in the first degree, murder in the second degree, manslaughter in the first degree, or manslaughter in the second degree and the victim was another child of the parent, another child for whom the parent was legally responsible, or another parent of the child. This requirement also applies to a parent who has been convicted of an attempt to commit any of the foregoing crimes. There is a spousal abuse defense when the convicted parent was the victim of physical, sexual, or psychological abuse by the deceased parent and such abuse was a factor in causing the homicide or attempted homicide.
- The parent has been convicted of criminal solicitation, conspiracy, or criminal facilitation, as defined in penal law, for conspiring, soliciting, or facilitating any of the foregoing crimes and the victim or intended victim was the child or another child of the parent or another child for whom the parent was legally responsible.
- The parent has been convicted of assault in the second degree, assault in the first degree, or aggravated assault, as defined in penal law, upon a person under 11 years of age and the victim of any such crime was the child, another child of the parent, or another child for whom the parent was legally responsible. This requirement also applies to a parent who has been convicted of an attempt to commit any of the foregoing crimes.
- The parent has been convicted in another jurisdiction of an offense which includes all of the essential elements of any crime listed above.

In addition, the agency is required to have made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the parent, when such efforts were not detrimental to the best interests of the child. It must also be shown that such efforts were unsuccessful and were unlikely to be successful in the foreseeable future [SSL §384-b(8)(a)(iv)].

When a court has previously determined that reasonable efforts were not required to make it possible for the child to be returned safely to their home, the agency is not be required to demonstrate diligent efforts to strengthen the parental relationship.

2. Repeated abuse

In order to terminate parental rights on the ground of repeated abuse, the agency must show that the parent has abused the child or another child in their care more than once over the previous five years.

A child is considered to be repeatedly abused by the parent when [SSL §384-b (8)(b)]:

- The child has been physically abused or sexually abused by the parent or the parent has knowingly allowed the child to be sexually abused [FCA §1012(e)(i) or (iii)]. Sexual abuse must be a felony sex offense as set forth in certain sections of Article130 of the Penal Law; and
- The child or any other child for whom the parent is or has been legally responsible was found by Family Court to be an abused child as defined in FCA §1012(e)(i) or (iii) on a previous occasion within the five years immediately preceding the initiation of the current TPR proceeding; or
- The parent has been convicted of a crime under PL §§130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70. 130.75 or 130.80 against the child, a sibling of

the child, or another child for whom the parent was legally responsible, within the previous five years; and

- The agency has made diligent efforts to encourage and strengthen the parent/child relationship, including efforts to rehabilitate the parent, when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future. Diligent efforts are not required where the court has issued a "no reasonable efforts" order.

3. Key legal elements: Diligent efforts

The following terminology is used in SSL §384-b (8)(b)(iii) to describe the diligent efforts that must be proven in a TPR proceeding based on the grounds of either severe abuse or repeated abuse.

"The agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent"

Termination proceedings based on either severe abuse or repeated abuse have one common element: the statutory requirement that, in addition to previous Family Court findings of parental abuse, the agency must be able to demonstrate it made diligent efforts to encourage and strengthen the parental relationship. This requirement can be waived if the efforts would be detrimental to the best interests of the child, such efforts have been unsuccessful in the past, and such efforts are unlikely to be successful in the foreseeable future.

As in permanent neglect proceedings, the agency is mandated to work toward strengthening the parent/child relationship. Although the statute does not specify what types of diligent efforts are required in these proceedings, the caseworker's review of the diligent efforts mandated in a permanent neglect TPR proceeding might be helpful (see Section C of this chapter).

When the parent has committed an act of felony sex offense or severe abuse under penal law, the District Attorney may charge the parent with a criminal offense. The court may issue an order of protection prohibiting the parent from having contact with the child or prohibiting unsupervised visits between the parent and child. The agency should obtain a copy of the order of protection and follow all of the provisions in the order.

If the parent is convicted and sentenced to prison, they may be incarcerated during the child's placement in foster care. This may impact the agency's ability to work with the parent and may present a barrier to the possibility of terminating parental rights. In this situation or any other involving an incarcerated parent, the authorized agency is still required to exert diligent efforts to assist, develop, and encourage a meaningful relationship between the parent and child, unless the agency satisfies one of the exceptions listed below. There may be an order of protection issued by the court preventing the parent from having contact with the child.

"When such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future"

A decision to avoid diligent efforts must be carefully considered and should not be put into effect without consulting the agency attorney. Diligent efforts are not required for a finding of severe or repeated abuse when **both** of the following elements are satisfactorily proven:

1. Such efforts will be detrimental to the best interests of the child**.** The authorized agency has the burden of proof in the TPR proceeding to demonstrate that efforts would be detrimental to the best interests of the child; **and**
2. Such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future.

This element requires documentation of the parent's past failure to respond to, or benefit from, the rehabilitative services aimed at treating the problems related to child abuse. The authorized agency should be prepared to offer evidence that proves all of the following elements at the court hearing:

- The agency made sufficient and appropriate services available to the parent to help alleviate the causes of child abuse.
- The agency's efforts to rehabilitate the parent were unsuccessful because the parent did not cooperate or was not able to obtain the parenting skills necessary to provide a safe return home for the child.
- Based on the parent's refusal or inability to use and benefit from the supportive and rehabilitative services offered by the agency, it is unlikely that continued diligent efforts will be successful in the foreseeable future.

Finally, the agency must show that diligent efforts are unlikely to be successful in the foreseeable future. This may require the caseworker's subjective evaluation of and expectations for future parental improvement. Expert opinions from third-party professionals such as psychiatrists and psychologists would be helpful. The depth of the trauma suffered by the child might also be a continuing barrier to a return home and may be proved by expert testimony. Although there is no statutory definition as to what is meant by "the foreseeable future," the period of time can vary from one to three years, depending on the court.

"Where a court has previously determined … that reasonable efforts to make it possible for the child to return safely to his or her home are not required, the agency shall not be required to demonstrate diligent efforts ..."

The authorized agency is not required to demonstrate diligent efforts if a judge has previously determined that reasonable efforts to make it possible for a child to return safely to their home are not required. The finding must be based on a determination that the parent has subjected the child to aggravated circumstances, has been convicted of certain crimes, or has had a prior involuntary termination of parental rights to the child's sibling. See **Chapter 3**, **Appendix 3.1** of this manual for details.

The LDSS may seek an order from the Family Court that reasonable efforts for the safe return of the child are not required. Such an order by the court does not mean that the

agency is prohibited from making such efforts. When the court issues an order that reasonable efforts to reunify the child with the child's parents are not required, the agency is still required to make reasonable efforts to finalize the child's permanency plan [FCA §§352.2(2)(c), 754(2)(b), 1039-b and 1052(b)(i)(A), SSL §§358-a (3)(b) and 384-b (8)(a)(iv)].

Also, when a court determines that reasonable efforts to reunite the family are not required, the agency may immediately file a TPR petition based on severe abuse when the parent has been convicted of one of the crimes listed in the statute, and the fact-finding hearing can begin immediately [SSL §384-b(4)(e)].

4. Key legal elements: Severe abuse

The following terminology is used in SSL §384-b (8)(a)(i) to describe the elements that must be proven in a TPR proceeding based on the grounds of severe physical or sexual abuse.

"The child has been found to be an abused child …"

If facts sufficient to sustain a petition alleging parental abuse have been established by clear and convincing evidence at a fact-finding hearing in a FCA Article 10 abuse proceeding, the Family Court must enter an order finding that the child is an abused child and must state the grounds on which it based its findings [FCA §1046(b)].

In the TPR proceeding based on severe abuse, it must be shown that there was a previous finding by the Family Court that the parent whose rights the agency seeks to terminate had abused the child.

"Reckless or intentional acts of the parent … evincing a depraved indifference to human life"

The type of parental misconduct envisioned by this element includes not only acts of cruelty and brutality intentionally inflicted on the child by the parent, but also those acts of gross negligence that show a depraved indifference to human life and have resulted in serious physical injury to the child.

Intent to cause the injury to the child does not have to be proved. Evidence of reckless acts that indicate the parent's callous disregard for the child's life will suffice if severe injury to the child was a direct result of the parent's reckless act.

When the court makes a finding of child abuse, it is required to specify in the order which definition of abuse has been proven. For the purposes of severe abuse terminations, the court must find and specify in the order that an act of abuse as defined in FCA §1012(e) has been established.

It should be noted that the definition of abuse in the Family Court Act is not the same as the definition of severe abuse in Social Services Law. In addition to a finding of abuse, the court also may make a finding of severe or repeated abuse as defined in SSL §384-b, which is admissible in a TPR proceeding based on severe or repeated abuse. In such cases, the court must state the grounds for the determination which must be based on clear and convincing evidence [FCA §1051(e)].

"… which result in serious physical injury to the child."

It is possible for a parent to commit an act that shows a depraved indifference to human life but does not result in serious physical injury to the child. Without this element, the court cannot find the child to be severely abused. The statute incorporates the meaning of the words "serious physical injury" as they are defined in PL.

"Serious physical injury" is defined as physical injury that creates a substantial risk of death or which causes death; or serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ [PL §10.00 (10)].

If the Family Court in an FCA Article 10 proceeding found that parental child abuse occurred and made a further finding to the effect that the abuse caused the child to suffer serious, life-threatening injuries, the judge at the TPR proceeding may take judicial notice of this fact. If this occurs, the agency may not have to offer medical evidence to prove the severity of the child's pre-placement injuries.

The following terminology is used in SSL §384-b (8)(a)(ii).

"Respondent must have committed or knowingly allowed to be committed a felony sex offense as defined in sections of the Penal Law"

The Family Court Act defines an abused child as one that has been subjected to acts that meet the definition of certain felony sex offenses [FCA §1012(e)(iii)]. This provision therefore describes a sexually abused child. The TPR statute also requires that the parent committed or knowingly allowed to be committed a felony sex offense as defined in PL §§130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, 130.75, 130.80, 130.95, and 130.96.

The text of Article 130 of the NYS Penal Law can be accessed at https://www.nysenate.gov/legislation/laws/PEN/P3THA130.

The definition of an abused child for the purposes of a TPR case based on severe abuse will permit a judicial finding of abuse against parents who, while they may not have inflicted the sexual abuse on the child themselves, allowed the abuse to occur. Also, for the purpose of terminating parental rights, the corroboration requirements contained in the penal law do not apply.

A TPR proceeding on the ground of severe abuse may also be based on the parent being found guilty of a crime listed in SSL §384-b (8)(a)(iii). The victim of the crime must be either the child, another child of the parent, another child for whose care such parent has been legally responsible, or another parent of the child, depending on the crime. (See page 31 of this chapter.)

5. Key legal elements: Repeated abuse

A necessary element in any termination proceeding alleging repeated abuse is that the Family Court made previous findings that the child or another child for whom the child's parent is or has been legally responsible was abused by the parent.

The following terminology is used in SSL §384-b (8)(a)(ii) to describe the elements that must be proven in a TPR proceeding based on the grounds of repeated abuse.

"The child or another child for whose care such parent is or has been legally responsible"

A key element in a case of repeated abuse is that the child or another child for whom the parent is or has been legally responsible was found within the previous five years to have been an abused child as a result of the parent's acts or the parent was convicted of a sex offense against the child, a sibling of the child, or another child for whose care the parent is or has been legally responsible.

The second finding of abuse does not necessarily have to have been committed against the same child who was previously injured or sexually abused. As long as it can be shown that the abusing parent had legal responsibility for both children, the agency can support a repeated abuse proceeding.

"Has been previously found, within the five years immediately preceding the initiation of the proceeding in which such abuse is found, to be an abused child"

An abused child, as defined in FCA§1012 (e), is a child less than 18 years of age whose parent:

- inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; or
- commits, or allows to be committed a felony sex offense against such child defined in PL Article 130;
- allows, permits or encourages such child to engage in any act described in PL §§230.25, 230.30, 230.32 and 230.34-a; commits any of the acts described in PL §255.25, 255.26 and 255.27; or allows such child to engage in acts or conduct described in PL Article 263; or permits or encourages such child to engage in any act or commits or allows to be committed against such child any offense that would render such child either a victim of sex trafficking or a victim of severe forms of sex trafficking in persons pursuant to 22 U.S.C 7102 or any successor federal statute, provided, however, that (a) the corroboration requirements contained in the penal law and (b) the age requirement for the application of FCA Article 263 does not apply to proceedings under FCA Article 10 [FCA 1012(e)(i) and (iii)].

Three elements of repeated abuse

Proving repeated abuse is more difficult than proving severe abuse. The agency must prove three elements to establish repeated abuse:

- abuse of the subject child;
- prior abuse of the subject child or another child in the parent's care; and
- the agency's diligent efforts to rehabilitate the parent.[2]

[2] Crick, A. & Lebovits, G. (2001). "Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights," *Journal,* May 2001, p 45. New York State Bar Association.

In defining an abused child for the purpose of repeated abuse termination, SSL §384-b incorporates the passive aspect of the definition of abuse which is set forth in FCA §1012(e)(i) or (iii). This definition will permit a judicial finding of abuse against parents who may not have inflicted the injuries on the child themselves but allowed the injuries to be inflicted or the abuse to occur.

However, for the purpose of terminating parental rights on the ground of repeated abuse, there must be evidence that there were previous court findings based on clear and convincing evidence of abuse against the parent based on FCA §1012(e)(i) or (iii) [SSL §384-b(8)(b)(i)]. If the court makes a finding of sexual abuse under FCA §1012 (e)(iii), it must make a further finding of the specific sex offense committed as defined in PL Article 130. As noted above, the court may make a finding based on clear and convincing evidence of repeated abuse [FCA §1051 (e)].

A key element in a case of repeated abuse is that the child or another child for whom the parent is or has been legally responsible was previously found to have been abused by the parent within the five years immediately preceding the initiation of the current TPR proceeding. The victim could be the child, a sibling of the child, or another child for whose care the parent is or has been legally responsible.

The prior finding of abuse must have occurred within five years of the initiation of the termination proceeding. Proof of this second act of abuse may result in a Family Court finding of abuse of the child under FCA §1012(e)(i) or sexual abuse under (iii) with a finding that the parent committed or knowingly allowed to be committed a felony sex offense under certain specified provisions of the penal law.

The second act of abuse does not necessarily have to have been committed against the same child who was previously injured or sexually abused. As long as the care of both child victims was the legal responsibility of the abusing parent, this element will be satisfied. Obviously, if the same child was the target of parental child abuse in both proceedings, the statutory requirement is met.

6. Burden of proof

In a severe abuse or repeated abuse case, the agency is required to prove its case by “clear and convincing evidence.” For Native American children subject to ICWA, the standard is “beyond a reasonable doubt.”

Even though the petitioner at the FCA Article 10 abuse proceeding must prove its case only by a preponderance of the evidence, under certain circumstances, abuse in an FCA Article 10 proceeding may be proven by clear and convincing evidence. Depending on the situation, an abuse finding at the FCA Article 10 fact-finding based on clear and convincing evidence may be used in the TPR proceeding to meet the burden of proving severe or repeated abuse by clear and convincing evidence.

7. Where to bring the case

Only Family Court has jurisdiction to entertain a severe abuse or repeated abuse cause of action. See **Appendix 1** for details on the venue in which to file a petition.

8. The hearing

Severe abuse and repeated abuse proceedings are divided into a fact-finding hearing and a dispositional hearing.

Fact-finding hearing

The fact-finding stage requires that the agency prove all allegations included in its petition by clear and convincing evidence. If the agency is unable to prove the necessary elements, the case is ended, and the petition will be dismissed. On the other hand, if the court determines that the child has been severely abused or repeatedly abused by their parent, the court will schedule a dispositional hearing to hear evidence as to whether termination of parental rights would be in the best interests of the child [SSL §384-b(8)(c)-(e)].

Dispositional hearing

In a dispositional hearing, the evidence that is introduced related to severe abuse or repeated abuse varies from the evidence that may be offered in a permanent neglect dispositional hearing. In the latter, as discussed, only material and relevant evidence is admissible in deciding what disposition would be in the child's best interests. At a severe abuse or repeated abuse dispositional hearing, material, relevant, and competent evidence is admissible [SSL §384-b(8)(f)].

The agency may present witnesses who will testify to facts relevant to the issue of severe abuse or repeated abuse. Among the witnesses who may be presented are:

The case supervisor: This witness will testify that the agency's case record is kept in the ordinary course of the agency's business. This testimony is essential if the agency desires to introduce the case record into evidence.

The child's caseworker: The worker will answer questions about the child and the parent, questions which may vary from case to case, but which normally will include inquiries relevant to the following:

- the date the child came into care and the circumstances surrounding the placement;
- contacts, visitation, and communications between the parent and child, including caseworker observations of the quality of such contacts;
- the efforts made by the agency to aid the parent in planning for the child's future and in rehabilitating the family unit;
- the efforts made by the parent to reunite the family;
- where applicable, reasons for any decision made by the agency to limit efforts to rehabilitate the family, i.e., the reasons for determination that these efforts would be detrimental to the best interests of the child.

The foster parent(s): The foster parents may be needed by the agency to testify to the child's current condition and functioning. They may also give evidence regarding any special care needs of the child.

The child: Generally, the child is not called as a witness at the hearing. An attorney must be assigned by the court to represent the child. If the child has relevant information to share with the court, many judges prefer to talk informally with the child in the judge's chambers.

Other persons who have relevant information: The agency attorney will call these witnesses to introduce particular relevant evidence.

9. After the hearing

There are two dispositional alternatives available to the court if it makes a finding that the child was severely or repeatedly abused. The court must enter an order either to suspend judgment or to commit the custody and guardianship of the child to the agency [SSL §384-b(8)(f)].

Suspended judgment

If the court decides to suspend judgment, it may set out certain rules of conduct for the parent to follow. The court may suspend judgment upon a finding, based on clear and convincing evidence, that the child's best interests require such a finding. The period of time of a suspended judgment is for a maximum of one year; however, if the court finds exceptional circumstances exist at the conclusion of that period of time, it may extend the suspended judgment for one more year. The conditions of a suspended judgment are the same as those discussed under permanent neglect dispositions [FCA §633].

Commitment of the guardianship and custody to the agency

This order terminates parental rights and commits guardianship and custody to the authorized agency, including the right to consent to the child's adoption.

F. *Death of the parents*

An order committing the guardianship and custody of a child on this basis may be granted when both parents of the child are deceased, and no guardian of the child has been lawfully appointed [SSL §384-b(4)(a)].

An authorized agency may also consent to the adoption of a minor whose care and custody has been transferred to the agency pursuant to FCA §1055 or SSL §384-a when such child's parents are both deceased, or when one parent is deceased, and the other parent is not a person entitled to notice [DRL §113(1)].

If an agency with care and custody of a child is allowed to consent to the adoption of the child in accordance with one of the above provisions, it is not necessary to terminate parental rights before the adoption proceeding is initiated. The agency must secure satisfactory documentation of the death of the parent, such as the certified death certificate.

Appendix 5.1: Where to Bring TPR Cases

The venue requirements are the same for all TPR cases, regardless of the grounds on which they are based.

If the child was placed or continued in foster care pursuant to FCA Article 10, 10-A, or 10-C or SSL §358-a, the petition must be filed in the Family Court in the county in which the FCA Article 10 or 10-A or SSL §358-a proceeding was last heard.

The court must assign the proceeding, where practicable, to the judge who last heard the FCA Article 10, 10-A, 10-C, or SSL §358-a proceeding.

If there are multiple proceedings to terminate parental rights under SSL §384-b about siblings or half-siblings placed in foster care with the same LDSS commissioner pursuant to FCA §§1055, 1089, or 1095, all of the proceedings may be commenced jointly in the Family Court in any county which last heard a proceeding under FCA Article 10, 10-A, or 10-C regarding any of the children who are the subjects of the TPR proceeding.

The court must assign the proceeding to the judge who last heard the proceeding, when practicable.

In any other case, including a proceeding brought in Surrogate's Court, the proceeding must originate in the county where either of the parents of the child live at the time of the filing of the petition, if known. If neither parents' residence is known, the petition must be filed in either the county in which the authorized agency has an office "for the regular conduct of business" or in which the child is living at the time of the initiation of the proceeding.

To the extent possible, the court must, when appointing an attorney for the child, appoint an attorney who has previously represented the child.

The court hearing a TPR petition is responsible for finding out whether the child is under the jurisdiction of another Family Court pursuant to a child protective or foster care proceeding or continuation in out-of-home care as a result of a permanency hearing and, if so, which court exercised jurisdiction over the most recent proceeding. If so, the court within which the most recent petition was filed must communicate with the other court, and both courts must tell the parties and the attorney for the child and give them an opportunity to present facts and legal argument, or to participate in the communication before the court issuing a decision. The SSL provides additional requirements to the courts under such circumstances, which the agency attorney will know about [SSL §384-b(3)(c)&(c-1].

Appendix 5.2: Issues Involving Incarcerated Parents

SSL §384-b(3)(l)(v) defines evidence of the parent's meaningful role in the life of the child to include, but not be limited, to the following:

- A parent's expression or acts manifesting concern for the child, such as letters, telephone calls, visits, participation in planning, and other forms of communication with the child.
- Efforts by the parent to communicate and work with the LDSS or VA, the attorney for the child, the foster parent, the court, the parent's attorney, and others providing services to the parent, such as correctional, mental health, and substance use treatment program staff for the purpose of complying with the service plan and repairing and maintaining or building the parent-child relationship.
- A positive response by the parent to the LDSS' or VA's diligent efforts as defined in SSL §384-b(7)(f).

When a parent is incarcerated, diligent efforts include making suitable arrangements with the correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. Arrangements for the parent to visit the child outside the correctional facility are not required unless reasonably feasible and in the best interests of the child.

When no visitation between the child and the incarcerated parent has been arranged for or permitted because such visitation is determined by the agency not to be in the best interests of the child, a permanent neglect TPR proceeding may not be initiated on the basis of a lack of such visitation [SSL §384-b(7)(f)(5)].

If the parent is incarcerated outside of New York State, the agency is only required to make visiting arrangements if "reasonably feasible and permissible in accordance with the laws and regulations applicable to such facility." [SSL§384-b(7)(f)(5)]

For more information, see "Incarcerated Parents and Parents in Residential Substance Abuse Treatment with Children in Foster Care: Termination of Parental Rights and Other Issues" (11-OCFS-ADM-07).

Appendix 5.3: When Reasonable Efforts are Not Required

Reasonable efforts to make it possible for the child to return safely home are *not* required when:

1. **The parent has subjected the child to aggravated circumstances.**

   - The child has been either severely or repeatedly abused as defined in SSL §384-b (8) *(See Section E of this chapter);* or
   - A child has subsequently been found to be an abused child, as defined in FCA §1012(e)(i) or (iii), within five years after returning home following placement in foster care as a result of being found to be a neglected child, provided that the respondent(s)in each of the foregoing proceedings was the same; or
   - The court finds, by clear and convincing evidence, that the parent of a child in foster care has refused and has failed completely, over a period of at least six months from the date of removal of the child, to engage in services necessary to eliminate the risk of abuse or neglect if the child were to be returned to the parent.

     This involves where the parent has failed to secure services on their own or otherwise adequately prepare for the return home and, after being informed by the court that such an admission could eliminate the requirement that the LDSS provide reunification services to the parent, the parent has stated in court under oath that they intend to continue to refuse such necessary services and are unwilling to secure such services. However, if the court finds that adequate justification exists for the failure to engage or secure such services, such as due to a lack of childcare, a lack of transportation, or an inability to attend services that conflict with the parent's work schedule, such failure will not constitute an aggravated circumstance.
   - A court has determined a child five days old or younger was abandoned by a parent with an intent to wholly abandon such child and with the intent that the child be safe from physical injury and cared for in an appropriate manner [FCA §1012(j)].

2. **The parent has been convicted of crimes under penal law.**

   - Murder in the first degree (PL §125.27) or murder in the second degree (PL §125.25); or manslaughter in the first degree (PL §125.20); or manslaughter in the second degree (PL §125.15), and the victim was another child of the parent and the parent acted voluntarily in committing the crime.
   - Attempt to commit any of the foregoing crimes and the victim or intended victim was the child or another child of the parent.
   - Criminal solicitation (PL Article100), conspiracy (PL Article 105), or criminal facilitation (PL Article115).
   - Conspiring, soliciting, or facilitating any of the foregoing crimes and the victim or intended victim was the child or another child of the parent.
   - Assault in the first degree (PL §120.10), assault in the second degree (PL §120.05), or aggravated assault upon a person less than 11 years old (PL §120.12) and the commission of one of the foregoing crimes resulted in serious physical injury to the child or another child of the parent.

3. **The parent has been convicted in any other jurisdiction** of an offense that includes all of the essential elements of any crime specified above, and the victim of such offense was the child or another child of the parent.

4. **The parent's parental rights to a sibling of the child** have been involuntarily terminated

   - **unless** the court determines and states in its order that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future [FCA §§352.2(2)(c), 754(2)(b), 1039-b & 1052(b)(i)(A); and SSL §358-a(3)(b)].

Chapter 6

Chapter 6
The Caseworker's Role in TPR Proceedings

Parents whose parental rights have been terminated have no right to have contact with the child, knowledge of the child's whereabouts, or information regarding the child.[1]

The TPR proceeding will focus on what the parents did or did not do since the child entered foster care. It also will scrutinize what the agency did to support the family and avoid TPR. Appeals to reverse TPR dispositions frequently are based on perceived agency shortcomings. With this in mind, caseworkers who anticipate testifying in TPR trials must be thoroughly familiar with the history of the case, including the details of everything the agency did or offered to do for the parents and how the parents responded.

A. Professional interrelationships

1. Caseworker and agency attorney

A proceeding to terminate parental rights (TPR) is a joint effort of the caseworker and the agency attorney. Each has a distinct role to play, although their duties overlap to some extent. The caseworker and the attorney should recognize each other's professional expertise and work to support and respect, but not interfere, in the other's area.

Continuing consultation and cooperation are essential, with disagreements handled in a professional manner, from the time of the initial casework decision to seek termination of parental rights through the final disposition of the case.

Caseworker's role

While the main responsibilities of the caseworker are in the preliminary areas of case recording, case management, and internal review, they also have an important role in case preparation. The caseworker can assist the agency attorney by providing an adequate set of facts, obtaining necessary additional evidence, and helping to keep documents and other papers organized and available during the hearing itself.

Attorney's role

After the attorney has studied the facts of the case and decided that there is sufficient evidence to support a TPR proceeding on one or more grounds, they must determine:

- the court in which the proceeding is to be initiated;
- the statutory grounds to be invoked;
- the method of notifying the respondent; and
- the witnesses to be called and the evidence to be offered.

The attorney will also be responsible for preparing the caseworker, who is often the primary witness, to give testimony in court. In this context, the attorney normally will tell the caseworker what questions the attorney plans to ask and prepare the caseworker for cross-examination by opposing counsel.

[1] Jones, William G. (2006) *Working with the Courts in Child Protection.* U.S. Department of Health and Human Services, Children's Bureau. Retrieved from https://www.childwelfare.gov/pubPDFs/courts.pdf.

Practice Tip: Working with the agency's attorney

As a caseworker, your goals and those of the attorney assigned to the case should be the same: the safety, permanency, and well-being of the children involved.

You and the attorney will, however, be approaching the case from different perspectives. You are most familiar with the family's situation and have been closely involved in developing plans with the family, including a permanency plan for the child. The attorney is well-versed in the laws that relate to TPR, the rules and procedures of the court, and in how to present the case to the Family Court judge.

Prior to the date for a court proceeding, meet with the attorney to review the case. If you are not sure who the attorney is, or how to schedule this preparatory meeting, consult with your supervisor. Review the case material carefully and organize written materials in advance of the meeting. One of the responsibilities of the attorney is to help you prepare for the court hearing, including how to present case information and how to testify.

Source: *A Guide to the New York State Family Court*

Judge's role

The judge is in charge of the courtroom. Judges listen to witnesses, examine evidence, and decide any legal questions that arise during the proceedings. After this information is presented, they determine the outcome of cases and issue any necessary orders. There is at least one Family Court judge in each county of the state. In general, the more populated a county, the more Family Court judges there are, including more than a dozen Family Court judges in each of the five boroughs of New York City. Family Court judges may be elected or appointed, depending upon the county government structure.

During the conduct of a trial, the judge is responsible for making decisions concerning the facts of the case and for ensuring that the trial is conducted fairly. They must make judgments about the admissibility of evidence, be concerned about the best interests of the child, protect the constitutional rights of the child's parents, and determine whether the petitioning agency has met its burden of proof.

Caseworkers should familiarize themselves with the roles and responsibilities of the judge, and with the basic rules of law that the judge must uphold. With increased knowledge, the caseworker will be able to communicate more effectively with this key participant in the TPR proceeding.

B. Preparing for a TPR proceeding

When the caseworker, in consultation with their supervisor, has determined that the facts of a case call for proceeding to terminate parental rights, or the court has ordered that a petition be filed, the caseworker should meet with the agency's attorney to discuss the possibility of initiating a TPR proceeding. The attorney will review the nature and amount of information that the caseworker has available and may ask that additional or different information be supplied. The caseworker and attorney should work together in the evidence-gathering process in order to present a complete and thorough case in court.

1. Deciding on the grounds for the petition

The specific facts of the case dictate the grounds that may be used to terminate parental rights (see **Chapter 5**).

Multiple grounds for TPR

Often more than one of the grounds for TPR is appropriate. For example, the facts of a case might indicate support for a petition based on both mental illness/intellectual disability and permanent neglect. The caseworker is uncertain whether permanent neglect can be proven because the parent had one seemingly insubstantial contact with the child. There is no legal restriction in this situation against alleging multiple grounds, and it is wise practice for the agency attorney to allege all grounds that may be supported by the evidence.

This is because, regardless of the care taken in preparation of the case, unanticipated evidence may be presented at the trial that will support one cause of action over another. Supportive information may be found in documentation in the case's progress notes and/or family assessment and service plans regarding lack of progress in achieving the discharge of a child from foster care to the child's parents.

Separate proceedings

It may also be necessary to proceed with two different separate proceedings when the agency is seeking to terminate the rights of more than one parent. For example, one parent may have clearly abandoned the child, while there is evidence to support a ground of permanent neglect or mental illness/intellectual disability for the other parent. The agency can file against both parents in separate proceedings or in a single proceeding, even if it is alleging different causes of action against each of them.

To free the child for adoption, it is not necessary to terminate the parental rights of both parents at the same time. For example:

- The LDSS may intend to initiate proceedings to terminate the rights of both the mother and father of a child, based on the ground of abandonment for the father and intellectual disability for the mother. The child must be in foster care for a minimum of one year before a parent's rights can be terminated on the ground of intellectual disability, so the LDSS might initiate the TPR proceeding against the father after six months and, after the child has been in foster care for one year, initiate a TPR proceeding against the mother.
- One parent has chosen to voluntarily surrender the child for adoption while the other parent's rights must be terminated in a judicial proceeding.

Any combination of these situations will effectively free the child for adoption.

The best interests of the child must be considered, however, before initiating a proceeding to terminate the rights of only one of the child's parents, even when sufficient grounds exist. Unless it is likely that the remaining parent's rights will also eventually be terminated or that the parent will surrender the child, terminating the rights of only one parent may be counterproductive. If it is likely that the other parent will be a resource for the child, the caseworker should consider the overall picture, including the relationship between the parents, before deciding to seek termination of one parent's rights. In all cases, the safety of the child must be the paramount concern.

2. Preparing the TPR petition

A TPR proceeding begins with the filing of a petition in court. The agency attorney will prepare and file the petition but often they will ask the caseworker to review the petition for the accuracy of certain facts, such as:

- The name, birth date, and birthplace of the child or children.
- The names and addresses of the child's birth parents.
- The date on, and manner in which, the child was initially placed in the care and custody of the agency. It should be stated whether the child came into placement through a voluntary placement agreement, or court commitment, and the reasons for the placement should be set forth briefly.
- The present placement status of the child or children, including the level of placement (e.g., foster home, group home, qualified residential treatment program, or other residential setting) and the agency caring for the child.

RESOURCES

Forms with the required legal language for TPR petitions are available from the New York State Unified Court System (nycourts.gov):

- Abandonment (TPR-6)
- Permanent neglect (TPR-1)
- Severe or repeated abuse (TPR-10)
- Mental illness/intellectual disability (TPR-8)
- Parents deceased (TPR-4)

The petition must include statements of sufficient facts to support the cause of action. The content will differ, depending on the specifics of the case. The following statements (required allegations) must be addressed in the petition:

- No previous TPR application has been made for the relief requested (for example, termination of parental rights on the grounds of abandonment); or if such application has been made, there is a statement of the relevant facts surrounding the disposition of that application.
- A request that the court commit the guardianship and custody of the child to the LDSS for purposes of adoption, pursuant to SSL §384-b.

3. Notifying the respondent

All respondents in a legal action must be given notice well in advance of the proceeding. The agency's attorney should make sure that the notice is served properly and within the time required. The requirements of the process and time frames involved are summarized on the next page.

Practice Tip: Who's who in a Family Court case?

Petitioner: The agency or other person who has filed a petition asking the court for relief.

Respondent: The person against whom the petition is filed. In a TPR proceeding, it is the parent or whoever has legal guardianship and custody of the child.

Interested Party Intervenor: A person other than the respondent or petitioner, usually a relative or noncustodial parent, who has an interest in the case. This person may appear in court proceedings for the purpose of seeking temporary or permanent custody of the child.

Legal Counsel: An attorney representing any of the parties in the case. If a respondent is indigent, the court may appoint legal counsel to represent them.

Source: *A Guide to the New York State Family Court. (2005).* The Fund for Modern Courts. Retrieved at *http://moderncourts.org/wp-content/uploads/2013/10/familycourtguide.pdf*

The respondent is served with a legal document called a "citation" in the Surrogate's Court and a "summons" in the Family Court. If the parent's location is known, the summons or citation and the petition is served in person by a process server, or another person supplied by the petitioner (the agency). The process server is required by law to submit a sworn affidavit as proof of personal service.

The notice informs the respondent that:

- legal action is pending and gives the hearing date, time, and purpose of the proceeding;
- they must attend court on a specific date (the "return date") to answer the petition;
- the proceeding may result in an order freeing the child for adoption without the consent of or notice to respondent;
- that upon failure to appear, all of the respondent's rights to the child may be terminated; and
- they have the right to the assistance of counsel, including any right they may have to counsel assigned by the court if they are financially unable to obtain counsel.

The summons and petition must be served at least 20 days before the time the respondent must appear in Family Court, or 10 days in Surrogate's Court. The court may extend this time frame if requested to do so by the respondent [FCA §617(a); SCPA §308(a)(iii)].

If, after a reasonable effort, the agency is unable to deliver the summons or citation to the respondent in person, the judge may order a form of substituted service or service by publication. Substituted service may use methods such sending notice by certified or registered mail to the last known address or delivering it to a suitable person at the respondent's residence or business. Service by publication requires publishing portions of the petition in a newspaper. If substituted service is ordered by the Surrogate's Court, service must be made at least thirty days before the return date [SCPA §308(a)(iii)].

4. Diligent search to locate a missing parent

Because substitute service or notification by publication is less reliable than other methods of notification, they can only be used when the court finds that service cannot be made in person. The agency is required to make a "diligent search" for the missing parent so they can be served.

Diligent searches for parents, including a non-respondent parent, must be done and the results documented when a child first enters the child welfare system. In an Article 10 proceeding, the agency is required to search for [FCA §1017(1)(a)]:

- Any non-respondent parents (not just those deemed "suitable").
- All relatives (not just "suitable" relatives), including, but not limited to, all those identified by a respondent or non-respondent parent or by a child over the age of five who has played a significant positive role in the child's life.
- All suitable persons identified by a respondent or non-respondent parent.[2]

It may be necessary to repeat this process periodically during the case and will again be necessary when a TPR proceeding is under consideration, so the dates are current at the time of the proceeding. Efforts to locate the parent will be documented by the caseworker in an affidavit (a sworn statement) that is attached to the petition.

The caseworker should begin by carefully reviewing the case record to identify previous attempts to locate a parent, the steps taken, and the results. Some of this information may provide clues about where to look in a new search. A supervisor might know the most common sources of information used by the agency. It is also advisable to check with the agency attorney, who may have guidance on what their local court accepts as documentation of a diligent search.

Courts can vary regarding the level of diligent effort required to ascertain a parent's whereabouts. The caseworker should attempt to check with as many of the following as possible:

- Social media, such as Facebook, Twitter, or Instagram
- Internet search engines, such as Google or Bing
- Local telephone book or directory assistance
- U.S. Postal Service for last known address (by sending a letter by registered or certified mail)
- Family members or friends
- Federal agencies, such as the Social Security Administration
- State agencies:
  - Department of Motor Vehicles
  - Department of Corrections and Community Supervision
  - New York State Police
  - Department of Health (death certificate)

[2] OCFS. "Changes to the Family Court Act regarding child protective and permanency hearings, including changes affecting the rights of non-respondent parents." 17-OCFS-ADM-02-R1.

  - Unemployment Insurance Office (must have parent's Social Security number)
  - Department of Taxation and Finance
- Parent Locator Service (see Practice Tip)
- Putative Father Registry (submit LDSS-2725)
- Local law enforcement agencies
- Any additional leads or sources of information

Practice Tip: Parent Locator Services

The Federal Parent Locator Service (FPLS) and the State Parent Locator Service (SPLS) are part of a computerized network of information designed to locate individuals who owe child support. LDSSs can request information from the database for cases involving child protective services, preventive services, foster care, and adoption services.

The SPLS obtains such information from New York State agencies, including the Division of Criminal Justice Services, and the Departments of Motor Vehicles and Taxation and Finance. The FPLS obtains its information from federal agencies, including the Internal Revenue Service, the Department of Defense, the Social Security Administration, and the Department of Veterans Affairs.

To request information, the caseworker completes a transmittal form (LDSS-7031), which is forwarded to the state Child Support Enforcement Unit. For detailed information, see "Access to the Federal Parent Locator Service (FPLS), State Parent Locator Service (SPLS), and Additional Financial Information in Child Welfare Cases for the Purposes of Permanency" (07-OCFS-ADM-09).

5. Gathering evidence

As has been noted previously, the caseworker often will assist the attorney in gathering and organizing the evidence to be presented in the TPR proceeding. It probably will be necessary for the caseworker to make repeated contacts with the same individuals, not only before the initial presentation of the case to the agency's attorney, but also while preparing the case. These contacts may provide a large portion of the evidence during the proceeding.

The child's foster parents, and foster care agency staff are often an essential source of relevant information about the child and the child's family. The primary role of the foster parents and agency staff is that of temporary, nurturing caregivers. If the agency does decide to petition for the termination of parental rights, the foster parents/agency staff may be able to verify information that is documented in the case record, such as the frequency, duration, and quality of parental visits, the parents' behavior, and the child's reaction to visits. They also may be helpful in verifying other information concerning the child's educational, physical, and emotional progress.

6. Testifying in court

Caseworkers may be called upon to testify (speak to the court under oath) during TPR proceedings. These are not jury trials, so the testimony will be given before the Family Court or Surrogate's Court judge. The caseworker usually is asked to answer questions or provide further support for documents that have been submitted in the case. The caseworker also may be required to answer questions from the attorney representing the respondent in the case.

The caseworker is expected to be knowledgeable about the condition of the child in care, the child's relationship (or lack thereof) with their birth parents, and the permanency planning goals that have been developed for the child. Much of this information has been entered in the child's case record in CONNX.

In particular, the caseworker should be familiar with the facts that support the elements of the grounds for termination of parental rights. The caseworker often is the pivotal witness in the presentation of the agency's case, as they usually have the largest amount of firsthand knowledge about the child and their parents.

The caseworker will testify to facts about which they have firsthand knowledge. This may also include testifying about documentation in the case record that was written by previous caseworkers assigned to the case. While the current caseworker may not have firsthand knowledge of the events documented by the previous caseworker, the current caseworker can testify that the information was documented in the case record, by whom, and the date it was recorded. Normally, the caseworker will testify to facts concerning:

- The circumstances surrounding the child's placement with the agency.
- Details of the caseworker's assessment of the family and the agreed-upon service plan.
- Details of the services provided to the family by or through the agency.
- Efforts made by the parents to visit the child, plan for the child, and reunite the family unit.
- Whether the parent has put into practice the lessons learned or skills acquired in trainings and services.
- Whether there has been any change in the parent's attitudes, behavior patterns, or thinking habits.
- Whether the parent is in any better position to parent their child now than at the time of placement.
- Where applicable, reasons for any decision made by the agency to discourage visitation or dispense with diligent efforts to rehabilitate the family (i.e., the reasons for a determination that these efforts would be detrimental to the best interests of the child).

A chronology of the case — key events, with dates of occurrence, in chronological order – is a useful tool in this regard. The caseworker may make marginal notations beside each piece of pertinent information, indicating where that information can be found in the case record. The chronology will not be introduced into evidence at the trial, but the caseworker may use it to prepare for trial.

If a case chronology has not been prepared, the caseworker should at least review the case record and make a list of the salient features of the case. This can include case information from CONNX, and any relevant documents associated with the case record, such as permanency

hearing reports, documentation from medical professionals, and correspondence from the parents. It is highly recommended that the caseworker and the agency attorney discuss the process, preparation, and potential evidentiary issues, including what documents the caseworker may bring to court.

While in court, the caseworker must avoid unnecessary emotional displays, such as laughing, grimacing in disagreement, or shaking their head to contradict someone else's testimony. Such behavior is unconvincing. Opposing counsel sometimes deliberately bait witnesses, hoping to get inappropriate reactions. Whatever their feelings, the witness should not become defensive or sarcastic, or ridicule opposing counsel, and should remain relentlessly polite.

On cross-examination, the respondent's attorney will try to elicit information to support their client's case. The caseworker should remain calm, answer only the question asked, and always answer truthfully, even if the answer to the question is not favorable to the agency's case. The respondent's attorney may seek to support arguments such as:

- The agency undermined or prevented visitation between the parent(s) and the child.
- The agency or the foster parents turned the child against the parents and encouraged the child to act out when the parents visited the foster home.
- The agency did not make a sufficiently strong diligent effort to reunite the family.
- The parents' inability to visit was due to circumstances beyond their control.
- The parents could not plan sufficiently because the agency did not provide enough support to help them overcome barriers.

Practice Tip: Appearing in court

Caseworkers are expected to be competent and professional – they are the experts in child welfare. To live up to that expectation, arrive at court on time (or early) and dress in conservative, professional attire. Behave professionally at all times, even in the hallways and waiting rooms. Follow the rules of the court and the courtroom.

When giving testimony, follow these basic principles.

- Always tell the truth.
- Answer only what is asked of you — don't offer additional information, especially if it is not in the case record.
- Don't be afraid to ask for a question to be repeated if you didn't hear or understand it. If you still don't understand it, say so. You are not required to answer a question you don't understand.
- Bring your notes with you to the witness stand. If you need to refer to them, ask the judge for permission with a phrase like, "May I refresh my recollection?" Don't read aloud from the document: put it aside to answer the question.
- If you don't know the answer to a question, or don't remember the answer, say so; don't guess at the answer.
- Don't feel rushed to answer; pause and think before answering questions, particularly during cross-examination.
- Speak to the court with confidence and respect, even if you believe that an attorney or the judge is not treating you with respect. Inappropriate behavior by attorneys or judges is not a reason for you to also behave inappropriately.

The judicial system is the best system we have for resolving controversies and administering justice in this country. The ideals and principles that stand behind the courtroom should be respected by all.

Source: Hamlett, J. (2007). "The Art of Testifying in Court," *Practice Notes*. North Carolina Division of Social Services, 12(4).

The caseworker should make sure to take all documents that they may need to refer to or that the agency attorney may want to introduce into evidence, even if the attorney also has copies of them. These documents will vary from case to case but often will include:

- Relevant portions of the case record, including printouts from CONNX and hard-copy documents associated with the case record.
- The case chronology or other reference material prepared by the caseworker.
- Any physical evidence which the attorney wishes to use at the hearing.
- Letters to or from the parent.
- Other documents in the caseworker's possession that are important to the case.

The caseworker should make sure that the copies of the documents they provide to the attorney are identical to those they bring to court. The documents used in the caseworker's testimony also may be reviewed by the respondent's attorney.

Lay witnesses

Lay witnesses have firsthand information relevant to the case but are not testifying in a professional capacity. They usually were first contacted by the caseworker during evidence gathering. Only those persons who can provide testimony relevant to the elements of the specific grounds of the TPR petition for termination should be considered as witnesses.

Lay witnesses should be used economically, or the termination hearing will be extremely lengthy. Although the agency attorney ultimately will decide which witnesses to call, the caseworker is often instrumental in identifying potential lay witnesses before the trial. Other important witnesses in a TPR proceeding may be:

The foster parents, whose testimony regarding the parents' visitation and communication with the child may be helpful, as they have had the most extensive firsthand contact with the child.

The child, who can share their wishes and preferences with the court if they are over age 14 [SSL §384-b (3)(k)]. The court may, in its discretion, consider the wishes of the child in determining whether it would be in the best interests of the child to commit their guardianship and custody to the LDSS. The child's wishes and preferences can be considered only at disposition.

Expert witnesses

The agency should obtain the services of an expert whenever it wishes to introduce into evidence a fact or opinion about which a lay person is not competent to testify. Normally, this testimony is related to a special area of knowledge and requires the degree of education and training possessed by an expert. While the lay witness may testify to their opinions about certain subjects, in other areas the law requires the opinion of an expert.

For example, the lay witness may testify to their opinion on whether a particular person was intoxicated at a specific time, but expert testimony may be required concerning certain types of drug use. The caseworker should consult with the agency attorney to determine whether an expert will be required to give testimony about a particular fact or occurrence.

Experts who may be useful in a TPR proceeding include physicians, psychiatrists, psychologists, and handwriting experts. Depending on the facts that the agency must prove, other kinds of experts may be useful.

It is most important that the expert be able to convince the court of the accuracy of their position. The attorney for the respondent parent likely will try to impeach the agency's expert with contradictory expert testimony or documents or by pointing out inconsistencies in the expert's testimony. Therefore, the agency should seek an expert who has a superior reputation for competency and integrity.

7. Rules of evidence

There is a complex system of rules about what information can be entered into evidence in a courtroom. These rules control the types of evidence that are admissible in court. Normally, the rules of evidence do not come into dispute until an attorney makes an objection. When a

witness is testifying and an attorney raises an objection, the testimony should stop until the judge makes a ruling on the objection. These are the rules of evidence that arise most often:

Hearsay evidence

Hearsay involves testimony or documents that include statements by people who are not in court and is offered for the truth of the matter asserted. A typical example of hearsay would be the witness's response to the question, "What did you hear Ms. Jones say?" Hearsay is generally not admissible because Ms. Jones is not in court to state her exact words or to be cross-examined by the opposing attorney. There are exceptions that allow hearsay testimony. There are many different types of statements that technically are hearsay (out of court statements) but that nevertheless are admissible as evidence because they belong to one or more of the categories of exceptions to the hearsay exclusionary rule. Some of the more common exceptions are admissions, business records, and public documents.

One exception that is significant in child welfare cases is related to business records. Any writing or record made as a memorandum or record of any act, transaction, occurrence, or event is admissible as evidence if (Civil Practice Law and Rules §4518):

- the entry was made in the regular course of any business, and
- it was the regular course of such business to make such an entry, and
- it was made at the time of the event or within a reasonable time thereafter.

Caseworkers are required to enter progress notes into the case record as contemporaneously as possible with the occurrence of the event or the receipt of the information [18 NYCRR 428.5(a)]. This standard supports agency compliance with the business record exception to the hearsay rule. Failure to contemporaneously complete progress notes may result in the court refusing to admit them into evidence. Neither statute nor regulation define what is a reasonable time or what is contemporaneous. Interpretation of such terms may vary from judge to judge, so caseworkers are encouraged to consult with their agency attorney on this issue. Concerning documentation of casework contacts, OCFS recommends that they be entered into the progress note within 30 days of the event.[3]

Opinion evidence

Opinion evidence often plays an important role in a termination proceeding. According to the rules of evidence, a witness may testify only to opinions the witness is competent to form. In general, a witness may testify only to facts and not to opinions or conclusions drawn from those facts. There are exceptions, however, that permit lay witnesses or experts to include their opinions in their testimony.

The law assumes that a lay witness is competent to testify to their opinion concerning those areas with which the witness has had general experience. Thus, opinions of non-expert witnesses have been received in evidence in areas such as:

- Matters involving taste, smell, sight, sound, and touch. For example, a witness may testify that a certain beverage that a person drank was whiskey.
- The state of emotion exhibited by a person, e.g., whether the person appeared to be angry or joking.

[3] OCFS. "Contemporaneous Documentation of Casework Contacts With Children in Foster Care" (20-OCFS-INF-11).

- Identification and likeness. The witness may be asked whether the witness knows a certain person, and if so, whether an indicated individual is that person.
- Whether a person appeared to be intoxicated.
- The estimated age of another person based on appearance, as described by the witness.

Documentary evidence: the best-evidence rule

When written documents are part of the evidence in a TPR proceeding, the original documents should be available because of the "best-evidence rule."

The best-evidence rule requires that whenever a party seeks to prove the contents of a writing, recording, or photograph, the witness must either produce the original writing, recording, or photograph or provide a satisfactory account for its absence. The rule applies to any writing, ranging from official records and private letters to a note on a slip of paper. It applies when:

- The witness's sole knowledge of a fact is gleaned from a document. This may be the situation when key information was recorded in the case record by previous caseworkers who no longer work for the agency and are unavailable to testify.
- The document is a legally operative instrument such as a divorce decree, a contract, or a surrender instrument.
- The witness expressly refers to a written document and attempts to summarize its contents.

The caseworker can help the agency's case by collecting as many original documents as possible that may be relevant to issues in the proceeding. If the agency has made a copy of an original document, and identifies it as such, it is admissible into evidence as the original, whether the original exists or not.[4]

Leading questions

When an attorney asks their own witness a question that suggests the desired answer, the question is a leading question and may be objected to by the opposing attorney. Although there are exceptions, a leading question generally can be identified because it can be answered adequately by a simple "yes" or "no." If there is an objection to a leading question, the attorney will have to rephrase the question so the witness can answer it in their own words.

An attorney who is conducting a cross-examination may ask leading questions of a witness called by the other party.

C. Actions required after disposition

Once the parental rights of the parents have been surrendered or involuntarily terminated, the child is legally free for adoption. Ideally, the agency has already identified and approved prospective adoptive parents for the child and these prospective parent(s) have already prepared a petition to adopt during the TPR proceeding. The reason for this is to expedite permanency for the child by taking actions concurrently rather than sequentially, as appropriate.

Upon terminating parental rights, the court will ask whether the foster parents with whom the child lives, a relative of the child, or another person seeks to adopt the child. If there is a person seeking to adopt the child, the court is required to accept the petition for the adoption of the

[4] Practicing Law Institute. *Compendium of New York Law.*

child, together with an adoption home study, if any, completed by an authorized agency. The court is responsible for establishing a schedule for concluding other inquiries and investigations necessary to complete a review of the adoption of the child and for finalization of the adoption.

When the court transfers guardianship and custody of the child to the agency, the agency attorney must promptly serve notice of the order to any persons who have been approved by the agency as the child's adoptive parents. The attorney must advise the prospective adoptive parents that an adoption proceeding may begin, explain the procedures necessary for the adoption of the child, and provide them with the necessary documents.

The practice in many courts is that the agency advises the prospective adoptive parents of both the fact that an adoption proceeding may begin and the procedures necessary for adoption. Prospective adoptive parents may submit a petition to adopt a child to the court in which the TPR proceeding is being heard, even before that proceeding is concluded [SSL §384-b(10) and (11)].

D. Appeals

Either the agency or the respondent has an absolute right to appeal an order of disposition issued by the court, such as an order terminating (or refusing to terminate) parental rights (FCA §1112). The appeal is taken to the Appellate Division of the Supreme Court of the judicial department for the geographic location in which the Family Court or the Surrogate's Court is located. There are four such judicial departments in New York State divided by geographic region (FCA §1111). An intermediate order that does not dispose of the case may be appealed only with the permission of the Appellate Division that would hear the appeal (FCA §1112).

A decision about whether to appeal must be made as quickly as possible, as state law limits the time within which a notice of appeal can be filed. An appeal must be taken no later than 30 days after service of the order to which the appeal is related, 30 days from the receipt of the order in court, or 35 days if served by mail by the clerk of the court, whichever is earliest. An appeal does not allow new testimony or witnesses to be presented. The Appellate Division allows the review of transcripts and the submission of written legal briefs and oral arguments by the opposing attorneys [FCA §1113].

It is not uncommon for an unsuccessful respondent parent in a TPR proceeding to appeal and also to seek a stay of the Family Court's or Surrogate's Court's order. A stay is an order of a court that stops any further actions related to the case until something else happens. The timely filing of a notice of appeal does not stay the order from which the appeal is taken (FCA §1114).

In a termination of parental rights proceeding, however, a justice of the Appellate Division to which the appeal is taken may stay execution of the order from which the appeal is taken on such conditions, if any, as may be appropriate (FCA §1114). Caseworkers should consult with their agency attorney for clarification on the scope of the stay granted by the Appellate Division.

Perfecting the appeal

After a timely notice of appeal has been completed, the case must be prepared for the Appellate Division ("perfecting the appeal"). This includes collecting the transcript of the court proceeding that is being appealed and preparing the record on appeal that includes, but is not limited to, exhibits, motion papers, and court orders, including the order being appealed. Both parties to the appeal also will prepare a brief that explains their respective positions concerning the appeal. Court rules establish time frames for perfecting the appeal. If those time frames are not met, the appeal is deemed abandoned and is dismissed.

Once the appellant has perfected the appeal, the clerk's office of the Appellate Division will issue an order directing that the appeal be placed on the Appellate Division's calendar for argument. Certain categories of cases are given a preference in being heard without the need of a party to request a preference and may be brought on such terms and conditions as the court may direct (CPLR §5521). One of these categories is an appeal of termination of parental rights proceedings (FCA §1112). Appellate Divisions are in session during certain parts of the year and such sessions are divided into what is called terms. Some terms are reserved for specific matters, such as bar admissions, disciplinary proceedings, and Election Law appeals. Appellate Division decisions are posted on the respective Appellate Divisions' websites.

Results of an appeal

There are several potential outcomes from the decision of the Appellate Division. The court may:

- Affirm the judgment of the Family Court or Surrogate's Court. This means that such judgment remains intact.
- Reverse such judgment in its entirety and remand the case back to the lower (trial) court to rehear the case in a new trial.
- Partially affirm and partially reverse the judgment and remand the case back to the lower (trial) court to rehear that part of the case that was reversed by the Appellate Division.

Following the decision of the Appellate Division, it is possible that the unsuccessful party may seek to appeal the case to New York's highest court, the Court of Appeals. Some categories of cases may be appealed to the Court of Appeals as a matter of right, such as a decision made on constitutional grounds or where at least two justices of the Appellate Division dissented on questions of law in favor of the appealing party (CPLR §5601). In addition, permission to appeal to the Court of Appeals may be granted by the Appellate Division or by the Court of Appeals itself to consider specified questions of law.

Agency attorneys are responsible for perfecting and arguing the appeal if one is taken. The caseworker may be involved in deciding whether or not to appeal a disposition, and should monitor the progress of the appeal, periodically check in with the agency attorney, and keep the pre-adoptive parents informed.

If an order committing custody and guardianship is appealed by the respondent, the adoption petition may not be filed until after the appeal is finally resolved and if the order of commitment remains in place [18 NYCRR 421.19(i)(5)(l)]. During the course of an appeal, the child usually will continue to be placed as the court had previously ordered, unless a stay of the court order is granted either by the trial court or the Appellate Division.

Chapter 7

Chapter 7
Services to Parents of the Child

During the process of severing the legal parent-child relationship, it is necessary both to respect and safeguard the legal rights of parents and to assist them in coping with losing their rights to their child. When the agency has made the decision to seek the surrender of parental rights to the child or to file a petition to terminate parental rights (TPR), the caseworker must continue to work with the birth parents at least until these processes are completed.

See **Chapter 4**, "Freeing a Child for Adoption Through a Surrender," and **Chapter 5**, "Termination of Parental Rights."

A. Before surrender or termination of parental rights

From the earliest days of the case, the caseworker should have been having open, frank, and respectful discussions with the parents about the permanency plan for the child. Through the use of concurrent planning, an alternative permanency plan, such as adoption of the child, should be known to everyone involved with the case in discussions that involve full disclosure by the caseworker.

1. Cultural competence

Discussions about adoption must take place in a culturally competent manner. Caseworkers should understand and respect the family's cultural norms in order to engage them in decision-making related to adoption. This approach is not only good practice that benefits the parents, but it also helps the worker identify the personal habits and behaviors of the child's family that can be communicated to the adoptive parents and promote continuity of care for the child in the future.

The caseworker must determine that the child's parents are able to understand and to effectively communicate with the caseworker, both verbally and in writing. If the family speaks a language other than English, this fact should be recorded in the case record, along with the need for an interpreter and when an interpreter was used. OCFS has prepared a Language Identification Tool for caseworkers to help them communicate with non-English speakers.

Many NYS counties have executive orders or local laws that require all county services to provide language assistance. Best practices for LDSSs:

- Use trained and competent interpreters.
- Do not rely on minors in the family to interpret beyond the basics.
- Remind contract agencies that they must provide language assistance.

If a parent is experiencing mental illness or has an intellectual disability, the caseworker must make their best efforts to discuss adoption with the parent in terms they can understand. If necessary, consideration should be given to involving professionals to assist the caseworker in effective communication with parents. Multiple conversations will be required.

Caseworkers may be assigned to work with adoptive parents who are considering surrendering their adopted child, or cases in which the agency is considering terminating the adoptive parents' parental rights. The work described below applies to such cases as well.

2. Talking with parents about a surrender

As discussed in **Chapter 4**, talking with a parent about surrendering their rights to the child is likely to be a series of conversations rather than a one-time event. Throughout these discussions, the caseworker should answer parents' questions and provide emotional support, if necessary. The caseworker must not push or coerce parents to surrender their rights.

These are some ways to approach these conversations:

- Focus on the positive aspects of surrender for both the parents and the child, especially in regard to the benefits of a conditional surrender as opposed to a TPR proceeding.
- Assess the parents' thoughts and feelings about and relationship with the resource family. If this is appropriate for the case, discuss the option of a conditional surrender.
- Explore how the parents' underlying conditions, including self-concept, values, beliefs, and cultural orientation, might influence their decision to surrender their rights.
- Explain the seriousness and permanency of this decision. Be certain the parents understand that they cannot be punished by the court for declining to surrender their rights.
- Share with the parents that feelings of grief are normal. Offer a referral to supportive counseling if the parents see it as beneficial.
- Encourage the parents to identify what is important for their child to remember about them or their heritage. If this interests them, suggest ways in which the parents can explain to the child the reasons they gave up their parental rights.
- Show the parents the surrender form and, if this is a judicial surrender, explain what is likely to happen in court.

It is important to understand these discussions may stimulate feelings of grief and loss; the caseworker should be familiar with the parents' need to work through these feelings. Throughout the process, the caseworker will need to be patient and diligent in providing support to the parents. Many agencies employ parent advocates to assist in supporting parents during this difficult time. These are individuals who have had personal experience with the child welfare system and, through training and supervision, are able to support parents going through a similar experience.

It is also possible that these discussions will prompt the parents to seek to have the child returned home.[1] In this situation, the caseworker, in consultation with the supervisor and the agency attorney, may decide to give the parents continued opportunities to correct the circumstances that have prevented the child from being returned safely to their home. An alternative would be to file a TPR petition. Consideration should be given to the length of time the child has been in foster care, the child's safety, the parents' strengths and needs, the parents' motivation and ability to make the required changes, and all other relevant case circumstances.

3. Parents' religious preference for the child

Just as agencies must advise parents of their right to express their religious preference for the foster home in which their child is placed when first coming into care, the agency must give the

[1] S. Edelstein, D. Burge, & J. Waterman. "Older Children in Preadoptive Homes: Issues Before Termination of Parental Rights." In G. Mallon & B. Leashore, eds, *Contemporary Issues in Permanency Planning*. CWLA Press, Washington, DC. (2002), pp. 1–22.

surrendering parents the opportunity to express their religious preference. The birth parents may prefer that the child be placed in a family of the same religion as the parent, of a different religion from the parent, without regard to religion, or with religion as a subordinate (less important) consideration.[2]

Where the circumstances are consistent with the best interests of the child and where practicable, the agency is required "to give effect to the religious wishes of the birth mother, and of the birth father whose consent would be required for the child's adoption." OCFS regulation requires that an agency "make an effort" to place each child in a home as similar to and compatible with their religious background as possible with particular recognition that state law requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as that of the child [SSL §373; 18 NYCRR 421.6(h); 18 NYCRR 421.18(c)].

If a parent wishes to designate a religious preference for a child, the parent must be offered the opportunity to use the model OCFS form that is available in both English (LDSS-3416) and Spanish (LDSS-3416-S) or a local equivalent form. The form also allows the parent surrendering to specify that, despite efforts to locate a home of a certain religion, if no home has been found for the child within a certain number of months, the placement of the child may be made without regard to religion.

In the case of unmarried parents, the parent whose consent is required for the adoption is allowed to express a preference for the child's religious upbringing. In working with the birth parents, care should be taken to avoid having two conflicting religious preference statements signed. Both parents should be advised that they have the right to establish a religious preference, but that conflicting statements are not in the best interests of the child, and that the agency will make the final decision. If the birth parents of the child separately surrender their rights and sign conflicting religious preference statements, the placing agency must choose between these statements on the basis of practicability and the best interests of the child.

4. Parents' financial support of a child in foster care

Parents are responsible for financially supporting their child in foster care. LDSS officials are required to advise parents accordingly at the time of placement and evaluate the parents' ability to contribute toward the cost of the child's care [18 NYCRR 422.5(a)]. While much of this work is done early in the case, it is relevant to adoption work because there are circumstances related to adoption under which the parent is not required to provide financial support. LDSS officials are prohibited from referring a parent of a child in foster care to the Child Support Unit when:

- the LDSS official determines that the referral will adversely affect the health, safety, or welfare of the foster child or other persons in the household or will adversely affect the length of the child's placement or impair the ability of the child to return home when discharged from foster care;
- a parent surrenders a child born out of wedlock to an LDSS official. [SSL §§398(6)(f)]; and
- a non-adopting spouse with a written separation agreement is living separate and apart from the adopting spouse or has been living apart from the adopting spouse for at least three years before the adopting spouse begins an adoption proceeding [SSL §398(6)(d), (e) and (f);18 NYCRR 422.4].

[2] OCFS. (2011). "Religious Designation of a Foster Child and a Child Being Placed for Adoption" (11-OCFS-ADM-04).

Also, the law exempts mothers of out-of-wedlock children from the obligation to support a child they surrender to a VA. Parents of children born in wedlock are not relieved of this obligation, and child support is to continue until finalization [SSL §§398(5)(a) & (6)(f)].

B. Rights of birth fathers

Caseworkers must make diligent efforts to identify, locate, and offer services to both parents when a child is placed in foster care. Traditionally, child welfare services have tended to focus on children and their mothers, but current legal and practice standards emphasize the importance of involving both of the child's parents, even when they are not legally married.

Locating and working to engage absent parents and their extended families — with child safety always the paramount concern — is an integral part of child-centered, family-focused casework practice. Even when the relatives cannot be permanency resources, developing or maintaining a relationship with both parents and their extended families can lead to a network of support and connection for the child. For more information, refer to the OCFS *Foster Care Practice Guide for Caseworkers and Supervisors*, Chapter 4.

These diligent efforts to identify family members often result in both of the child's parents being listed in the case record. However, if only one parent is listed when adoption is the permanency goal for a child, the caseworker must make diligent efforts to locate the parent of a child born outside of a legal marriage. This effort should include putative (presumed) fathers who are recorded on the Putative Father Registry (PFR) administered by OCFS [SSL §372-c].

1. Putative Father Registry

Putative (presumed) fathers are often recorded in the Putative Father Registry (PFR) administered by OCFS [SSL §372-c]. The registry includes the names and addresses of any person who:

- has been adjudicated by a court in New York State to be the parent of a child born out of wedlock;
- has filed with the PFR, before or after the birth of a child born out of wedlock, a notice of intent to claim parentage of the child;
- has been adjudicated by a court of another state or territory of the United States to be the parent of an out-of-wedlock child, where a certified copy of the court order has been filed with the PFR by such person or any other person;[3] and
- has filed an instrument with the PFR acknowledging paternity [SSL §372-c(1)(a)-(d)]. The PFR also registers an "Acknowledgement of Paternity" executed by the birth mother and the birth father in accordance with PHL 4135-b.

The names and addresses of persons in the PFR are furnished to any court or authorized agency upon request, with the understanding that the information may not be divulged to any other person except upon order of a court for good cause shown. Therefore, caseworkers should contact the PFR to obtain the names of any persons who might be required to give consent or are entitled to receive notice regarding foster care, TPR, or adoption proceedings. It may be advisable for the caseworker to check with the PFR even if a person is known to be the

[3] OCFS. (2021) "Report to New York State: Court Determination of Parentage" (OCFS-2726).

adjudicated father, as it is remotely possible that a different person has filed an intent to claim paternity with the registry.

To make a request, caseworkers complete form OCFS-2725 "Response/Request for Name and/or Address of Parent of Child Born Out of Wedlock" and mail it to:

New York State
Office of Children and Family Services
Putative Father Registry
52 Washington Street, Rm 332N
Rensselaer, NY 12144

2. The rights of unwed parents

If a child has been born in wedlock and one parent plans to surrender their parental rights, or the agency is going to file a petition to terminate their parental rights, the spouse who is or was married (at the time of conception or birth) to the parent also must surrender their parental rights or the agency must take action to terminate those rights [DRL §111(1)(b)].

When the child's parents were not married at the time of conception or birth, SSL §384-c specifies the categories of fathers of children born out of wedlock who are entitled to receive notice of certain custody and guardianship proceedings affecting the child.

The caseworker, the supervisor, and the agency attorney must agree upon a course of action regarding the father. This discussion must take place before any action is taken so the parental rights of both parents can be resolved at approximately the same time.

If the child was born out of wedlock, the agency must determine what rights the unwed father has regarding the child in order to determine what action is necessary to free the child legally. First, the agency must resolve this question if an unwed mother is going to surrender her rights, or the agency is considering filing to terminate her rights: "Does the father have legal rights that also need to be relinquished by surrender or terminated?" This question is answered by determining whether the parent has full legal rights, due process rights, or no legal rights at all (SSL §384-c).

Who must consent before a child can be freed for adoption?

Parents with full parental rights ("consent parents") must give their consent before a child can be legally freed for adoption. Consent parents are defined by state law and case law.

Chapter 828 of the Laws of 2022 made significant amendments to DRL §111 concerning whose consent is required for an adoption. The following are persons whose consent is now required in the case of the adoption of a child whose custody and guardianship has been transferred to an authorized agency, foster parent, or relative pursuant to SSL §§384-b or 383-c:

- Any person adjudicated to be the father of the child by a court in New York or a court in any other state or territory of the United States prior to the filing of a petition to terminate parental rights of the child pursuant to SSL §384-b, or an application to execute a judicial surrender of rights to the child pursuant to SSL §383-c(3), or an application for approval of an extra-judicial surrender pursuant to SSL §383-c(4).
- Any person who filed a petition in a court in New York seeking to be adjudicated the father of the child prior to the filing of a petition to terminate parental rights to the child pursuant to SSL §384-b, an application to execute a judicial surrender of rights to the child pursuant to SSL §383-c(3), or an application to approve a judicial extra-judicial

surrender pursuant to SSL §383-c(4), provided that the parentage petition has been resolved in the petitioner's favor or remains pending at the conclusion of the SSL §384-b, 383-c or 384 proceedings.

- Any person who has executed an acknowledgment of parentage pursuant to SSL §111-k, FCA §516-a or PHL §4135-b prior to the filing of a petition to terminate parental rights to the child pursuant to SSL §384-b, an application to execute a judicial surrender of rights to the child pursuant to SSL §383-c, or an application for the approval of an extra-judicial surrender pursuant to SSL §383-c, provided that such acknowledgement has not been vacated.
- Any person who filed an unrevoked notice of intent to claim parentage of the child pursuant to SSL §372-c prior to the filing of petition to terminate parental rights to the child pursuant to SSL §384-b, an application to execute a judicial surrender of rights to the child pursuant to SSL §383-c or an application for approval of an extra-judicial surrender pursuant to SSL §383-c [DRL §111(1)(e)].

If the child was placed for adoption **more than six months after birth**, then the father is a consent parent if he has maintained substantial and continuous or repeated contact with the child as manifested by paying a reasonable and fair sum toward child support, according to his means, and has either:

- visited the child at least monthly when physically and financially able to do so, and has not been prevented from doing so by the person or agency having lawful custody of the child; *or*
- maintained regular communication with the child, or with the person or agency having custody of the child, when he was either physically and financially unable to visit with the child or was prevented from doing so by the person or authorized agency having lawful custody of the child.

A father who openly lived with the child for six months during the year before the child was placed and held himself out to be the father of the child is deemed to have maintained substantial and continuous contact with the child [DRL §111(1)(f)(i)].

If the child born out of wedlock was placed for adoption **less than six months after birth**, the criteria for who is a consent father is based on a decision by the New York State Court of Appeals, which held that the standard set forth in DRL §111(1)(f)(ii) was unconstitutional.[4] To date, no action has been taken by the legislature to amend DRL §111(1)(f)(ii) to conform with the court's decision.

According to the standard established in the court's decision, a father is a consent parent when he has shown a willingness to accept parental responsibility by assuming full custody of the child and not merely seeking to block the adoption. Such manifestation of parental responsibility must be prompt, and due consideration must be given to the father's manifestation of responsibility for the child during the six continuing months immediately preceding the child's placement for adoption.

As previously addressed, for a person to become a consent father who was either adjudicated as the father, filed a petition seeking adjudication, executed an acknowledgement of parentage or filed an unrevoked notice to claim paternity, such action must also satisfy requirements

[4] In Matter of Raquel Marie X., 76 N.Y.2d 387, 559 N.Y.S. 2d 855 (1990).

related to the timing of the filing of a TPR petition, the execution of a SSL §383-c judicial surrender, or the approval of a SSL §383-c extra-judicial surrender.

Who must be notified of an adoption proceeding?

Chapter 828 of the Laws of 2022 also amended the notice requirements for putative fathers in regard to adoption proceedings. DRL §111-a was amended to eliminate the requirement that notice of any adoption proceeding be provided to the following persons in the case of the adoption of a child born out of wedlock who is in the custody and guardianship of an authorized agency, foster parent, or relative pursuant to SSL §384-b or in the custody and guardianship of an authorized agency pursuant to SSL §383-c [DRL §111-a(2)].

Notice of an adoption proceeding **does not** have to be given to a person:

- adjudicated by a NYS court as the father of the child (the "legal father");
- who was adjudicated as the father in another state or territory of the United States and filed a certified copy of the adjudication with the Putative Father Registry;
- who has filed an unrevoked notice to claim paternity of the child with the Putative Father Registry;
- who is listed on the child's birth certificate as the father;
- who lived with the child and mother and at the time that the child went into care or when the legal proceeding is commenced and is holding himself out to be the child's father;
- identified as the father in a written and sworn statement by the mother;
- who married the mother before the child was six months old and before any surrender or termination of mother's rights; or
- who has filed with the Putative Father Registry an instrument acknowledging paternity of the child under estates, power, and trusts law.

The persons listed above remain entitled to notice to any adoption proceeding where custody and guardianship of the child was transferred to a VA through a surrender executed pursuant to SSL §384.

The sole purpose of giving notice to a non-marital father who fits into one of these listed categories is to enable him to come to court to present evidence as to what he thinks would be in the child's best interests. If a non-marital father's only paternal claim is that he fits into one of these categories but does not satisfy the criteria for a consent father, he will not have veto power over the child's adoptive placement.

Specifically excluded from the right to notice is a man who has been convicted in New York or any other jurisdiction of rape in the first degree involving force when the child who is the subject of the proceeding was conceived as a result of such rape in the first or second degree, course of sexual conduct against a child in the first degree, predatory sexual assault, or predatory sexual assault against a child [DRL §111-a(1); SSL §384-c(1)].

Chapter 828 of the Laws of 2022 also eliminated the notice requirements set forth in SSL §384-c in regard to SSL §384-b proceedings to terminate parental rights. The law retained SSL §383-c notice requirements for foster care placements initiated pursuant to SSL §358-a and surrenders executed pursuant to SSL §384.

Non-marital fathers may waive their rights to receive such notice by a written instrument signed and acknowledged or executed in the presence of one or more witnesses before a notary public or officer authorized to take proof of deeds [SSL §384-c(5)].

3. Notification requirements

Due to the changes in notification requirements resulting from the enactment of Chapter 828 of the Laws of 2022, agencies are required to notify a non-marital parent of an adoption proceeding only when the child was surrendered for adoption to a VA under SSL §384.

Notice of the proceeding must be given at least 20 days before the proceeding by a delivery of a copy of the petition and notice to the parent. If personal service at the notice parent's last known address cannot be done with reasonable efforts, notice may be given, without prior court order, at least 20 days before the proceeding by registered or certified mail sent to the parent's last known address or the address in the PFR [SSL §384-b(4)]. A notice parent is not required to be given notice by publication [SSL §384-c(4)].

C. After surrender or termination of parental rights

Casework services must continue to be provided to parents to assist them with the issues resulting from the surrender or termination of their parental rights. Caseworkers should help parents move forward with their lives and to view adoption as the way they are providing a permanent and safe environment for the child.[5]

To the extent possible and appropriate, parents should be encouraged to consider the connections that adoption can establish between them, the child, and the adoptive family. Such connections will help the child to thrive in the adoptive placement and minimize feelings of abandonment, desertion, and guilt.

1. Continued contact

In the case of a conditional surrender that includes continued contact between the parents and the child, the caseworker can assist the parents in arranging and maintaining the contact. See **Chapter 4** for more information on conditional surrender of parental rights.

Where appropriate, caseworkers should offer referrals for professional counseling to birth parents to help them through this transition. A referral for family counseling may be appropriate if there are siblings remaining at home. Referrals should also be made to the appropriate program areas within the agency, as well as to community agencies that may assist with the parents' needs. These sources may include Temporary Assistance for Needy Families (TANF) and referrals for medical and employment services designed to meet the physical, mental, emotional, and other needs of the parents.

If the parent's rights were involuntarily terminated, Family Courts in NYS do not have the authority to direct continuing contact between a parent and a child (SSL §384-b).[6]

[5] OCFS. (2012) "Termination of Parental Rights Effect on Continuing Contact of Birth Parent and Child" (12-OCFS-INF-06).

[6] Matter of Hailey ZZ. 85 AD3d 1265 [3d Dept 2011]; affirmed by the New York State Court of Appeals at 19 N.Y. 3d 422(2012)].

2. Information on medical and family history

The caseworker should convey the importance of having the parents provide detailed information on the child's developmental, medical, social, and family history. The questions caseworkers complete in the CONNX health module about parents capture much of the necessary information (e.g., pre-natal care, medications, illnesses, drugs, alcohol, tobacco during pregnancy). The *Biological Family Health Information* window provides for recording additional health information about the family that is pertinent to the child.

Particularly in the case of an older child, the parent(s) should be encouraged to provide photographs, letters, awards, and similar materials that would allow the child to make some connection with their past.

3. Birth Parent Consent Program

The caseworker must explain to the parents the agency's procedure on confidentiality of records. This will include information provided to the Birth Parent Consent Program, which is an expansion of the Adoption Information Registry administered by the NYS Department of Health (DOH) (see **Chapter 4**). At the age of 18, persons who were born and adopted in New York State can register and obtain information about their birth parents and biological siblings.

Caseworkers are required by law to provide a Birth Parent Registration Form (DOH-4455) to birth parents, who must complete and sign the form at the time of surrender. The form is filed by the attorney or the authorized agency handling the adoption with the court. The court will forward the form to the Adoption Information Registry when the adoption is finalized.

Birth parents whose children have already been adopted may also participate in the Birth Parent Consent Program by completing and submitting Form DOH-4455 directly to the Adoption Information Registry.[7] The birth parent indicates on the form whether they consent to the release of their name and address by the registry to the adopted child when the child reaches at least 18 years of age and voluntarily registers with the Adoption Information Registry.

If the birth parents have registered their consent, the contact information will be released to the adoptee only after they reach at least 18 years of age and register with the Adoption Information Registry. A birth parent who gives permission for the release of their contact information will not be asked for final consent and will not be notified of the release of their contact information to the adoptee if or when the adoptee registers.

Three types of information are available from the Adoption Information Registry:

Non-identifying Information: The adoptee can get non-identifying information about their birth parents even if the birth parents did not register with the registry or consent to the sharing of information. This includes their general appearance, religion, ethnicity, race, education, occupation, the name of the agency that arranged the adoption, and the facts and circumstances relating to the nature and cause of the adoption.

Identifying Information: If all are registered and all have given their final consents, adoptees, their birth parents, and their biological siblings can share their current names and addresses. If only one parent signed the surrender agreement or consented to the adoption, then the registration of the other parent is not needed for the exchange of identifying information between the adoptee and the registered birth parent.

[7] NYS Department of Health. "Adoption Information Registry," https://www.health.ny.gov/vital_records/adoption.htm.

Medical Information: Birth parents can give medical and psychological information to the registry any time after the adoption. The information will be shared with the adopted person if they are registered. If the adopted person is not registered, the information will not be shared until they register. The information is important to adoptees because it can indicate if they have a higher risk of some diseases. Medical information updates must be certified by a licensed health care provider.

For more information, see the Adoption Information Registry webpage on the DOH site: https://www.health.ny.gov/vital_records/adoption.htm.

Chapter 8

Chapter 8
Services to the Child

Children who are on the path to adoption often need preparation and support to help them understand past events in their lives and process feelings about their future. Caseworkers focus their efforts on providing supports and services to help children and youth in their transition to "forever" families.

A. Children who are not legally free

Regulations require that an action to legally free the child be initiated within 30 days of establishing the permanency planning goal (PPG) of adoption [18 NYCRR 420.12(e)(1)]. The case record must include a copy of the petition to terminate parental rights (TPR) and supporting documentation.

If the child is not freed within 12 months, the local department of social services (LDSS) is considered to be out-of-compliance with the regulatory standard unless [18 NYCRR 430.12 (e)(1)(i) & (ii)]:

- At the time of the first required family assessment and service plan or the risk assessment and service plan required after the 12 months, a petition to terminate parental rights was filed within 120 days of the date the permanency planning goal of adoption was chosen, and the delay was caused solely by the court and not by the LDSS or voluntary authorized agency (VA) caring for the child; or
- The court refused to terminate parental rights.

1. Casework services

Children who are waiting to be legally freed for adoption will continue to receive the services provided to them since they entered foster care or another care arrangement. In addition, the caseworker should inform them, in an age-appropriate way, about what is likely to happen during and after court proceedings. Children should be prepared, as much as possible, to accept that they will probably not return home to live with their parents.

Members of the adoption "triad" (children who are adopted, birth parents, and adoptive parents) may have to cope with any number of the seven core issues related to adoption:

1. Loss
2. Rejection
3. Shame and guilt
4. Grief
5. Identity
6. Intimacy
7. Mastery and control[1]

Caseworkers and other professionals can help children work through their emotions and feelings of grief and loss. Adoption-related grief isn't widely known or understood by society at large. We

[1] Child Welfare Information Gateway. (2019). The impact of adoption. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. (https://www.childwelfare.gov/pubPDFs/factsheets_families_adoptionimpact.pdf)

lack formal rituals or ceremonies to mark the loss caused by adoption and the resulting grief. Because our culture considers people who were adopted "lucky" to have been chosen by another family, the grief experienced by an adopted child may not be recognized or understood.

A Lifebook is one tool that can help a child move toward adoption and maintain a connection with their past. It is a combination story, diary, and scrapbook and includes information about the child's birth, their family (including pictures), previous placement(s), medical history and needs, schools attended, religious affiliations, and other relevant information about the child and their background. The process of developing a Lifebook can help a child understand events in their life, give them tangible links to the past, and provide a vehicle for them to share their life history with others, including prospective adoptive parents.

For a listing of resources on creating Lifebooks, see "Lifebooks for Adopted People" on the Child Welfare Information Gateway website.

While caseworkers can be helpful and supportive to children, an assessment should be made as to whether the child would benefit from counseling from an adoption-competent therapist. Group and peer counseling also may be beneficial for children, particularly adolescents.

2. Medical services

A comprehensive medical examination for each child for whom adoption is planned must be completed prior to placement for adoption in order to determine the state of the child's health, significant factors that may interfere with normal development, and the implications of any medical problems [18 NYCRR 507.2(d)]. The medical report shall be filed with the child's record. The examination is not required if the child had such an examination within the six months prior to adoptive placement.

The state of the child's health and any factors inhibiting normal development health and their implications must be noted. Necessary treatment programs for any conditions should be outlined and medical certification of handicaps obtained.

Psychological or psychiatric observation and testing must be carried out and included in the child's comprehensive health history. The information gathered during this exam, as well as information from previous medical exams and services, can be used when determining whether the child qualifies for an adoption subsidy as a handicapped child (see **Chapter 13**).

The agency must give prospective adoptive parents the comprehensive health histories, both physical and mental, of a child legally freed for adoption and of their parents, to the extent they are available. Caseworkers may find the output reports from the CONNX Health Services module to be helpful.

For these purposes, a prospective adoptive parent is an individual who has indicated an interest in adopting a particular child and for whom the authorized agency has begun the placement agreement process. In the case of finalized adoptions, such information must be provided upon request to the child's adoptive parents. In all cases, information identifying the birth parents must be removed from the comprehensive health history.

Caseworkers must help prospective adoptive parents and adoptive parents to understand the psychological and medical reports and the implications of such reports for the child's health [SSL §373-a;18 NYCRR 357.3(b)(3), and 18 NYCRR 421.18(m)].

3. Legal risk placements

In a legal risk placement, a child who is not yet legally free for adoption is physically placed in a prospective adoptive home with approved adoptive parents. An adoption placement agreement (APA) has not been signed at this point because the child has not been legally freed for adoption.

This type of placement is most often made when the child is living with foster parents who have made a commitment to provide foster care for as long as needed and to adopt the child if and when the child is legally freed. Legal risk placement helps reduce the time the child spends in foster care and provide permanency for the child at an earlier stage in the process. When it is determined that the non-freed child is unlikely to return home and the agency's plan for the child is adoption, a legal risk placement may be appropriate.

The "risk" in a legal risk placement is that the child will not be freed for adoption and the adoption placement will be disrupted. The determination of the degree of risk and of the feasibility of this type of placement must be made in consultation with the agency attorney.

Is a legal risk placement appropriate for this child?

Children who are not yet freed for adoption can be divided into three groups that are at different levels of risk of not being legally freed for adoption. Within each group, there are indicators of how likely it is that the child will return home or not be freed for adoption. No one indicator alone will be sufficient to determine the likelihood of freeing a child and/or of achieving a successful outcome through a legal risk placement. These indicators must be considered along with other factors in the casework assessment. Each child, family, and case situation must be considered on its own merits.

The first group is highly likely to be freed for adoption, as in the following cases:

- One parent has surrendered guardianship and custody of the child and the other parent is either unknown or uninvolved with the child and/or the agency's attempts to identify or locate the parent have been unsuccessful.
- A child came into care as the result of the death of the parent with whom the child was living and the other parent is unknown or uninvolved with the child; attempts have been unsuccessful to identify or locate the other parent.
- A child has been or apparently has been abandoned by one or both parents and initial attempts to locate one or both parents have been unsuccessful.
- One parent's rights have been terminated and the second parent's rights are likely to be terminated due to non-involvement with the child. Those rights have not yet been terminated solely because that other parent is unknown or has not been located.

The second group has a slightly higher or moderate risk that they may not be legally freed. This is due to a higher level of parental involvement in the children's lives. The parents' actions indicate, however, that the children are unlikely to return home and that the parents' rights are likely to be terminated. The presence of some parental involvement means it may be more difficult to free these children for adoption. Examples of such cases are:

- The parents have discussed and affirmatively considered surrendering their parental rights since the child's birth and have transferred the child's care to a LDSS or VA, but they have not actually signed a surrender instrument.

- The parents have previously surrendered their rights to a sibling of the child and have said they are planning to surrender rights to this child.
- The parents' rights to older siblings have been terminated.
- The parents have a history of not participating in planning for this child or for an older sibling who has been in care.
- The child has previously been placed in care due to parental abuse, has returned home and been abused again, and has been returned to care. It is likely that TPR proceedings will be initiated against the parents.
- The parents have a history of drug or alcohol abuse and have shown no evidence of overcoming or attempting to overcome their addiction.

In each of these situations, there is a greater risk that the child will not be freed for adoption due to at least some, if minimal, parental involvement in the child's life. Greater effort in casework assessment is required to determine the feasibility of a legal risk placement. The caseworker must inform the prospective adoptive parents about the degree of risk and a possible delay in the child being freed for adoption.

The third group includes children who will eventually be freed for adoption and circumstances indicate that legal risk placements may be appropriate for them. These situations often involve the termination of parental rights, although a conditional surrender by one or both parents is also possible. For example, one parent has surrendered their rights to the child and the other parent is incarcerated or institutionalized.

A parent's incarceration or institutionalization is not in itself a basis for termination of parental rights or for making a legal risk placement for the child. If, however, the incarcerated or institutionalized parent has met at least one of the legal standards for TPR (permanent neglect, abandonment, or severe or repeated abuse), it is highly likely that a TPR petition will be successful. When this is the case, the likelihood that a petition to terminate parental rights will prove successful is sufficiently high that, even though there may be some delay in completing the process, a legal risk placement would be an appropriate consideration.

See **Chapter 5** of this guide for more information on diligent efforts on behalf of incarcerated parents.

Such cases would be considered at higher risk due to the greater complexity in freeing the child for adoption, but also because of the probable length of time involved in the freeing process. Even though prospective adoptive parents are aware of the risks, a long period of delays and uncertainty is anxiety-producing for both them and the child. Such factors are manageable when there is appropriate recruitment and preparation of foster families and continued counseling, and support are provided during the course of the placement.

B. Children who are legally freed for adoption

With some exceptions, the child must be legally freed for adoption within one year of setting the goal of adoption. Progress notes in the child's service plan must indicate the date the action was initiated and the date the child was freed.

Children must be placed in adoptive homes within six months of being freed for adoption. Such placements must be documented in the progress notes for each child. For a child in a facility operated or supervised by the New York State Office of Mental Health (OMH) or the New York

State Office of People With Developmental Disabilities (OPWDD), the LDSS will be deemed in compliance with the six-month requirement during the time the child remains in such facility. If the child is discharged from the facility and returns to a foster care placement, the time in the facility when the child was legally freed will be considered part of the total time the child was legally freed but not in an adoptive home [18 NYCRR 430.12(e)(2)(i)].

American Indian or Alaska Native (AI/AN) children who are legally freed for adoption must, in the absence of good cause to the contrary, be placed in accordance with the ICWA preferences set forth in OCFS regulation 18 NYCRR 431.18. Documentation and additional criteria for compliance with this standard are set forth in 18 NYCRR 430.12(e)(2)(iii). For detailed information, see **Chapter 12** of this guide.

The adoption must be finalized within 12 months of the child's placement in the adoptive home [18 NYCRR 430.12(e)(3)(i)]. Failure to meet this time frame will not be determined to be out of compliance where the delay is caused solely by the court, and not by the LDSS or VA caring for the child, or where the adoptive parents have delayed finalization of the adoption [18 NYCRR 430.12(e)(3)(ii)]. OCFS regulations require that agencies "recognize that any child who is legally free is adoptable" [18 NYCRR 421.8(a)].

When a TPR appeal is pending

Either the petitioning authorized agency or the respondent parent may **appeal an unfavorable order** of the Family Court or Surrogate's Court in a termination proceeding. State law limits the time in which a notice of appeal can be filed. An appeal must be taken no later than 30 days after service of the order to which the appeal is related, 30 days from receipt of the order in court or 35 days from the mailing of the order by the clerk of the court, whichever is earliest. During the course of an appeal of a court order, the most recent disposition made by the court is generally continued and the child usually will continue to be placed as the court has ordered, unless a stay of the court order is granted by either the trial or appellate court [FCA §1113].

1. Child Case Record in CONNX

Once a child is legally freed for adoption, information about them must be maintained in a stage separate from the Family Services Stage (FSS). The Child Case Record (CCR) is an individual stage created to document casework activities and services for each legally freed child. A separate CCR must be created for each legally freed child in the family.

A child is not legally free for adoption unless the rights of both parents have ended. The manner in which both parents' rights were ended should be recorded in the Family Services Stage.

Before creating a CCR, the caseworker should make sure that progress notes related to the child are up to date and accurate. Once the CCR is created, no progress notes or casework contacts can be added to their record in the FSS. This also applies to FASP or plan amendments involving the child, except for the plan amendment freeing the child for adoption, which is done in the CCR.

For detailed information on creating a CCR, see the CONNECTIONS Tip Sheet, "Creating a Child Case Record for a Legally Freed Child."

2. Adoption subsidy

When a child is freed for adoption, the child's eligibility for adoption subsidy must be assessed [18 NYCRR 421.8(c)]. It is the responsibility of the LDSS to assess whether the child may be eligible for adoption subsidy and to document that assessment in the case record.

More information on assessing eligibility for adoption subsidy is in **Chapter 13** of this guide and in the Eligibility Manual for Child Welfare Programs under "Adoption Assistance Eligibility."

If the child does not appear to be eligible for the adoption subsidy and the prospective adoptive parents or the foster parents are unable or unwilling to adopt the child without subsidy, the LDSS or the VA must look for an alternative adoptive placement for the child. The caseworker must document the efforts made to locate adoptive parents willing to adopt the child without subsidy [18 NYCRR 421.24(b)(1)(ii)].

From the date of the adoptive placement until the date of the court order finalizing the adoption, the LDSS is required to make these payments as foster care payments, with two exceptions:

- the child is in the guardianship and custody or care and custody of the LDSS, has been freed and placed for adoption, is eligible for adoption subsidy, and is to be adopted by approved adoptive parents who are *not* also certified or approved foster parents; or
- the adoptive parent is not a foster parent and cannot be certified or approved as a foster parent.

In these cases, if a fully executed adoption subsidy is in place, adoption subsidy payments begin on the date of placement with the approved adoptive parents. Until the adoption is final, medical benefits must be continued for all children placed for adoption, as they are still foster children in the custody of the LDSS commissioner [18 NYCRR 421.24(c)(2)(ii) and (iii)].

State law provides that adoption subsidy payments must be made until the child's 21st birthday [SSL §453(1)(a)]. The federal statute authorizes that Title IV-E foster care and adoption assistance eligibility be extended to age 21 [42 U.S,C. §673(a)(4)]. The federal standard applies to all children who are eligible for adoption subsidy as handicapped children.

For otherwise Title IV-E eligible, hard-to-place adopted children, federal reimbursement is available if the child was 16 years of age before the adoption agreement became effective and the child is:

- completing secondary education or a program leading to an equivalent credential;
- enrolled in an institution which provides post-secondary or vocational education;
- participating in a program or activity designed to promote, or remove barriers to, employment;
- employed for at least 80 hours per month; or
- incapable of doing any of the activities described above due to a medical condition, which incapability is supported by regularly updated information in the case plan of the child.

Further guidance can be found in "Title IV-E Foster Care and Adoption to Age 21" (10-OCFS-ADM-10).

C. The NYS Adoption Album

The Adoption Album — Our Children, Our Families is an online system that provides real-time, comprehensive information on children who are freed for adoption. There are two modules to this system:

- Child Photolisting
- Family Adoption Registry

These modules help match potential families with available children currently freed for adoption by automating the child photolisting process and allowing prospective adoptive parents to register and indicate their interest in adopting. See **Chapter 11** for more information about the Family Adoption Registry.

Caseworkers can use the *Adoption Album Training Manual* to guide them through the details of these processes.

1. Child photolisting

Each legally freed child who has been in foster care for a period of three months or more and is not in an adoptive placement must be referred to the OCFS Bureau of Permanency Services (OCFS/BPS) for photolisting within 10 working days of being freed for adoption, except when a waiver of referral is authorized. A photo and a written description of the child should be prepared while the child is in the process of being freed so they can be sent to OCFS within the 10-day time frame (18 NYCRR 420.2, 421.8).

In New York State, a child must be registered through the Adoption Album. Registering the child with other photolisting services does not fulfill this requirement [SSL §372-f; 18 NYCRR 420.2 and 18 NYCRR 421.8].

For purposes of photolisting, a child is considered legally freed when custody and guardianship have been transferred to an authorized agency by a court order terminating parental rights (SSL §384-b); by an executed and, where necessary, court-approved surrender; or the child's care and custody have been transferred to an authorized agency and either both of the child's parents are deceased, or one parent is deceased and the other parent is not a person entitled to notice of the adoption proceeding [18 NYCRR 420.1(a)(1)&(2)].

Practice Tip: Accessing the Adoption Album system

Caseworkers can access the Adoption Album using their New York State Directory Services (NYS DS) account credentials (login ID and password) at https://my.ny.gov/LoginV4/login.xhtml. Caseworkers should speak to a supervisor for assistance in setting up and using this account.

Only authorized users can access information maintained in the Adoption Album. The public accesses the Adoption Album at https://ocfs.ny.gov/programs/adoption/disclaimer.php where they can search the database of photolisted children in categories such as gender, age, and special needs.

The automated photolisting process allows caseworkers to submit an electronic photolisting referral and upload digital photos to OCFS. If, however, caseworkers are unable to scan or upload digital photos, they will need to print out the referral and mail it to OCFS along with a hard-copy photo.

The photolisting process includes information that the caseworker must enter, as well as information that is pre-filled from CONNX, such as demographics, information about health and education, and a list of siblings. Most of this information can be modified for the photolisting and information can be added, such as an optional "Narrative Written by the Child," which is written in the first person in the child's own words. Caseworkers should encourage children to write

their own narratives (even if it is only a few sentences), especially when they are old enough to express what they would like in a family or what they would like the family to know about them.

The "Caseworker Comments" section of the referral is only available for viewing by caseworkers and should include any significant information about medical, physical, behavioral, emotional, scholastic, or developmental concerns. As much as possible, the specific conditions should be described. Diagnoses or sensitive information regarding a child should be included in the caseworker narrative section on the intranet version of the Adoption Album and not in the public narrative that can be viewed on the internet.

The caseworker is allowed to edit the photolisting only until the time the referral is submitted to OCFS. After that time, caseworkers must use the "Change Request" process to update and edit the referral. These updates can include a change to the child's status, a change in the child's own narrative, a change in the child's needs, and caseworker comments. Caseworkers should consult the *Adoption Album Training Manual* for more information on making change requests.

Waiver of Adoption Album referral

There are two circumstances under which an agency cannot refer a child to OCFS/BPS, also known as a waiver of referral. These are:

1. The child has been placed with a foster parent and the foster parent has expressed — *in writing* — an interest in adopting the child.
2. The agency has identified two or more potential placements for the child, or a family has been selected to adopt the child. This waiver allows agencies up to nine months to determine the most appropriate placement for the child. However, if the child has not been placed into an adoptive home within nine months of the date the child was freed for adoption, the child must be referred to OCFS/BPS for photolisting in the Adoption Album [18 NYCRR 420.2(d)(2)].

The agency must make an entry in the Adoption Activities window in CONNX to document the waiver of referral and the reason for the waiver. This will allow OCFS/BPS to track the legal status of these children and monitor the required time frame for children for whom two or more placements have been identified.

Practice Tip: Intent to adopt

Caseworkers and agencies are encouraged to use the "Declaration of Intent to Adopt" form (OCFS-7060) when foster parents are willing to submit a written statement that they intend to adopt a child in their care. Any comparable form developed by an LDSS or VA must include, at a minimum:

- a statement that the adoptive parent was informed that the child was freed and available for adoption, or in the case of an expedited adoption, that the child is to be freed for adoption; and
- a statement that the foster parent understands that by signing the form they are indicating a written intent to adopt the child. Written documentation of the intent to adopt should be directly related to the freeing of the child for adoption.

In the case of an expedited adoption (see **Chapter 11**), the forms should be signed and dated as soon as the goal of adoption is set and no later than the date the waiver of referral code is entered into CONNX. The signed form must be placed in the child's record.

When the child's circumstances change so the waiver of referral is no longer authorized, it is the caseworker's responsibility to refer the child to OCFS/BPS for photolisting unless there is an appropriate reason to request a waiver of photolisting (see below). All changes in the status of a child must be reported to OCFS/BPS within five working days after the change has occurred (18 NYCRR 420.3).

If the foster parent withdraws their interest in adopting the child or is disapproved as an adoptive parent for the child at any time before the adoption is finalized, the child must be referred to OCFS/BPS for photolisting within five working days [18 NYCRR 420.2(d)(1)].

In some cases, the foster parent signs the Declaration of Intent to Adopt, but then insufficient progress is made toward finalization for an extended period of time. Progress toward finalization should be carefully monitored and reassessed on a regular basis, including service plan reviews. If progress is not made toward finalization in a timely manner, depending on the case circumstances, the agency should consider an alternative plan.

Photolisting siblings together

State law, regulations, and adoption practice guidance emphasize the importance of keeping siblings together when they are placed in foster care or with adoptive families, unless such a placement is not in the best interests of one or more of the siblings. See **Chapter 11** of this guide for more information on sibling placements.

Caseworkers should refer siblings together for photolisting in the Adoption Album when they are freed and available for adoption. This is one tool for helping siblings to be adopted by the same family. Each sibling must be referred to OCFS for photolisting within the required time frames described previously. If siblings are freed on different dates, the dates by which they must be referred for photolisting will also be different. Once the first sibling is photolisted, however, one or more siblings who are subsequently freed can be added to the photolisting. The instructions for doing so are included in *The Adoption Album Training Manual.*

Disapproved and incomplete photolistings

If the photograph and/or summary submitted for photolisting is unacceptable for quality reasons, OCFS/BPS will notify the agency that a new photograph or summary is required. The agency will have 30 calendar days to submit a revised referral. If, however, the agency submits a partial referral without a photograph or complete narrative, the child will be considered unregistered, and there will be no 30-day extension. The agency also will be notified that the child has not been registered.

18-month updates

Information on waiting children, including updated photographs and written descriptions, must be provided for the Adoption Album every 18 months. This requirement applies to all children who are still in the Adoption Album 18 months after photolisting, including those on hold (see "Placing a Photolisting on Hold" on the next page).

OCFS/BPS will send notice of an approaching 18-month deadline to both the caseworker whose user ID is listed in the referral and to the agency photolisting contact. These notices normally begin six to eight weeks before the due date. In the case of infants, agencies may wish to update the photographs more frequently than every 18 months.

Practice Tip: Photographs and summaries

While the child is in the process of being freed for adoption, the agency should arrange to have a high-quality photograph taken of the child. The agency should also prepare a summary that will be the basis for the description in the Adoption Album.

Guidelines for photographs:

- The photograph must be clear and in focus. Trained photographers should be used whenever possible. Try to obtain school pictures or photos taken by professionally trained photographers who volunteer their time for the Heart Gallery recruitment program.
- The child must be the only person in the photograph, unless the picture is of a sibling that will be placed together. No other persons, such as foster parents, social workers, neighbors, etc., may be in the picture.
- Photos of siblings should include at least one photo of the entire sibling group and an individual picture of each sibling, if possible.
- There cannot be any identifying information in the photograph.
- The background should be relatively uncluttered, although an attractive background that does not distract from the child is acceptable. Pay attention to the contrast between the child's skin tone and the background.
- The child must be clearly visible and discernable from their surroundings.
- If a child has a physical disability, it is acceptable to show the disability condition.
- The child should be presented in a way that best captures their personality.

Guidelines for public narratives:

- Include the month and year (but not the day) of birth, along with the child's age (e.g., "John, born in October 2015, and is now 7 years old ….").
- Include the child's grade level (if in school) and special hobbies or interests.
- Describe the child's unique personality. Any information that can help prospective adoptive families gain an understanding of the child should be included.
- Include a description of the type of family desired (two-parent, Catholic, etc.).
- If the child has siblings with whom they are not being placed, include a description of the contact that has been maintained.
- In the last paragraph, note special circumstances that may make the placement difficult (e.g., foster parents do not wish to adopt, and the child will have difficulty separating from them).

For more information about writing children's narratives, see *Creating Effective Narratives for Children Waiting for Adoption* by AdoptUSKids (2017).

2. Photolisting waivers and delays

Request to waive photolisting

A waiver of photolisting is not the same as a waiver of referral to OCFS/BPS. An agency may request that photolisting of a freed child be waived when:

- The child has been placed with a relative within the third degree of the parents of the child, the child does not have a permanency goal of adoption, and OCFS determines that the photolisting of the child continues to be contrary to the child's best interests (the child must be referred to OCFS/BPS if the child's goal changes to adoption).[2]

  There is no Adoption Activity code in CONNX for a child who has been placed with a relative and does not have a goal of adoption; the child's permanency goal in this circumstance should not be adoption.

- The child is 14 years or older and will not consent to their adoption (the child must be referred to OCFS/BPS if the child changes their mind and agrees to be adopted). Agencies must document this in the case file and enter the appropriate code in the Activities Window in CONNX indicating that a waiver is being requested because the child is 14 or older and refuses adoption. If the child was previously photolisted, OCFS/BPS will withdraw the photolisting from the Adoption Album [18 NYCRR 420.2(c)].

Although the case record must include the details of the refusal, no further documentation is required by OCFS/BPS. While children who are age 14 or older can refuse to be photolisted and adopted, efforts should be made to help them reach a decision that is in their best interests.

For more information, see **Chapter 3, Section B**, "Child's Perspective on Adoption."

Request for delay in photolisting

Photolisting of a child may be delayed when OCFS determines that photolisting is not in the child's best interests because the child is not emotionally prepared for an adoptive placement. The appropriate code should be entered in the Activities Window to reflect the reason for the delay of photolisting [SSL 372-f(4)(a);18 NYCRR 420.2(b)]. To request a delay in photolisting, an agency must submit the referral to OCFS/BPS with a written statement that photolisting is not in the child's best interests because the child is not emotionally prepared for adoption.

The agency must provide a written statement from a psychiatrist, psychologist, or certified social worker verifying that the child is not emotionally prepared for an adoptive placement. If the statement is incomplete or insufficient, OCFS/BPS may request additional information, which the agency must supply within 15 working days of receiving this notification.

OCFS/BPS will inform the agency whether the request for a delay is approved or disapproved by indicating the status in the referral. A delay in photolisting will be given for a one-time period of six months, starting from the date the child was referred to OCFS/BPS. If the child is not placed in an adoptive home by the end of the six-month period, the child will immediately be photolisted. There are no extensions given on delays [18 NYCRR 420.2(b)(2)].

[2] "Relatives within the third degree" applies to the parent's first, second, and third degree of relatives as follows. Examples of first-degree relatives include a spouse, child, or parent. Second-degree relatives include brothers, sisters, half-brothers, half-sisters, grandchildren, and grandparents. Third-degree relatives include uncles, aunts, nephews, nieces, great-grandparents, and great-grandchildren.

3. Change in photolisting status

In some circumstances, a caseworker may need to request a change in the photolisting status of a child after the referral has been submitted to OCFS/BPS for approval or the child has already been photolisted. It is the agency's responsibility to keep OCFS/BPS informed of the child's situation [18 NYCRR 420.2].

Putting the photolisting on hold

In some cases, a request is made to put the photolisting on hold. If OCFS/BPS approves the request, the child's photolisting will be temporarily removed for a period of time, the length of which depends on the reason for the request.

OCFS/BPS created the Hold category to help agencies respond to inquiries about photolisted children whose placements are in process but are still required by law to be photolisted. There are categories of Hold Codes that group children with similar situations as those in the waiver of referral/delay categories. While some of the Hold Codes appear similar to requests for waivers or delays, they are handled differently because the child has an active photolisting already in place. Once a child has been photolisted, the caseworker should use only hold requests to reflect changes in the child's status.

Examples of reasons for hold requests and time frame guidelines are:

- There are multiple inquiries about adoption of the child. (30 days)
- The child is visiting with prospective adoptive parent(s). (60 days)
- The child is not emotionally prepared for adoption as demonstrated through a written statement from a psychiatrist, psychologist or certified social worker verifying that the child is not emotionally prepared for an adoptive placement. (6 months)
- Multiple potential families have been identified for the child. (9 months)
- The child has been placed with a foster parent who has expressed, in writing, an interest in adopting the child.
- Child has reached 14 years of age and will not consent to adoption.

Withdrawal of photolisting

Other changes in the child's status result in a request for the Adoption Album referral to be withdrawn permanently [18 NYCRR 420.4]:

- The child has been adopted;
- The child has reached their 18th birthday, and will not consent to the agency's adoption plan;
- The child has been discharged from foster care in New York State; or
- The child has died.

Other reasons for withdrawal of photolisting might include:

- Child is in an adoptive placement;
- The child has been placed in a kinship guardianship and their PPG is no longer adoption;
- The child cannot be located.

The caseworker submits the request for a change in photolisting status to OCFS/BPS through the Adoption Album. OCFS/BPS reviews the request and emails the caseworker of the decision to either approve or disapprove the request. If the request is disapproved, the reasons for the disapproval will be included in the email. Once the change in status is approved by OCFS/BPS, the caseworker (or other agency staff, depending upon local practice) must enter the appropriate code on the Adoption Activities window in CONNX.

Adoption disruption

If the APA has been signed and the family then states it no longer wishes to adopt, the placement is considered to be disrupted. The date of the disruption is the new freed date for the child for the purposes of photolisting, and the required time frames for photolisting are based on that new freed date. In such instances, the caseworker must refer the child to the Adoption Album unless there is a reason for a waiver [18 NYCRR 420.2(d)(2) and 18 NYCRR 430.12(e)(2)(iii)(a)]. An agency may request that the photolisting be delayed for six months following a disruption if the agency determines that the child is not emotionally prepared for adoption.

4. Adoption Album inquiries

If a family wants more information about a photolisted child, they may contact the caseworker at the telephone number included on the photolisting.

If the caller is not an approved adoptive parent, the caseworker should determine whether they have applied to an LDSS or VA. If they have not, the caseworker should encourage them to contact an authorized agency in their area to discuss the approval process. They can also be directed to the list of adoption agencies on the OCFS website if they reside in New York State.

If the inquirer is an approved adoptive parent, their agency should receive a response within 10 days with a summary describing the child or with an explanation that a summary describing the child will not be sent because [18 NYCRR 421.17(f)]:

- the child has been placed;
- the child's placement is currently being planned;
- a number of summaries are currently under consideration for this child; or
- another reason why this family will not be considered for this child.

Even if a child is no longer available for adoption, the inquiring family may be a potential resource for another child. The caseworker should engage the family in a discussion about the adoption process in general and other available children to see if this may be an appropriate option to explore. Agencies are encouraged to retain home studies of inquiring families if similar children are available, so that, even if the child who was the subject of the inquiry is not placed with the family, other waiting children in the agency may be presented to the family for consideration.

D. Preparing children for pre-adoptive visits

When prospective adoptive parents are not the child’s current foster parents, the next step for the caseworker is to arrange visits between them and the child so they can get to know one another. The frequency, duration, and location of the visits should be based on the child’s individual needs and should be appropriate for their age and developmental abilities. For example, for young children with minimal or no special needs, one or two visits with prospective adoptive parents may be sufficient before placement.

Older children and children with special needs may require more visits to ensure that they and the prospective adoptive parents both are ready for the placement. While a long period of visitation is not necessary in many new placements, frequent visits, including overnight or weekend, may be arranged to prepare for and expedite the placement [18 NYCRR 421.18(f)].

For most children, it is appropriate to share verified information about the adoptive family as it becomes available (with the family's permission). For some children, based on their age and development, it is preferable to share little information until the adoptive parents have been engaged, background information is complete, and the team has made a clinical judgment to approve initial contact with the child. Caseworkers should consult with those who are most familiar with the child to determine the best way to handle this information.

Steps for caseworkers to consider in helping to prepare the child for initial visits with prospective adoptive parents:[3]

- Arrange for phone calls, letters, pictures, or email between the child and new family members before the initial meeting.
- Tell the child how the meeting will be structured — how long it will last, where it will take place, who will be in charge, how the child might participate, and how it will end. Ask the child about any changes the child would like to make.
- Discuss with the child the child's expectations and concerns, including safety, and develop a plan to address them.
- Introductions should take place in a supervised setting where the child will be most comfortable.
- Ask the child if the child would like to bring anything to share with the prospective adoptive parents, such as artwork or crafts.

E. Preparing children for permanency

Caseworkers should use techniques that help prepare children and youth for adoption and are appropriate for their age and development. Caseworkers can be instrumental in helping the child successfully transition to an adoptive placement by being mindful of the needs of the child in the context of their age; mental and physical health; personality; and cultural, ethnic, religious and/or racial experiences.

Children, particularly younger children, may not understand what joining a new, permanent family means. Even when they are being adopted by their foster parents with whom they have good relationships, children still may find the transition confusing and struggle with their emotions. While in foster care, the child may believe that reunification with their birth family is still possible. During the transition to adoption, a child may experience a different set of emotions and behaviors than when they were first removed from their home.

[3] Louisell, M. (2008). *Six Steps to Find a Family: A Practice Guide to Family Search and Engagement (FSE).* Hunter College School of Social Work & California Permanency for Youth Project: National Resource Center for Family Centered Practice and Permanency Planning, p. 38.

Below are some ideas for communicating with the child during transition to adoption:

- Explain what a permanent family means in terms that are appropriate to the child's age and developmental level.
- Ask children to respond in their own words to open-ended questions about any perceived difference between foster care and adoption (e.g., “How do you think being adopted is different from being in foster care?”).
- Let children know that being adopted does not mean they need to forget about their birth or foster family.
- Remind children that adoption makes them a “forever” member of the family, even as an adult.
- Provide opportunities for children to speak with other children who have been adopted (as appropriate).[4]

[4] Child Welfare Information Gateway. (2020). Preparing children and youth for adoption or other family permanency. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. Retrieved from https://www.childwelfare.gov/pubPDFs/bulletins_preparingchildren.pdf.

Chapter 9

Chapter 9

Finding Adoptive Families

Adoption services must be made available for each child who is freed for adoption. Adoption services include the recruitment and home study of prospective adoptive parents [SSL §372-b]. Agencies must have a comprehensive recruitment plan that focuses on developing a pool of adoptive parents willing and able to adopt the children needing placement and representative of the children in care. In compliance with these mandates, OCFS regulations require the following.

Authorized agencies operating an adoption program must [18 NYCRR 421.10]:

- carry out recruiting efforts specifically directed at communities of populations that have ethnic, racial, religious, or cultural characteristics similar to those of the children identified annually by OCFS as representing the largest number of waiting children;
- keep the community informed about the development and progress of the adoption program and the characteristics and needs of the children who require adoption;
- offer information about the program, the need for adoptive homes, and the availability of adoption subsidy, to organizations, agencies, media representatives, and other persons who may be a referral source in the community; and
- seek to recruit persons with the ability and motivation to serve children in need of a permanent family.

Recruitment of families for children must be an ongoing, year-round function for an agency to have a pool of approved adoptive families available for children who are legally free and waiting for adoption, as well as children who will soon be free for adoption. Agencies have a responsibility to achieve timely and appropriate placements of all waiting children in need of families.

A. Recruiting kinship caregivers

Kinship caregivers are key resources in the overall strategy for finding homes that best meet children's needs. When children cannot live safely with their parents and are placed into care, caseworkers must first make diligent efforts to achieve placement with a kinship caregiver.

Kinship caregivers can be relatives, godparents, neighbors, family friends, or adults with a positive relationship to the child or the child’s family, an unrelated person where placement with such person allows half-siblings to remain together, and the parents or stepparents of one of the half-siblings is a relative of such person who are providing care to a child.

1. The Kinship Guardianship Assistance Program (KinGAP)

KinGAP provides an option for kinship foster parents to assume legal guardianship of a child in their care and receive financial assistance similar to an adoption subsidy.

A person who has a lawful order of guardianship of a child has the right and responsibility to make decisions related to protection, education, care and control, health and medical needs, and physical custody of the child [FCA §657(c)].

Legally, adoption is considered to be a more permanent arrangement than guardianship because adoption is less vulnerable to challenges by parents. A legal guardian has custody and

guardianship of the child, but the parents' rights have not been terminated or surrendered by the appointment of the guardian.

For this reason, federal and state KinGAP laws require the agency and the court to determine that neither reunification nor adoption are appropriate permanency options for the child. If the assessment shows that the caregivers have a lasting commitment based on kinship ties, guardianship may be the appropriate choice.

Adoption is not the ideal option in some cases. Relatives and other family members may prefer to retain their identities as the children's grandparents, aunts, uncles, or adult siblings rather than becoming their parents. The termination or surrender of parental rights, which is a prerequisite for adoption, may be perceived by kin as unnecessary and disruptive to existing family relationships. Fictive kin may be reluctant to alter existing relationships through adoption; particularly if they have close bonds with the child's parents. Older children also may refuse to consent to the adoption because they do not want to terminate their relationship with their parents. In such cases, KinGAP fills an important niche in the permanency planning landscape.

Eligibility for KinGAP

Caseworkers must first determine whether the foster parent and child meet the eligibility requirements for KinGAP [SSL §458-a; 18 NYCRR Part 436]. If they qualify, the next step is to determine whether the child and family meet the eligibility requirements for Title IV-E kinship guardianship assistance reimbursement.

Detailed information about eligibility criteria, along with specific information about the documentation that is needed for each of the eligibility criteria, can be found by reviewing the Kinship Guardianship Assistance Eligibility Checklist (OCFS-4435a) and the Kinship Guardianship Assistance Eligibility Checklist Instructions (OCFS-4435b) for completing the checklist.

Best interests determination

In addition to the eligibility criteria referenced above, the caseworker must also determine that it is in the best interests of the child for the kinship foster caregivers to become the legal guardians of the child. This determination includes determining and documenting that compelling reasons exist that the return home or adoption of the child is not in the best interests of the child and therefore is not appropriate. These compelling reasons must be documented in the case record.

For detailed information on caseworkers' responsibilities in KinGAP determinations, see the OCFS Kinship Guardianship Assistance Program (KinGAP) Guide.

B. Foster parents as adoptive resources

Foster parents are the primary adoptive resource for children in foster care. A caseworker should regularly update foster parents on the status of a child in their care, especially when they are likely to be freed for adoption.

When foster parents have cared for a child continuously for a period of 12 months and the child has been freed or is in the process of being freed for adoption, foster parents must be given preference and first consideration to adopt the child. If the foster parents have not completed an application to become adoptive parents, caseworkers should determine their interest in adopting the child and explain the procedure for applying to adopt [SSL §374(1-a); SSL §383(3)].

Although foster parents who have cared for the child for a continuous period of 12 months are entitled to a preference and first consideration, the agency must still apply a best interests standard in making the decision whether to grant the adoptive placement with the foster parent [18 NYCRR 421.18(d)].

If foster parents want to adopt a child who has been in their home for less than 12 continuous months, the agency must accept and prioritize the foster parents' application according to the priority rating established for adoptive applicants (see **Chapter 10** for details on priority ratings). While these foster parents are not guaranteed first consideration to adopt the child, the caseworker should carefully consider the foster parents' relationship with the child and the foster parents' ability to care for the child on a permanent basis [18 NYCRR 421.19(a)-(c)].

Foster parents must be informed if a freed child in their care has any siblings or half-siblings who are also free for adoption. These children must be placed together for the purposes of adoption unless it can be documented that such a placement would not be in the best interests of one or more of the children [18 NYCRR 421.2(e)].

If the foster parents are interested in adopting, they must indicate their interest in writing by completing a Declaration of Intent to Adopt (OCFS-7060) or a comparable agency form. If the foster parent provides a written statement indicating their intent to adopt the child, the photolisting requirement for the child will be waived [18 NYCRR 420.2(d)].

1. Concurrent approval / certification

An applicant can apply for approval as an adoptive parent at the same time they apply to become a certified or approved foster parent [18 NYCRR 443.9]. If applying to a VA, the applicant should verify that the VA is approved to both certify and approve foster parents and to approve adoptive parents.

The applicant is not required to submit dual documentation to the authorized agency for such approval. They can apply for approval only as an adoptive parent for a specific child in their home or for a child who may not yet have been identified.

The standards for dual certification/approval are essentially the same as those for certification/approval of a foster parent. The only exceptions are the different requirements regarding marital status and age. Applicants to adopt must be 18 years of age or older, while applicants to become foster parents must be over the age of 21 [18 NYCRR 421.16(b); 18 NYCRR 443.2 (c)(1)(i)]. Applicants for concurrent approval/certification complete the same *Foster/Adoptive Parent Application* (OCFS-5183B) as those who are applying to be foster parents. See **Chapter 10** for details on the approval of adoptive homes.

C. Diligent recruitment

Diligent recruitment is designed to create a pool of potential foster and adoptive families that reflects the ethnic and racial diversity of the children for whom homes are needed. While requiring such efforts, federal law and state regulations prohibit the delay or denial of adoption due to the race, color, or national origin of the child or of the foster or adoptive parents.

Diligent recruitment plans include the following:

- A description of the characteristics of the children for whom homes are needed.
- Specific strategies to reach the individuals and communities that reflect the children in care (e.g., recruitment at community centers, religious establishments, school PTA meetings).

- Various methods for providing prospective foster and adoptive parents with all the information they need (e.g., radio announcements, pamphlets, television ads, and informational sessions).
- Strategies for maximizing access of prospective foster/adoptive parents to the home study process (e.g., flexible hours to conduct home studies).
- Strategies for the provision of training staff regarding working with diverse communities and dealing with linguistic barriers (e.g., utilizing interpreters, translating written information into different languages).

OCFS requires LDSSs and VAs involved in recruiting foster/adoptive parents to provide periodic recruitment and retention plans to their OCFS regional offices.

1. General recruitment

General recruitment uses methods that are designed to reach as many people as possible with a one-size-fits-all message. Volume is the key factor in this approach. While this approach can be helpful in reaching a wide variety of families, it is most helpful in setting the stage for more targeted recruitment.

General recruitment casts a wide net in the community and builds awareness of the ongoing need for foster/adoptive families. General recruitment can also promote positive images of foster care and adoption. Its value lies in helping create a local environment that is receptive to targeted and child-focused recruitment, rather than resulting in new foster/adoptive homes.

Newspaper and television campaigns

Media campaigns featuring waiting children and the need for foster/adoptive families have been conducted by local newspaper and television outlets. This coverage is provided free of charge as a public service.

Heart Galleries

Over the past two decades, Heart Galleries featuring professional photographs of children waiting to be adopted have been held across New York State. They are traveling exhibits set up in public areas, such as shopping malls, and are designed to raise awareness about adoption from foster care.

The **Heart Gallery New York** website is an online version of this tradition. It is a collaboration between OCFS and Heart Gallery NYC, with the participation of five Heart Galleries throughout New York. In addition to photographic images of children in foster care who have been freed for adoption, the site includes links to the OCFS Bureau of Permanency Services and Adoption Album photolistings.

Practice Tip: Using data to improve recruitment efforts

Even the most robust foster care programs can face challenges in recruiting adoptive families. When an agency does not have enough adoptive homes for children waiting for adoption, their first instinct may be to redouble their efforts to do more of the recruitment activities they've always done. But perhaps there is a better way. A careful look at data related to recruitment and retention of foster homes will help create a road map to guide future actions.

The analysis of recruitment data helps you create a strategy tailored to fit the needs of your agency. You can then base your recruitment decisions on accurate and complete information, reducing guesswork and reliance on anecdotes.

Relevant data is available to agencies through the annual Monitoring and Analysis Profiles (MAPS) reports and Foster Boarding Home Data Packets.

Source: OCFS, *Revitalizing Recruitment and Retention of Kinship, Foster, and Adoptive Families*.

2. Targeted recruitment

With targeted recruitment, efforts are concentrated on narrowly defined, smaller groups of people in order to achieve a clearly defined objective. Targeted recruitment routes the recruitment message directly to the people who are most likely to follow through to become foster or adoptive parents. It focuses on families in targeted communities where homes are needed, as well as on families with specific backgrounds that reflect the backgrounds and needs of children awaiting homes.

Effective targeted recruitment is based on an analysis of local data that helps agencies understand current recruitment strengths and gaps. This defines the work that has been accomplished, identifies areas that need more attention, and provides a launch pad for innovative solutions.[1]

Key strategies for promoting targeted recruitment:

- **Develop partnerships with diverse communities:** Targeted recruitment relies on engagement with diverse racial, ethnic, and cultural communities. As agencies develop relationships in target communities, they can work with these contacts to develop a plain-language message that explains the impact of Disproportionate Minority Representation (DMR) on children and youth and describes the need for more foster/adoptive families in affected communities. Trust building is also encouraged by taking advantage of opportunities to work alongside faith, ethnic, and civic organizations.
- **Build resources in the Native American community:** The recruitment of foster/adoptive families for Native American children must conform to the requirements of the federal Indian Child Welfare Act (ICWA) and corresponding OCFS regulation

[1] OCFS. *Revitalizing Recruitment.* "Driving recruitment with data." Retrieved from https://ocfs.ny.gov/programs/fostercare/recruitment/strategies/data-driven.php.

[18 NYCRR 431.18]. ICWA outlines foster/adoptive placement preferences. Specifically, absent good cause to the contrary, agencies must seek placement with the extended family first. Partnerships between non-tribal and tribal child welfare systems can be an important support for tribes in developing their capacity to certify foster homes. See **Chapter 12** of this guide for details on ICWA requirements.

- **Make connections with LGBTQ+ couples:** Lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ+) couples choose to foster and adopt at higher rates than different-sex couples. Although same-sex couple households in the United States make up less than 2% of total coupled households, 21% of same-sex couples with children have adopted children versus less than 3% of opposite-sex couples with children.[2]

  In the past, LGBTQ+ individuals have faced discrimination when attempting to foster or adopt children. Such experiences may deter them from future attempts to engage. To best recruit and serve LGBTQ+ foster/adoptive parents, home finders may consider the following:

  – Using inclusive imagery (e.g., same-sex foster parent couples, gender-nonconforming youth) in media such as websites, brochures, flyers, manuals, etc.

  – Displaying Safe Space signs or rainbow stickers as silent cues to LGBTQ+ families that they are welcome.

  – Assessing agency policy for inclusion of nondiscrimination protections related to LGBTQ+ individuals. New York state law and OCFS policy consider sexual orientation and gender identity to be protected classes.

  – Posting information for all applicants about their right to be protected from discrimination and how they can pursue legal remedies.

  – Engaging with an LGBTQ+ Center. Such centers provide connections to services and programming and serve as hubs for activities. LDSSs/VAs can partner with centers by asking them to host recruitment events, advertising in their media campaigns, and providing information for them to give their members.

- **Engage current foster parents in recruitment:** According to a nationwide survey, engaging foster and adoptive parents in recruitment is one of the most successful methods of recruiting new families.

  OCFS has established a policy that allows LDSSs to adopt a policy to pay a foster parent a finder's fee of up to $200 for each new foster home that they recruit. The payment of a finder's fee is designed to be an incentive for experienced foster parents to recruit new homes. All current foster parents, including those certified by VAs, are eligible to receive the finder's fee. Payments may be made to eligible foster parents when the home that they recruited is certified and receives the first child. It is not paid for the recruitment of approved relative foster homes. For detailed information regarding how to apply this policy, please refer to Chapter 8, Section G, of the *Standards of Payment for Foster Care of Children Program Manual*.

[2] Lifelong Adoptions. "LGBT adoption statistics." Retrieved from https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics.

3. Child-focused recruitment

Child-focused recruitment uses intensive, tailored techniques to create permanency for children and youth for whom it has traditionally been difficult to find homes. Child-focused recruitment models vary in their implementation approach, but share these components:

- Building a relationship with the child and engaging the child in recruiting a family, as developmentally appropriate.
- Exploring placement options with relatives and other connections by "mining" the case file to carefully search for information about people who have known and cared about the child who might be possible placement resources.
- Creating a personal recruitment team for the child that includes interested people, such as relatives, friends, school personnel, coaches, and current/past caregivers.
- Exploring placement options outside of the child's family based on the child's strengths, needs, and background.
- Establishing permanency through either an adoptive home or a committed network of caring adults.

D. Hard-to-find adoptive homes

The children waiting longer periods of time in foster care for adoptive placement are, for the most part, members of "special needs" populations, including those with emotional or physical disorders, children older than 6, children of color, and members of sibling groups.[3] According to the Government Accounting Office (2002), children adopted from foster care and those who are waiting are similar when looked at by gender and race; the major difference between the two groups is in age.[4]

This fact is illustrated by 2022 OCFS data: out of the 421 children over age 8 who were freed for adoption but not yet placed, 255 (60.6 percent) had been waiting to be placed for more than a year. In addition, 51. 2 percent of children over age 8 who reached the milestone of adoption placement in 2022 had been waiting for more than three years.[5]

1. Home finding for older youth

Although achieving safety and permanency for children and youth is the overarching goal of child welfare practice, case plans of older youth may not reflect permanency with an adoptive family as the primary goal. This may occur because child welfare professionals may not view permanency with a foster parent, family member, or other caring adult as a viable option for older youth, or they may not have a full understanding of what permanency can entail or how it

[3] Casey Family Programs National Center for Resource Family Support (2003). *Individualized and Targeted Recruitment for Adoption,* p.1. Retrieved from: http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/targeted-recruitment.pdf.

[4] US Government Accounting Office. (2002). Foster care: Recent legislation helps states focus on finding permanent homes for children, but long-standing barriers remain. (GAO-02-585).

[5] OCFS. 2022 Monitoring and Analysis Profiles: New York State. Retrieved from https://ocfs.ny.gov/reports/maps/counties/New%20York%20State.pdf.

can help lead to future success for youth.[6]

Establish relationships

When returning home is not an option, the best place to start planning for permanency, whether guardianship or adoption, is urgent and consistent engagement with the youth themselves. Caseworkers should have candid and ongoing discussions with youth about the importance of permanency, and provide a safe space where youth feel comfortable to express ideas and concerns.

Youth need to understand the different permanency options and the pros and cons of each one. They may show initial or even long-term resistance to permanency planning that involves the termination of their birth parents' rights because of their natural emotional ties to their families, or they may crave independence, given their developmental stage. As such, it is essential not to start the conversation with guardianship or adoption, but rather to lead with the importance of having lifelong, supportive relationships. Once that foundation is established, caseworkers can begin to explore the youth's openness to guardianship or adoption.

Involve youth in permanency planning

The participation of adolescents in planning their own adoption is critical. Adolescents need to be actively involved in identifying past and present connections that can be explored as potential adoptive resources. The participation of adolescents in planning their own adoption is critical. Adolescents need to be actively involved in identifying past and present connections that can be explored as potential adoptive resources. Young people who are age 14 and older can refuse to consent to adoption.

Exploring the permanency option of adoption with all children, and particularly adolescents, is a process that involves multiple conversations over a period of time. Some adolescents are open to, and even enthusiastic about, adoption. Other adolescents are more hesitant or even quite negative about adoption. Caseworkers should discuss sensitively with the youth where the youth might like to belong and address the strong feelings that might underlie a statement by a young person that they do not want to be adopted. The youth may raise concerns that include[7]:

- "I don't have a choice on my adoptive parents."
- "I don't want to lose contact with my family."
- "I don't want to lose contact with important people."
- "I will have to change my name."
- "No one will want me."
- "I am too destructive for a family."
- "Families are for little kids."
- "I don't want to betray my family."
- "Mom said she would come back."
- "I want to make my own decisions."

[6] Child Welfare Information Gateway. (2019). Promoting permanency for older youth in out-of-home care. U.S. Department of Health and Human Services.
[7] Mallon, G. (2006). *Unpacking the NO! Facilitating Permanency for Older Adolescents.* New York: National Resource Center for Family-Centered Practice and Permanency Planning.

- "I'll just mess up again."

Caseworkers need to hear the concerns the youth is expressing and help to address them, rather than accepting the youth's initial negative response to discussions about adoption.

Explore connections

Teens in foster care usually have emotional attachments to others. They may have created their own "families of choice." These families may consist of friends, parents of friends, current and/or former foster parents, teachers, coaches, cottage parents, maintenance staff, relatives, older siblings, or friends who are now adults, neighbors, church members, attorneys for children, social workers, employers, counselors, etc. Ask youth to help explore these connections. There are often more than a dozen people currently in the youth's life circle that could be approached about offering a home to the youth.[8]

Exploring connections can help an older adolescent understand the importance of a permanent family and also help identify potential adoptive resources for the youth.[9] Due to the likely history of trauma, the casework team should explore who would be the best person to have these discussions with the child: foster parent, case planner, therapist, etc.

Who cared for you when your parents could not? Who paid attention to you, looked out for you, cared about what happened to you?

- With whom have you shared holidays and/or special occasions?
- Who do you like? Feel good about? Enjoy being with? Admire? Look up to? Want to be like someday?
- Who believes in you? Stands by you? Compliments or praises you? Appreciates you?
- Who can you count on? Who would you call at 2 a.m. if you were in trouble? With whom would you want to share good news? Bad news?
- Who are the three people in your life with whom you have had the best relationships?
- Would it help to review where you have lived in the past to help you recall important adults in your life?
- To whom have you felt connected to in the past?
- Who from the past or present is someone you want to stay connected to? How? Why?
- How are you feeling about this process? What memories, fears, and anxieties is it stirring up?

2. Child-specific recruitment for older youth

It is widely recommended that agencies use child-specific recruitment for older children and children with special needs. Child-specific recruitment strategies that have been found to produce promising results include:

- **Adoption exchanges:** The description of a specific child may be selected for presentation at a regional or statewide adoption exchange, local or national foster parents' organizations, or adoptive parents' associations that recruit families. After each

[8] OCFS. *Foster Care Recruitment* website. "Hard-to-Find Homes." Retrieved from https://ocfs.ny.gov/programs/fostercare/recruitment/strategies/hard-to-find.php#special-needs.

[9] Mallon, op. cit.

recruitment effort for a specific child, the caseworker should assess the results of the effort and develop a new plan of action if no promising placement possibility is found. Caseworkers must be careful not to disclose confidential information about the child and/or family at such exchanges and forums. Information that may be discussed is the information available to the public through the Adoption Album.

Rather than posting youth profiles for prospective adoptive parents to review or hosting an adoption fair, youth attend an event where the profiles of potential adoptive parents are displayed, and the youth can select which family or families they want to learn more about. The families are not present but social workers are available to answer questions.

Practice Tip: Wendy's Wonderful Kids

Wendy's Wonderful Kinds, a program of the Dave Thomas Foundation for Adoption, provides funding to agencies for the hiring of staff ("recruiters") who are dedicated to finding permanent families for children in foster care for whom homes are hard to find: teenagers, children with special needs and siblings. Recruiters use child-focused recruitment by searching within a child's familiar circles of family, friends and neighbors and then reach out to the communities in which they live. The program is partnering with more than two dozen VAs in New York State. Document everything — all contacts and attempted contacts with parents, relatives, the child, foster parents, and service providers.

Source: Wendy's Wonderful Kids, "About Us," retrieved from https://www.davethomasfoundation.org/our-programs/wendys-wonderful-kids/.

- **Individual Adoption Plans (IAPs):** Individual adoption planning is one of several recruitment strategies that can be used to locate prospective adoptive parents for children available for adoption. It is not intended to replace broader recruitment strategies but rather to complement and supplement them with the common goal of finding appropriate, permanent adoptive families for children and youth in foster care.

  Some of the guiding principles to consider when working with older youth on child-specific recruitment are based on the understanding that youth:[10]

  – Must be involved in the process and must have input.
  – Must be informed about the importance of a permanent family.
  – Need to be involved in recruitment efforts.
  – Can identify persons with whom they feel they have connections.
  – Should be able to work with professionals who understand them and enjoy working with them.

- **Case file mining:** Case file mining (or "relationship mining") has been found to contribute to successful adoptions and other forms of permanency. Case mining

[10] Mallon, op. cit.

includes a thorough review of a youth's existing files to identify significant people in the child's life, both past and present.

This could include child welfare workers, foster parents, attorneys, Court Appointed Special Advocates (CASAs), teachers, neighbors, coaches, therapists, relatives, mentors, faith-based representatives, and extracurricular activity leaders. Any connections the youth has had, no matter how briefly mentioned in the case record, may be potential permanency resources or sources of information about other people who have been important to the youth in the past.[11]

Given that some youth have been in care for prolonged periods of time, case records can have many volumes. All volumes should be explored, however, in an effort to uncover clues about possible connections, both past and present. Third-party reviewers can be helpful in the process of uncovering these possible connections, as caseworkers who have been assigned the case may inadvertently miss connections that may be more visible to fresh eyes.

3. When a youth becomes an adult

An adoption that occurs when a youth is 18 years old or older is considered to be an adult adoption. Their parents' rights do not have to have been terminated and their parents' consent is not required.

Youth who are adopted at age 16 or older may be eligible to receive Educational Training Vouchers (ETVs). An ETV is a benefit from a federally funded program that awards grants to current and former foster care youth to help pay for college or vocational programs. There also may be post-adoptive services available to the youth and the adoptive family.[12]

Resources

For more information about adopting adolescents, see:

Home Finding Practice Guide, published by OCFS (2020), provides extensive guidance for home finders, with Chapter 3 focusing on recruitment.

"What are some effective strategies for older youth adoption?" on the Casey Family Programs website, published in 2020.

"Permanency for Youth," a webpage at Gateway to Child Welfare Services website, provides a list of resources for caseworkers.

4. Home finding for sibling groups

Successful recruitment and retention of homes for sibling groups requires building support systems for parents, including material and financial resources, and policies and procedures that make it easier for families to care for sibling groups. Families caring for sibling groups need the "plus" version of the usual supportive services, such as respite. Ask families what they specifically need and respond effectively. These needs may include:

- Logistical support, such as transportation
- Assistance with tasks such as school registration

[11] OCFS. *Home Finding Practice Guide,* Chapter 3.

[12] OCFS. (2011) *Adoption Rights for Foster Care Youth Who are 14 Years Old and Older*.

- Day care
- Additional material resources, such as household items

Community members and businesses can be asked to help support foster/adoptive families by donating or reducing the cost of items such as vans and bunk beds.

LDSSs and VAs are instrumental in building support systems for these unique and valued families. Support groups of new and experienced foster parents allow foster/adoptive families to share and learn from each other. Families who have fostered or adopted sibling groups can act as mentors to newer families, as well as recruiters of prospective families.[13]

5. Home finding for children with special needs

Finding homes for children with special needs (those with exceptional physical, emotional, developmental or health care needs) requires understanding each child holistically: their interests, hobbies, connection to siblings, and experiences with trauma, etc. Although a child may have complex medical, developmental, or mental health needs, the goal is the same as for any other child: to reach positive outcomes for the child and family and to achieve a successful, permanent in-home living situation.

Effective recruitment strategies may include:

- Plan a targeted recruitment campaign, including materials that reflect the need for homes for children with special needs, with a realistic vision to recruit foster/adoptive families appropriate to care for these children.
- Contact and engage medical societies, nurses' associations, community medical providers, and other organizations for health care professionals.
- Pediatricians may be helpful in identifying prospective families: those already caring for a child with special health care needs, foster parents of typically developing children, and parents who work in health care fields.[14]

[13] National Resource Center for Permanency and Family Connections. (n.d.). Working With Siblings in Foster Care: A Web-based NCCWE Toolkit. Retrieved from https://www.nccwe.org/toolkits/siblings/index.html.

[14] OCFS. *Foster Care Recruitment* website. "Hard-to-Find Homes." Retrieved from https://ocfs.ny.gov/programs/fostercare/recruitment/strategies/hard-to-find.php#special-needs.

Appendix 9.1: The Multiethnic Placement Act

The federal Multiethnic Placement Act of 1994 (MEPA), as amended by the Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, requires LDSSs and VAs that receive federal funds and provide adoption services to actively recruit prospective adoptive parents. These parents should reflect the ethnic and racial diversity of the children in need of adoptive homes.

Among the major provisions of the MEPA are the following:

- Prohibits state agencies and other entities that receive federal funding and are involved in foster care or adoption placements from delaying, denying, or otherwise discriminating when making a foster care or adoption placement decision on the basis of the parent or child's race, color, or national origin. Note: This includes LDSSs and VAs with foster children in their care.
- Prohibits state agencies and other entities that receive federal funds and are involved in foster care or adoption placements from categorically denying any person the opportunity to become a foster or adoptive parent solely on the basis of race, color, or national origin of the parent or the child.
- Requires states to develop plans for the recruitment of foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom families are needed.
- Prohibits agencies from routinely considering race, color, or national origin in making placement decisions.
- Requires that any consideration of race, national origin, or ethnicity must be done on an individualized basis when special circumstances indicate that their consideration is warranted.
- Has no effect on the provisions of the Indian Child Welfare Act of 1978.
- Makes failure to comply with MEPA a violation of Title VI of the Civil Rights Act.

This means that states, LDSSs, and VAs required to comply with MEPA cannot have a stated or unstated policy that requires race, color, or national origin to be a primary or routine condition or determining factor when deciding on the best foster or adoptive home for a child, or when accepting or rejecting an applicant interested in becoming a foster or adoptive parent.

Impermissible activities

Caseworkers and agencies must pay careful attention to MEPA requirements. Failure to comply with the provisions of MEPA could result in serious financial and other penalties for the caseworker, the agency, the state, or any other entity that receives federal funds.

MEPA reflects the judgment of the U.S. Congress that children are harmed when placements are delayed for a period longer than is necessary to find qualified families. The legislation seeks to eliminate barriers that delay or prevent the placement of children into qualified homes. In particular, it focuses on the possibility that policies designed to match children with families of the same race, culture or ethnicity may result in delaying, or even preventing, the adoption of children by qualified families. It also intends to ensure that every effort is made to develop a large and diverse pool of potential foster and adoptive families so that all children can be quickly placed in homes that meet their needs.

Federal law forbids decision-making based on race, color, or national origin unless it advances a compelling government interest. Here, the only compelling government interest is to protect the best interests of the child. An adoption agency may take race, color, or national origin into account only if it has made an individualized determination that it is necessary, based on the facts and circumstances of the specific case and to advance the best interests of the specific child. Any placement policy that takes race, color or national origin into account is subject to strict scrutiny by the courts to determine whether it satisfies the tests noted above.

Statutes or policies violate MEPA or Title VI of the Civil Rights Act of 1964 if they:

- establish time periods during which only a same race, color or national origin search will occur;
- establish orders of placement preferences based on race, color, or national origin;
- require caseworkers to specially justify transracial placements; or
- otherwise have the effect of delaying placements, either before or after termination of parental rights, in order to find a family of a particular race, color or national origin.

Other rules, policies or practices that do not meet the constitutional strict scrutiny test noted above would also be illegal.

Race, color, or national origin may not routinely be considered in assessing the capacity of particular prospective foster or adoptive parents to care for specific children. However, assessment by an agency of the capacity of particular adults to serve as foster or adoptive parents for specific children is at the heart of the placement process, and essential to determining what would be in the best interests of a particular child.

An essential component of the recruiting process is having staff present in the community from which the agency wants to recruit. Orientation meetings should be conducted in meeting space available in churches, community centers, community organizations, or national organizations. Use of the media (radio, television, newspapers, and magazines) should be made continually, but the recruitment process goes beyond advertising in the media. Whenever the interest in adoption is found, be it church groups, unions, or work sites, agency staff should be available to speak and offer information about the program, including the need for homes and the availability of subsidy.

Recruitment, especially in rural areas, involves tapping into the natural helping systems. Adoptive parents are frequently a resource in locating other adoptive parents. Having parents who have adopted successfully become a part of the agency's recruiting efforts can facilitate this process [18 NYCRR 421.16(j) and 421.18(d)(2)].

See the OCFS policy directive, "Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996" (15-OCFS-ADM-05).

Chapter 10

Chapter 10
Adoption: From Inquiry to Approval

Over the past two decades, research has shown that, despite an increasing number of children waiting for adoption and active adoptive family recruitment efforts, relatively few "general applicants" (those who were not the children's relatives or foster parents) adopt children from foster care. One study found that only one out of 28 people who contacted a child welfare agency went on to adopt a child.[1]

In 2021, for example, of the 53,500 children and youth who were adopted nationwide in 2021, 55% were adopted by their foster parents and 34% by a relative. During that same year, 113,000 children were waiting to be adopted.[2] This indicates that agencies can improve their practices in meeting the needs of prospective adoptive parents, from the first inquiry to finalization of an adoption.

A. Responding to inquiries

Agencies operating an adoption program are required to have a designated adoption or home finding unit that can handle inquiries from the public about adoption. That unit is responsible for receiving all adoption inquiries coming into the agency.

1. Following up on contacts

A response to an adoption inquiry must be made within five business days of receiving the inquiry, and an invitation must be offered to either an individual or a group meeting (which could be held in conjunction with a foster parent orientation meeting) to take place within 30 days of the inquiry. A prompt and personal contact with an agency caseworker can help reduce the number of families that initially show interest but withdraw between the initial inquiry and the initial orientation session. Among the reasons for this withdrawal of interest may be a feeling of vulnerability, and even fear, that they will not be accepted as adoptive parents for one reason or another [18 NYCRR 421.11 (a) & (b)].

Although OCFS regulations require that agencies respond to inquiries within five business days, best practice suggests that a timely response is within 24 hours. The National Resource Center for Diligent Recruitment (NRCDR) recommends, "Return all phone calls to prospective and current foster and adoptive parents and kinship caregivers within 24 hours. Even if you are waiting for more information and can't answer the caller's questions, call them back to let them know that you're working on their questions."[3]

The first person to speak with prospective adoptive parents should be a professional staff member with a background in counseling and specialized training in adoption. Families need to be given a clear, written road map of the adoption process at the outset.

[1] J. B. Wilson, J. Katz, & R. Geen. (2005). *Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care*. John F. Kennedy School of Government, Harvard University.

[2] Congressional Coalition on Adoption Institute (2022). *Fact Sheet: U.S. Adoption & Foster Care Statistics*.

[3] National Resource Center for Diligent Recruitment. (2017). Improving Customer Service: Phone Interactions with Families.

2. Orientation sessions

An individual or a group orientation meeting must take place within 30 days of the inquiry. Orientation sessions must be held at convenient hours for those invited and should include evening and/or weekend sessions. They can also be held as online meetings.

Each attendee must be offered a copy of the Adoptive Parent Application (OCFS-5200B) [18 NYCRR 421.11 (d), (e) & (f)] and the Self-Assessment form (OCFS-5200A). They also should be encouraged to visit the adoption section of the OCFS website: https://ocfs.ny.gov/programs/adoption/.

In each session, the characteristics of the children available for adoption shall be discussed and *The Adoption Album* must be shown and explained. This may expand attendees' interest in adopting a child or a sibling group who are hard to place or have special needs. The procedures for applying to adopt, the adoption study process, and the availability of adoption subsidies and a federal adoption tax credit must be discussed.

At the orientation session, caseworkers may want to discuss the documentation that will be required from applicants during the application process, although this is not required until the first meeting with the applicant as part of the home study process. Key topics to highlight might include a report from a physician about the health of each household member and three personal references, one of whom can be a relative of the applicant.

Within five days of an orientation session, the agency must contact persons who were invited to an orientation session but did not attend. Such persons must be invited to another orientation session or, if they are unable to attend a scheduled orientation session, be offered an individual orientation session [18 NYCRR 421.11(h)].

A record must be developed for each person inquiring about adoption and must contain:

- the date the inquiry was received and by what means;
- a dated copy of the invitation sent to the orientation session;
- a dated copy of the written acknowledgement of the inquiry; and
- a dated record of all further communication with the individual or couple**.**

The record must be kept for 12 months after the last communication if the individual or couple does not complete an application [18 NYCRR 421.11(i) & (j)].

3. Self-assessment

The Self-Assessment form (OCFS-5200A) includes a series of questions designed help applicants and their families consider why they want to become adoptive parents, stimulate conversation about the various aspects of the process, and provide an opportunity for them to assess the potential impact that becoming adoptive parents would have on their lives.

The Self-Assessment form should be completed after the applicants have attended the initial interview or orientation. It is recommended that the self-assessment be completed multiple times, as needed, throughout the process as the applicant's family circumstances and understanding of adoption evolve.

The applicants and any children in the home (depending on their age and developmental ability) should complete the form together as a family. The caseworker and the family then should discuss and identify together the family's readiness to adopt and what needs to be done to help support the family.

There are three levels of family readiness:

- **Early Stages.** The family has some understanding about what adoption is but needs more information and discussion about the impact on their family.
- **Minimal Support Needed.** The family needs some support and/or more information from the LDSS or VA on what the experience of adopting a child will be like and what impact it will have on their family. The family is willing and able to learn.
- **Acceptable.** The family is prepared and knowledgeable about the experience of adopting a child and the impact of adoption on their family.

Caseworkers must use this information to assess the appropriate next steps in the home study process, including what supports, if any, are needed before the application can be approved. Each time the level of family readiness is reassessed, the form must be signed by the prospective adoptive parent, the caseworker, and the caseworker's supervisor. It must be maintained in the applicant's file.

B. Foster parents as adoptive parents

Foster parents are the primary adoptive resource for children in foster care. A caseworker should regularly update foster parents on the status of a child in their care, especially when they are likely to be freed for adoption. Foster parents can be given the OCFS publication, "Adopting a Child from Foster Care in New York State" (OCFS Pub.1128), which outlines the steps for adopting a child in their care.

When foster parents are interested in adopting a specific child, they must indicate their interest in writing by completing a Declaration of Intent to Adopt form (OCFS-7060) or a comparable agency form. When the foster parent submits the signed form indicating their intention to adopt the child, the requirement to photolist the child will be waived [18 NYCRR 420.2(d)].

Foster parents who are not concurrently approved as adoptive parents (see below) must submit an Adoptive Parent Application (OCFS-5200B) as soon as possible to begin the adoption home study process. Progress toward finalization should be carefully monitored and reassessed on a regular basis. If progress is not made toward finalization in a timely manner, depending on the case circumstances, the agency will consider an alternative plan for the child.

If the certified or approved foster home has been concurrently approved as an adoptive home, the adoption process moves directly to the signing of an Adoptive Placement Agreement (LDSS-0570).

1. Concurrent approval as foster/adoptive parent

An applicant can apply for approval as an adoptive parent at the same time they apply to become a certified or approved foster parent. The applicant is not required to submit dual documentation to the authorized agency for such approval. They must confirm, however, that they are applying for approval with an agency that provides both foster care and adoptive services. In NYS, all LDSSs have the statutory authority to provide both foster care and adoption services. VAs, on the other hand, must have OCFS-approved specific corporate authority to provide either foster care services, adoption services, or both foster care and adoptive services.

Applicants seeking concurrent certification/approval as foster/adoptive parents must follow the process outlined in "Foster/Adoptive Home Certification or Approval Process" (18-OCFS-ADM-07)

and utilize the forms in "FFPSA Model Licensing Standards and Updated Forms for the Certification or Approval of Foster/Adoptive Homes" 19-OCFS-ADM-07. The standards for dual certification/approval are essentially the same as those for certification/approval of a foster parent. The only exceptions are the different requirements regarding marital status and age.

In an adoption, both partners in a married couple must consent to the adoption, unless they are living separately under a legally recognized separation agreement or decree of separation, or they have lived separately for three or more years before the start of the adoption proceeding. Applicants to adopt must be 18 years of age or older, while applicants to become foster parents must be over the age of 21 [18 NYCRR 421.16(b); 18 NYCRR 443.2 (c)(1)(i) & 18 NYCRR 443.9]. Applicants for concurrent approval/certification complete the same *Foster/Adoptive Parent Application* (OCFS-5183B) as those who are applying to be foster parents.

2. Prioritized applications

The agency must acknowledge, in writing, completed applications from certified or approved foster parents within 10 days of receipt. Caseworkers must assess each application as quickly as possible to determine information that will need to be updated or reassessed since the agency approved or certified the foster home [18 NYCRR 421.19(d) and (e)], including:

- Information about the family found in the original foster home study, gathered for the annual recertification, and available from caseworkers who are supervising the home and the child.
- Additional information that is needed for an adoptive home study and is lacking or not current.
- Areas of family functioning that may need further exploration or strengthening.

3. Information for home study

The adoption home study process for foster parents does not repeat information-gathering activities for information that is already available. Additional or updated information must be obtained as rapidly as possible. The adoption study must focus on areas identified as needing further exploration or strengthening. Foster parents are not required to repeat NTDC (formerly MAPP) training sessions.

The caseworker must access the results of any previous criminal history record checks on the foster parents and all persons age 18 or over currently living in the home, as well as any safety assessments related to their criminal history, if such a history exists. A state criminal history check must be conducted for any person age 18 or older living in the household who has not previously had a state criminal history record check.

These inquiries must be made again for the applicant and all other persons living in the home who are over the age of 18:

- An FBI criminal history record check of the applicant and any person over the age of 18 residing in the home of the applicant. This will include notice of any arrests subsequent to the original certification or approval and related safety assessments.
- A request to OCFS to determine whether the applicant, or other person over the age of 18 who lives in the home of the applicant, is the subject of an indicated report of child abuse or maltreatment on file with the Statewide Central Register of Child Abuse and Maltreatment (SCR), and, if the applicant or other person over the age of 18 who lives in

the home of the applicant lived in another state at any time during the five years preceding the application, requests to the applicable child welfare agency in each such state for child abuse and maltreatment information maintained by that state's child abuse and maltreatment registry.

- An inquiry to the Justice Center for the Protection of People with Special Needs about whether an applicant or other person over the age of 18 who resides in the home of the applicant is listed on the Staff Exclusion List (SEL), in accordance with 18 NYCRR 421.16 (r).

The caseworker must explain the difference between foster care and adoption to the applicants, including the psychological changes that take place when foster parents become adoptive parents. Foster parents also must receive clarification of the issues involved in obtaining an adoption subsidy (see **Chapter 13** of this guide) [18 NYCRR 421.19(d)&(e)].

The adoption study process for foster parents must be completed within the following time limits:

- Within two months of receiving the completed application for a child who is legally free; or
- Within four months of receiving the completed application when the child is not yet legally free, but in no event more than two months after the date the child becomes legally free [18 NYCRR 421.19(f)].

Discontinuation of study by mutual consent

The adoption home study of a foster parent can be discontinued only by mutual consent of the agency and the foster parent. The caseworker must document in the foster family's file the discussion leading to the mutual agreement to discontinue the study [18 NYCRR 421.19(h)(1)]. The agency must inform the foster parent, in writing, of the discontinuation of the study, and the letter must also indicate that the child is available for adoption by other persons and will be photolisted [18 NYCRR 421.19(h)(2)].

4. Disapproval of foster parent applicant

The agency may disapprove the foster parent's application to adopt only in accordance with the disapproval criteria outlined in OCFS regulations [18 NYCRR 421.15(g) and 18 NYCRR 421.27].

The agency must send the foster parent a letter describing the disapproval decision and the reasons for the decision. The disapproval letter must offer the foster parent the opportunity to discuss the decision in person with the caseworker's supervisor and must notify the foster parent that they may apply for a fair hearing in accordance with SSL §372-e. The letter also must state that the child in foster care is available for adoption by other persons and that the child will be photolisted.

If the child is not removed from the foster home within three months of the disapproval letter, agencies must document in the child's case record why the family continues to be acceptable as a foster family for this child but is not acceptable as an adoptive family. Documentation must be made in the foster family file, if recertification or reapproval is granted, as to why the home continues to be suitable for foster care but not for adoption [18 NYCRR 421.19(g)].

Foster parents who have applied to adopt are entitled to a fair hearing if:

- their application to adopt is denied; or
- their home study is not acted upon within six months of their application to adopt; or

- their application for approval as adoptive parents was approved but their request to adopt a particular child who was eligible for adoption was denied or was not acted upon within 60 days of the request where the particular child is in the care of the foster parents seeking to adopt or the foster parents are related within the second degree of the particular child; or
- their application to adopt the child was denied or delayed in whole or in part based on the location of the foster parents outside of the social services district, or state, of the authorized agency that has custody of the child [SSL §372-e; 18 NYCRR 421.18(n)].

5. Preparing a foster family for removal of a child

When foster parents are unable or unwilling to adopt the child, their cooperation is needed to prepare the child to move to an adoptive home. The importance of their love and care for the child should be acknowledged even though they cannot make the commitment to adopt. Their role can be critical in enabling the child to feel secure enough to leave the home.

The emotional bond between a child and their foster parents may be strong. Foster parents should be encouraged to continue to have contact with the child after adoption when it is desired by the adoptive parents and the child, and when it is in the child's best interests. If possible, adoptive parents should be found who will allow ongoing contact between the foster parents and the child if it is in the child's best interests. While the agency is required to give written notice to foster parents 10 days before removal of a child from a foster home, more time should be given to prepare the child and the foster parent emotionally, except when the health and or safety of the child is at risk.

The agency must respond not only to the emotional needs of the child being removed, but also to the emotional needs of the foster family, including other children in the home. Working through the emotional release of the child from the foster parent and actively involving the foster parent in planning for the child can often help with this process [SSL §400; 18 NYCRR 421.19(g) and 18 NYCRR 443.5].

C. Adoptive Parent Application

The Adoptive Parent Application form (OCFS-5200B) has been approved by OCFS for individuals who are seeking to adopt a child. This includes foster parents who are not concurrently approved as adoptive parents.

The application is to be used by all LDSSs and VAs throughout New York State. Each applicant is required to independently complete the application, which was given to them at the initial orientation session [18 NYCRR 421.11(f)].[4] By completing the form, the applicant provides:

- Basic demographic information
- Current and past employment information
- Household composition
- Foster/adoptive parenting experience
- Transportation

[4] OFCS. "Adoption-Only Home Study Forms" (21-OCFS-ADM-13).

- References
- Education history
- Financial information

For foster parents planning to adopt a child placed in their home, the child's name, date of birth, and the date of placement in the home should be noted. Non-foster parents or foster parents planning to adopt a child not in their home are asked to indicate the characteristics of the children sought (i.e., age, race, sex, type of handicap, or sibling group size) [18 NYCRR 421.12(a)].

The application also includes a section requiring each applicant to submit a sworn statement indicating whether, to the best of the applicant's knowledge, the applicant, or any other person over the age of 18 currently residing in the home has ever been convicted of a crime in New York State or in any other jurisdiction [18 NYCRR 421.11(g)(3)].

Agencies must respond to applicants within five working days acknowledging receipt of the application. A record must be developed and maintained for each person completing an application. The record must include milestones in the adoption process, such as [18 NYCRR 421.12(b)]:

- A record of the applicant's inquiry.
- The application form, medical report, and references.
- Summaries of interviews with the applicant and visits to the applicant's home.
- A summary of conferences that supports each decision that affects the applicant's status with the agency.
- Copies of all correspondence with the applicants.
- Response from the New York Statewide Central Register (SCR) and other states' child abuse registers, if applicable.
- Response to an agency inquiry to the Justice Center for the Protection of People with Special Needs.
- Response from OCFS regarding the FBI and New York State Criminal History Record background check.

Entries in the record should be dated, with the dates of events documented for use in future compliance reviews or in fair hearings. If the applicants are applying to adopt a handicapped or hard-to-place child, information from the application must be entered by the caseworker/agency into the Family Adoption Registry upon submission of the application.

1. Prioritizing applications

OCFS regulations require agencies to prioritize applications based on the characteristics of children awaiting adoption. This makes it easier for agencies to use limited staff time to recruit and develop families who would be resources for these children. It also makes it easier for agencies to explain, and for families to accept, the delay in an adoption home study if the child they seek is not in a priority group. Applications must be prioritized for adoption studies according to the type of child desired, as follows:

First priority for adoption study is given to:

- persons seeking to adopt children having the characteristics of the largest proportion of waiting children as determined by OCFS;
- foster parents seeking to adopt a child who has lived in their home for 12 continuous months; and
- Native American applicants seeking to adopt Native American children.

Such applicants must be informed, in writing, that their applications will be accepted for immediate study. They must be provided with a date for the first appointment with the agency, to be held not more than 30 days from receiving the completed application. Each study must be completed within six months of receiving the application. The applicant must be given the name and telephone number of an agency staff person who can be contacted while they are waiting for the study to begin [18 NYCRR 421.13(a)(1) & (b)(1) and 421.14(b)(1)].

Second priority is given to:

- applicants seeking to adopt children photolisted in *The Adoption Album* who do not have the characteristics of the largest proportion of waiting children, as determined by OCFS; and
- applicants seeking to adopt children who are currently available for adoption, in the care of the agency, and for whom there is no waiting list of approved families.

Applicants must be given an estimate for when a study may begin and the name and telephone number of an agency staff person who can be contacted while waiting for the study to begin. The study must be completed within six months of receiving the application [18 NYCRR 421.13(a)(2) & (b)(2) and 421.14(b)(2)].

Third priority is given to all other applicants, such as those expressing an interest in adopting healthy young children who are not photolisted, if such children are not immediately available for adoption in the care of the agency where the application was made.

Third priority applicants should be informed if there is any likelihood that an adoption study will be granted. Unless the agency is able to initiate the study promptly and complete it within six months of receiving the application, such applicants must be rejected on the basis of “no need.” Notice to the applicants of the rejection based on “no need” must include:

- a statement of the fair hearing rights which are set forth in SSL §§22 and 372-e; and
- a statement that the applicant has the option of remaining on a waiting list with a description of the procedures for exercising this option [18 NYCRR 421.13(a)(3) & (b)(3)].

Agencies are required to contact applicants on the third priority waiting list at least once a year, invite them to a meeting to discuss the characteristics of waiting children and ascertain whether the applicants have continued interest in remaining on the waiting list [18 NYCRR 421.14(c)].

2. Referrals to other agencies

An applicant may be referred to another agency before the adoption study begins when:

- the applicant has expressed interest in a specific photolisted child determined to be in the care of that other agency; and
- the applicant indicates a willingness to be referred.

If the applicant does not accept a referral, completion of the adoption study cannot be delayed beyond the time periods specified in OCFS regulation 18 NYCRR 421.14. In some cases, when the referral would create an inconvenience for the applicant due to the distance of the agency caring for the child, the referral to the other agency should not be suggested, as it will be perceived as a rejection and may result in the applicant's premature withdrawal. Further, the applicant could become a resource for children other than the specific child desired [18 NYCRR 421.13(d)].

3. Waiting lists

Agencies must maintain separate waiting lists of first-, second-, and third-priority applicants. Each waiting list must contain the name of each applicant, the date the agency received the completed application, and the characteristics of the child the applicant seeks to adopt [18 NYCRR 421.14(a) & (b)].

To make the best use of limited agency resources for completion of studies, first-priority applicants must be given priority in when their studies begin, the assignment of agency staff, the scheduling of individual and group appointments, and conferences to review their studies and decide whether to approve the family to adopt [18 NYCRR 421.14(b)(1) & (3)].

Second-priority applicants do not have to be served in the order of when their applications were received. They can be grouped according to similar interests, the characteristics of specific waiting children, or characteristics representative of the needs and resources of the community being served. The adoption study must be completed, however, within six months of the agency's receipt of the completed application [18 NYCRR 421.14(b)(2)].

D. The adoption home study

The adoption home study includes information gathering, interviews, and training sessions both the agency and the prospective adoptive family. It is an essential part of the adoption process that helps applicants decide whether they are ready to adopt. The home study also allows agencies to find out more about what the prospective family has to offer and to appropriately place children in their care.

According to OCFS regulations, the adoption study process must include meetings or training sessions, either in groups, individually, or a combination of both. If two or more group sessions are held during the home study process, one must include the participation of parents who have already adopted a child. The interaction of applicants with adoptive parents can add a significant dimension to preparation for adoption [18 NYCRR 421.15(a) & (b)].

At the first appointment or meeting, applicants must be informed that the following documents will be required before the conclusion of the study [18 NYCRR 421.15(c)(1)-(9)]:

- A completed Adoptive Applicant Medical Report (OCFS-5200D) for each member of the household (signed by a health care professional);
- Personal reference forms (OCFS-5200H) are required from at least three persons per applicant, only one of which may be related to the applicant, who can attest to their character, habits, reputation, personal qualifications and suitability for caring for a child;
- If married, proof of marriage;

- If married and living separate and apart from their spouse:
  - proof that the separation is based upon a legally recognizable separation agreement or decree of separation; or
  - an affidavit executed by the prospective adoptive parent attesting that they have been or will be living separate and apart from their spouse for a period of three years or more prior to the commencement of the adoption proceeding;
- If previously married, proof of dissolution of marriage by death or divorce;
- Evidence of employment and salary, such as W-2 form or pay stub for each employed applicant;
- A response from OCFS to an inquiry about any indicated child abuse or maltreatment report within New York State and, if applicable, a response from an out-of-state central register;
- A response to an agency inquiry to the Justice Center for the Protection of People with Special Needs;
- A response from OCFS to the FBI and New York State criminal history record checks of the applicant and any other person over the age of 18 currently living in the home of such applicant; and
- A sworn statement indicating whether, to the best of the applicant's knowledge, the applicant, or any person over the age of 18 currently living in the home has ever been convicted of a crime in New York State or any other jurisdiction.

1. OCFS-approved training

The study process must include training designed to prepare applicants for their role as adoptive parents. The National Training and Development Curriculum (NTDC) was introduced in 2023 as the OCFS-approved training program for both foster and adoptive parents. It is expected that the new curriculum will be used statewide by 2025. The program will be phased in to replace GPSII/MAPP training and features a combination of self-assessment, classroom sessions, and online modules.

The curriculum identifies 14 characteristics of successful foster and adoptive parents, based on parent interviews, focus groups from different sources around the country, and a literature review. Strengthening these characteristics can help build a strong foundation for a home that is as nurturing as possible for children who have experienced trauma, separation, and loss.

1. **Adaptability and flexibility:** Caregivers have the willingness and ability to make changes in their parenting style to adjust, encourage, and support the child's physical, emotional, and mental needs.
2. **Appreciation for diversity and other world views:** An understanding and appreciation for children who bring a different set of values with them.
3. **Attunement:** The ability to be aware of, understand, and be sensitive to the specific responses and needs of a child at any given time, even if the child does or does not express these needs directly.
4. **Belief in self-efficacy:** Feel competent and have confidence in their ability to be an effective parent.

5. **Committed:** The ability to be dedicated to a child, sticking with them no matter how difficult the journey.
6. **Emotionally supportive and nurturing:** Creating an emotionally supportive environment that gives the child a safe space to talk about their emotions, including the positive ones.
7. **Empathy and compassion:** The ability to perceive/feel others' emotions, particularly others' disappointment or sadness.
8. **Having a sense of humor:** The ability to laugh at themselves and not take everything too seriously.
9. **Realistic:** Understand that there are different kinds of success with different situations and with each child.
10. **Relationally oriented:** The ability to recognize and value the importance of previous relationships to the child.
11. **Resilient and patient:** Foster and adoptive parents see their role as helping children achieve success in small steps, beginning with measurable daily tasks.
12. **Self-awareness and self-reflection:** These parents are able to understand and be aware of why they have responded to a child in the manner that they have.
13. **Tolerance for rejection:** These parents do not take it personally when a child directs hurtful comments or behaviors at them.
14. **Trustworthiness:** Trust is based on understanding the importance of honesty, consistency, routines, and rituals — and then being able to put that understanding into practice.[5]

By the end of the training, applicants should be able to decide whether foster parenting and/or adoption are the right fit for them at this time in their lives, and the agency should be able to make a similar decision about the applicants. The goal is to do this in partnership through discussions both in the group setting and in individual meetings with the caseworker.

As much as possible, applicants should be encouraged to decide for themselves whether adoption is suitable for them as they come to understand the challenges inherent in being an adoptive parent and the needs of children available for adoption. If the caseworker respects the applicant's ability to decide whether adoption is the best course for them, the applicant is more likely to be open about their doubts, uncertainties, and conflicts. In addition, if the applicant decides to adopt, they are likely to be more willing to ask for and accept help after placement.

OCFS regulations require that agencies with adoption programs explore each applicant's ability to be an adoptive parent and discuss the following topics with the applicant [18 NYCRR 421.15(d)]:

- characteristics and needs of children available for adoption;
- the principles and requirements for adopting a child who is a member of a sibling group;
- principles related to the development of children;
- reasons a person seeks to become an adoptive parent;

[5] National Council for Adoption. (2022) "Characteristics for Successful Parents Who Foster or Adopt…."

- the understanding of the adoptive parent's role;
- the person's concerns and questions about adoption;
- the person's psychological readiness to assume responsibility for a child;
- the attitudes that each person in the applicant's home has about adoption and their concept of an adopted child's role in the family;
- the awareness of the impact that adoptive responsibilities have upon family life, relationships, and current lifestyle;
- a person's self-assessment of their capacity to provide a child with a stable and meaningful relationship; and
- the role of the agency in supervising and supporting the adoptive placement.

2. Adoption home study criteria

In determining whether an applicant should be approved, the caseworker must assess the prospective adoptive parents in terms of whether they can be an appropriate resource for a waiting child.

General requirements

Agencies must explore the following characteristics of adoptive applicants:

- Capacity to give and receive affection;
- Ability to provide for a child's physical and emotional needs;
- Ability to accept the intrinsic worth of a child, to respect and share their past, to understand the meaning of separation the child has experienced, and to have realistic expectations and goals;
- Flexibility and ability to change;
- Ability to cope with problems, stress, frustrations, and the ability to accept a child with limitations;
- Feelings about parenting an adopted child and the ability to make a commitment to a child placed in the home; and
- Ability to work with the agency and use community resources to strengthen and enrich family functioning.

The Final Assessment and Determination completed by the caseworker at the end of the home study should indicate what was discussed and done to assess these characteristics, and on what basis they were determined to be absent or present [18 NYCRR 421.16(a)].

Practice Tip: Household Composition and Relationships

In assessing the ability of a prospective adoptive parent to meet the general criteria listed above, the caseworker must conduct interviews with the applicant and others living in their household. The OCFS form "Household Composition and Relationships" (OCFS-5200F) is designed to guide these interviews in several key areas that correspond to the form used to create a Final Assessment and Determination at the end of the adoption home study.

- Partner Relationship
- Family
- Parenting
- Child Interview (if applicable)
- Psychosocial Interview

Answers to these questions, plus the caseworker's observations of the family during the study period, will assist caseworkers in feeling confident about their decisions on whether to approve an adoptive home.

For detailed information on assessing household composition and relationships, see the OCFS Home Finding Practice Guide, **Chapter 4**, pp. 4-26.

Age

Agencies must accept for study an application to adopt from any person 18 years old or older and must determine the personal readiness of each person applying to adopt through the adoption study process. Agencies cannot establish their own minimum and maximum age standards for study or acceptance of adoptive applicants [18 NYCRR 421.16(b)].

Health

Approved applicants must be in such physical condition that it is reasonable to expect the applicant will live until the child reaches majority (age 18) and have the energy and other abilities needed to fulfill their parental responsibilities.

The agency must collect information on the health of the prospective adoptive parent and each household member residing with the prospective adoptive parent. The Adoptive Applicant Medical Report (OCFS-5200D) is a general health review and attestation of the medical status of each applicant and household member.

A report must be completed for each member of the applicant's family and be based on the results of a physical examination conducted not more than one year before the date of the Adoptive Parent Application. It must be filled out and signed by a physician, physician assistant, nurse practitioner, or other licensed and qualified health care practitioner, as appropriate, regarding members of the applicant's household's general health, the absence of communicable disease, infection, or illness, or any physical or mental condition(s) which might affect the proper care of an adopted child.

If the applicant has a physical condition that would negatively affect their ability to carry out a current or long-term parental role, the adoption study may be discontinued with the agreement of the applicant. If the applicant does not agree with the assessment of their physical or mental condition, the applicant must be given the opportunity to seek another medical opinion and submit another medical report before a final decision is made. When a home study is discontinued or rejected because of a medical condition, the applicant's record must state the condition found and the effects it has caused or is likely to cause [18 NYCRR 421.16(c)(3) & (4)]. Physical medical conditions that can be corrected or healed need not end in withdrawal or disapproval of the applicant.

Marital status

Agencies must not consider marital status in their acceptance or rejection of applicants. Both married and single adoptive parents have adopted hard-to-place and handicapped children successfully. It is important to recognize that all types of families are potential resources for waiting children and should be considered as potential adoptive parents. Maturity, self-sufficiency, ability to parent, and availability of support systems are the critical assessments in identifying parents' appropriateness for specific children.

Persons who may adopt in New York State must meet these criteria regarding their marital status (DRL §110):

- An adult unmarried person;
- An adult married couple (together);
- Any two unmarried adult intimate partners (together);
- An adult married person living separate and apart from their spouse pursuant to a separation decree, judgment, or agreement; or
- An adult married person who has been living separate and apart from their spouse for at least three years prior to starting an adoption proceeding.

While not often relevant to adoptions of children from foster care, a married couple may adopt a child together who was born to either of them. Also, a spouse may as an individual adopt a child of the other spouse.

An unmarried person, an adult married couple together, or any two unmarried adult intimate partners may adopt another person [DRL §110]. To determine whether an intimate relationship exists between two unmarried partners, the agency should consider factors such as: the nature or type of the relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts is considered to be an intimate relationship.

Agencies must not consider marital status in their acceptance or rejection of applicants. However, married persons must both consent to the adoption unless one partner is living separately and apart from their spouse with a legally recognizable separation agreement or decree of separation, or the couple has lived separately for three or more years before the start of the adoption proceeding. Agencies must not establish policies that put single or divorced applicants, applicants who are separated from their spouse, or widowed applicants at a disadvantage [DRL§110; 18 NYCRR 421.16(d)].

Separated spouses: In the case of separated foster parents applying to adopt, the adoptive study should explore the reasons for the separation and the likelihood of reconciliation. This is especially important when a child has lived in the foster home for at least 12 months or has emotionally bonded with the foster parents. In cases where reconciliation is imminent, expected, planned, or sought by a spouse, it may be advisable to delay making an adoptive placement until the marital relationship stabilizes.

Single applicants. It was sometimes assumed in the past that a single parent did not have sufficient social, emotional, or family support to raise a child. The application cannot be disapproved solely because an applicant is single. All parents need access to help and support from time to time. It is appropriate to explore the assistance available to parents on a daily basis, regardless of their marital status.

Length of marriage. Adoptive applicants cannot be rejected for a study, or during the study, based on the length of their marriage.

Same-sex marriages. Same-sex marriages solemnized in NYS became legally recognized with the enactment of the Marriage Equality Act (Chapter 95 of the Laws of 2011).

In addition, same-sex marriages legally performed in other jurisdictions are "entitled to recognition in New York in the absence of express legislation to the contrary."[6] This court decision is consistent with other state court decisions. There are numerous statutory and regulatory provisions related to adoption that refer to a person's marital status and use gender-specific words for parents and spouses. These provisions must be interpreted to recognize same-sex marriages and both spouses in the same-sex marriage when the same-sex marriage was legally performed in another country or state.

Resources

For more information about adoption, marital status, and same-sex marriages, see:

- Recognition of Legal Same-Sex Marriages (09-OCFS-ADM-07)
- Adoption by Two Unmarried Adult Intimate Partners (11-OCFS-INF-01)
- Clarification of Adoption Study Criteria Related to Length of Marriage and Sexual Orientation (11-OCFS-INF-05)

Fertility

Adoptive applicants cannot be rejected on the basis of their fertility status. The significance of fertility and infertility as it relates to the desire to adopt must be explored during the adoption study, but applicants are not required to provide proof of infertility [18 NYCRR 421.16(e)].

Family composition

Agencies may study family size as it relates to the ability of a family to care for another child and the quality of life that will be offered to an adoptive child. Policies cannot be established that require rejection of an applicant based on family composition without an assessment to determine its effect on the ability to care for a child and the quality of life that will be offered.

[6] Appellate Division, Fourth Department, *Martinez v. County of Monroe* 50 A.D. 3d 189. See also Appellate Division, Third Department, *Lewis v. New York State Department of Civil Service et al.* 60 A.D. 2d.

Routine preference cannot be extended to childless families, but rather the study must determine the effect that children in the home will have on the ability of the parent(s) to care for another child and the willingness of the children in the home to welcome or accept another child [18 NYCRR 421.16(f)(1)]. The caseworker should also consider the impact of adding another child or children into the home on the children already in the home, taking into account any special needs they may have.

An application cannot be rejected because of the presence or absence of children in the home, regardless of their age or sex. Each situation must be evaluated to determine the parents' ability to successfully care for the number of children in the family. However, if an adoptive placement will result in more than two children under the age of two being in the home at the same time, the placement can be made only after a study specifically focusing on the family's ability to care successfully for such a number of young children [18 NYCRR 421.16(f)(2) & (3)].

Foster children in the home

If there are foster children in the home, placement of an adoptive child must be delayed if it would result in a family composition that violates SSL §378(4) and 18 NYCRR 443.1(j). State law and OCFS regulations specify that no more than six children can be placed or cared for in a foster home. These six children may include foster children of any age and non-foster children under the age of 13.

There are some exceptions to this limitation:

- Two additional children may be cared for in the home if they are siblings or half-siblings of each other; siblings or half-siblings of a child living in the home; or are freed and being placed for adoption in the home;
- A minor child who is the child of a minor parent in foster care; or
- A child who is being returned to foster care or being returned to a foster home from a foster care residential/group placement, to make it possible for them to be placed with their last foster parent [SSL §§ 378(4) and 398(6)(n) and 18 NYCRR 443.1(j) and 443.6].

Practice Tip: Capacity considerations

If all the foster children in a home are being adopted by the foster parents in that home, the agency could approve it as an adoptive home rather than a foster home. In that case, the capacity limitations stated above would not apply but the parents would no longer receive foster boarding home payments. If they were eligible, however, adoption subsidy payments could be made prior to the completion of the adoption [SSL §§378 & 398; 18 NYCRR 421.16(f)(4) and 421.24(c)(2)(ii)].

Adding another adopted child

Many children have needs that require intensive parenting during the early period of their adoption. For this reason, an adoption usually must be finalized before another adoption process can begin. An adoptive placement cannot be made in a home where another child has been placed for adoption, but has not yet been adopted, except when:

- the child to be placed is a sibling of a child already in the home;
- the delay in adoption is due primarily to court delays; or

- the child to be placed is unusually hard to place and other placement resources are not available.

Exceptions to placing another child for adoption before the finalization of a child already in the home must be fully documented in the records [18 NYCRR 421.16(f)(5)&(6)].

A parent's belief that they can care for an additional child should always be evaluated without preconceptions. The ability to parent a large number of children varies among families and also may depend on the characteristics of the children involved. Families with one or both parents or another adult at home can sometimes care for more children than families where all adults work outside the home. A number of school-age children may be cared for more easily than an equal number of preschoolers.

The decision must be based on the functioning of the family; indicators of the care provided to the children placed in the home; and the parents' ability to individualize children, serve their physical and emotional needs, and structure family life so that the parents' needs can also be met.

Gender preference and applicants' sexual orientation

Applicants must not be rejected solely because they seek children of a specific gender. The needs of individual waiting children and the capacity of the prospective adoptive parent to meet those needs should be the primary considerations when making placement decisions. Any exploration of a preference to adopt a child of particular gender, where found necessary and appropriate, must be carried out openly, with a clear explanation to the applicant of the basis for, and relevance of, the inquiry.

Authorized agencies providing adoption services must prohibit discrimination and harassment against applicants for adoption services on the basis of sexual orientation, gender identity, or expression and must take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur [18 NYCRR 421.3(d) & 18 NYCRR 421.16(g)].

A religious-based VA was entitled to a permanent injunction prohibiting OCFS from requiring the VA, pursuant to the adoption regulation prohibiting discrimination [18 NYCRR 421.3(d)], to provide adoption services to unmarried or same sex couples, contrary to the VA's religious beliefs.[7]

Applicant's employment and education

Employment, education, or volunteer activities of applicants may not be a basis for rejection. The essential question is not whether a parent works but the amount of quality time they can provide for the child. Heavy career demands for travel, evening meetings, etc., should be carefully explored, as well as the support available to the parent. For all families, rejection should be considered if the applicant does not appear to be able to coordinate their outside responsibilities in order to provide adequate time for the consistent parenting needed by all children [18 NYCRR 421.16(h)].

Religion and race

Race, ethnic group, or religion shall not be a basis for rejecting an adoption applicant [18 NYCRR 421.16(i)]. This means that an agency is prohibited from disapproving an application

[7]New Hope Family Services v. Poole, United States District Court ND New York, Memorandum-Decision and Order, ECF No. 42, 2022.

because of the applicant's race, ethnic origin, or religion. Authorized agencies providing adoption services must prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, or religion, and must take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur [18 NYCRR 421.3(d)].

These standards are consistent with the federal Multiethnic Placement Act (MEPA), where only the most compelling reasons may serve to justify consideration of race and ethnicity (national origin) as part of a placement decision. See **Appendix 1** for information on MEPA.

There is one major exception to this legal standard: any foster care placement or adoptive placement involving Native American child must be done in accordance with the preference standards set forth in the federal Indian Child Welfare Act (ICWA). The provisions of MEPA do not apply to Native American children. See **Chapter 11** for more information about ICWA.

Income

Applicants are required to provide proof of income, such as pay stubs or W-2 tax forms. There is no specific income requirement for families that wish to adopt. An applicant is required, however, to provide at least the minimum standards of nutrition, health care, shelter, clothing, and other essentials for the child. As part of the adoption home study, the caseworker must evaluate an applicant's financial resources to determine that a child placed in the home can be reasonably assured of at least these minimum standards.

Agencies cannot reject applicants because of low income or because they are receiving government assistance. An applicant who needs skills in budgeting and money management must be referred to available resources that might help improve these skills. Disapproval of an applicant is appropriate when:

- the applicant refuses to accept needed financial management services;
- the caseworker has determined that living in the home would clearly endanger the health or safety of a child; or
- there is clear evidence that the applicant, even with a subsidy designed to help support the needs of the child, cannot supply minimum levels of nutrition, health care, shelter, clothing, or other essentials for a child placed in the home [18 NYCRR 421.16(j)].

Employment and geographical stability

Employment and geographical stability may or may not have an impact on an applicant's ability to provide a loving, consistent family life for a child. Frequent changes in employment and residence should be examined to determine the reasons for such changes. Frequent changes in employment and residence may not be a basis for rejection unless such changes reflect an applicant's inability to provide for the well-being of a child placed in the home.

An applicant's apparent inability to hold a job is a concern that warrants further exploration, but, by itself, does not justify disapproval. If the applicant is emotionally depressed, highly irritable, or emotionally affected due to their employment situation, they may not be a good candidate for the additional stress of parenting an adopted child.

Similarly, if the applicant has moved frequently, the reasons should be explored. Caseworkers should discuss with families the reasons for their frequent moves and whether the moves

contribute to a sense of isolation or a lack of support that may be needed to successfully parent the child [18 NYCRR 421.16(k)].

Childcare experience

An application cannot be rejected solely on the basis of a lack of childcare experience. The caseworker must ask about the applicant's experience with children and offer an opportunity to the applicant, if feasible and appropriate, to increase their experience, knowledge, and skills in this area [18 NYCRR 421.16(l)].

An exploration of the applicant's present knowledge about childcare is appropriate. However, it is also important to keep in mind that experience in settings like schools, camps, or neighborhood organizations may not prepare a person for the stresses of having children, particularly children with special needs, in their home.

The caseworker should help the applicant to understand the trauma many children in foster care have experienced; the effects of those experiences on children; and the behaviors that result from those experiences. The goal is to give applicants a fair and balanced view of children available for adoption from foster care so the caseworker can assess the applicant's experience with children with special needs and identify any need for additional training and support to help prepare the applicant for adoption.

Issues such as trauma-informed care of children who are adopted should be explored as part of the agency's training program for applicants.

Socialization and community support

Every family needs a support system. The ability of parents to relate to neighbors and others in the community is important to a child's well-being.

The adoption study process must include an inquiry into the applicant's ability to locate and take advantage of human and organizational resources to strengthen their own capacity as parents. There must not be any requirement, however, for particular levels of educational achievement or kinds of organizational involvement or community recognition [18 NYCRR 421.16(m)].

Substance use disorder

As stated in OCFS regulation, "current abuse of alcohol or other drugs requires the rejection of the applicant [18 NYCRR 421.16(p)(1)]." An application must be rejected when the applicant has current, untreated substance use disorder (SUD). Caseworkers must clearly document in the case record the evidence of this disorder.

SUD is a treatable mental disorder that affects a person's brain and behavior, leading to their inability to control their use of substances like legal or illegal drugs, alcohol, or medications. Symptoms can be moderate to severe, with addiction being the most severe form of SUD.[8]

An applicant may not be rejected for a previous diagnosis of SUD or other mental health disorders unless the record shows these factors would contribute to the applicant's inability to care for an adopted child [18 NYCRR 421.16(p)]. The caseworker must determine what treatments the applicant has received and for how long. This may require a discussion with the applicant's health care provider, who can explain their diagnosis of the applicant and share their assessment of the long-term effectiveness of therapies and medications the applicant has received.

[8] National Institute of Mental Health (NIMH), "Substance Use and Co-Occurring Mental Disorders."

E. Database checks for child abuse and maltreatment

All applicants must complete the forms necessary to determine whether they or any person 18 years of age or older who lives in the house is the subject of an indicated child abuse maltreatment report on file with the New York Statewide Central Register of Child Abuse and Maltreatment (SCR). In addition, if the applicant or any other person 18 years of age or older who lives in the home of the applicant lived in another state in the five years preceding the application, to obtain such information maintained by the state's child abuse and maltreatment register in each state of previous residency [18 NYCRR 421.15(7)(i)].

In New York State, the communication received back from the SCR informs the agency whether there is an indicated report naming the applicant or other person over the age of 18 who lives in the home of the applicant as subject of the indicated report. The SCR will also notify the applicant or other person over the age of 18 who lives in the home of the applicant in the event that a record of an indicated report exists and inform them that the inquiring agency has been so notified.

1. Notification of indicated report

If there is no CPS report history or only history of unfounded or pending CPS reports, or the SCR has been directed not to release indicated reports because they are not relevant and reasonably related to the application, the inquiring agency will receive a letter from the SCR that the person is not the subject of an indicated report of child abuse or maltreatment to that effect.

If, however, the SCR has an indicated report on file concerning the applicant/household member, but the report has not been upheld at an administrative hearing at the fair preponderance of the evidence standard, and the SCR has not previously been directed not to release such history on the basis of the report not being relevant and reasonably related to such application, the SCR sends a letter to the applicant/household member notifying them that they are the subject of an indicated report and that they have the right to request an administrative hearing, before the agency is notified of the existence of the report.

The applicant/household member then has 90 days to request an administrative hearing. If an administrative hearing is not requested, the inquiring agency will be advised that the person is the subject of an indicated report.

According to a recent amendment to SSL §424-a, if a person is the subject of an indicated report of child maltreatment (and not the subject of an indicated report of child abuse) and the report was issued more than eight years before the current inquiry, it will be deemed as not relevant or reasonably related to the request. Such reports will not be visible to SCR staff and will not be disclosed to the inquiring agency.

Administrative hearing

If a timely request is made for an administrative hearing, OCFS will conduct an administrative review of the case record based on a fair preponderance of the evidence standard to determine that:

- the report should be amended to unfounded;
- the report should be retained as indicated but found not relevant and reasonably related to the application; or
- the report should be retained as indicated and is relevant and reasonably related to the application.

An administrative hearing is held if the administrative review affirms the indication determination and finds that the report is relevant and reasonably related to the application. If the hearing officer affirms the indication using a fair preponderance of the evidence standard and determines that the report is relevant and reasonable, the inquiring agency is then informed that the person is the subject of an indicated report. If the hearing officer does not affirm the indication or determines that the report is not relevant and reasonable, the inquiring agency is informed that the person is not the subject of an indicated report. The process described in this paragraph is a result of federal court decision in Valmonte v. Bane 18 F.2d 992 (1994). (See 95-LCM-039.)

If the inquiring agency is notified that the applicant/household member is the subject of an indicated report, the agency must consider this factor, along with other background information, in deciding whether to approve the applicant in accordance with guidelines established by OCFS.

Practice Tip: OCFS guidelines for reviewing an indicated report

The following factors should be considered by the LDSS or VA when determining if the person who is a confirmed subject in an indicated child abuse or maltreatment report is suitable to be a certified or approved foster parent(s) or other person residing in such home.

- The seriousness of the incident(s) involved in the indicated report.
- The seriousness and extent of any injury sustained by the child named in the indicated report.
- Any detrimental or harmful effect on the child as a result of the subject's actions or inactions, and the relevant events and circumstances surrounding the actions and inactions as these relate to the indicated report.
- The age of the subject and the child at the time of the incident of child abuse or maltreatment.
- The time elapsed since the most recent incident of child abuse or maltreatment.
- The number and/or frequency of indicated incidents of abuse or maltreatment.
- Any information produced by the applicant, or produced on their behalf, regarding their rehabilitation, such as:
  - The acts of child abuse and maltreatment apparently have not been repeated.
  - Evidence of actions taken by the person, which show that they are now able to deal positively with a situation or problem that gave rise to the previous incident(s) of child abuse and maltreatment.
  - Professional treatment (e.g., counseling, or self-help groups) has been successful.
  - The applicant has been successfully employed in the childcare field.

Each report must be carefully reviewed. Extra weight and scrutiny must be given to report(s) where the abuse or maltreatment resulted in a fatality, sexual abuse, subdural hematoma, internal injuries, extensive lacerations, bruises, welts, burns, scalding, malnutrition or failure to thrive.

Source: "Requesting Records from the New York Statewide Central Register of Child Abuse and Maltreatment (SCR) for the Certification or Approval of Foster Boarding Homes" (18-OCFS-ADM-08).

The response from the SCR states only that the applicant/household member is the subject of an indicated report. It does not provide any details on the report or reports. The agency needs to obtain the details in order to review the application according to the OCFS guidelines.

The agency may ask the applicant/household member to provide details of the situation or incident that resulted in the indicated report. The person who is the subject of the indicated report also may be asked to sign a release allowing the agency to receive a copy of the indicated report on file with the SCR. The authorization form (OCFS-5023) used in the

assessment of proposed foster homes can be used as a sample of a release. Best practice is to request the person to sign a release. If they refuse, the agency may use the refusal as a basis to deny the application.

If the agency decides to approve an applicant who is the subject of an indicated report, the caseworker must indicate the specific reasons why the applicant was determined to be appropriate for approval as an adoptive parent in both the adoption home study and the applicant's record.

Fair hearing

If the agency rejects the applicant based on the indicated report, the applicant must be informed in writing of the specific reasons for the disapproval and notice of their right to a fair hearing under SSL §424-a. The applicant must request a fair hearing within 90 days of receiving the written notice of rejection. The sole issue at the fair hearing is whether the applicant has been shown by a fair preponderance of the evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report.

For some applicants, the issue of whether there was a fair preponderance of the evidence that the person abused or maltreated a child or children was already addressed at a fair hearing held in accordance with the Valmonte process noted previously [SSL §424-a(1)(c); 18 NYCRR 421.15 (c)(7) and 421.16(n)].

2. Child abuse/neglect clearances with other states

Agencies must ask applicants whether they, or any person age 18 or older who lives in their home, lived in any other state within the five years preceding the application [18 NYCRR 421(c)(7)(i)].

If the applicant/household member did live in another state during that time, the agency must contact that state to request child abuse and maltreatment information maintained by the child abuse and maltreatment registry in that state about the applicant/household member over the age of 18. The federal definition of "state" includes the 50 U.S. states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa.

If more assistance is needed in contacting or following up with another state, LDSSs may contact their OCFS regional office.

Some states cannot release information directly to an agency because of their own confidentiality statutes. The caseworker may need to ask the applicant to sign a release form giving permission for the agency to obtain this information. As an alternative, the applicant may need to obtain the information directly from the other state and then provide it to the agency in New York. New York State's authority to grant access directly to agencies in other states is set forth in SSL §422(4)(A)(z).

If the applicant or another adult who lives in the applicant's home has a history of child abuse or maltreatment in another state, the agency must determine whether to approve or reject the application based on information from the other state and from the applicant, using the same guidelines used to evaluate indicated reports from within New York State. If the application is approved, the caseworker must document in the adoption study case record the specific reasons for the approval.

The agency must safeguard the confidentiality of the information received from the other state and may not use the information for any other purpose than conducting the background check

as part of the adoption study [18 NYCRR 421.16(o)]. The applicant's file must indicate who was contacted in the other state and their response.

Resources

AdoptUSKids maintains a list of state child abuse registries in the U.S. on their website.

"Definition of 'State' for the Purpose of Out-of-State SCR Checks" (08-OCFS-INF-03).

Chapter 3 of the OCFS Child Protective Services Manual provides detailed information on requesting a search of the SCR database.

See OCFS policy directive 95-LCM-039 for details on the Valmonte decision (Valmonte v. Bane, 18 F.3rd 992).

F. Criminal history record check

The LDSS or VA must obtain federal and NYS criminal history record checks regarding any prospective adoptive parent and each person 18 years of age or older who is currently residing in the home of the applicant [SSL §378-a(2)].

Applicants also must sign a sworn statement indicating whether, to the best of their knowledge, they or any other person over the age of 18 who lives in their home has ever been convicted of a crime in NYS or any other jurisdiction [18 NYCRR 421.15(c)(9)].

1. Fingerprinting

As part of the criminal history record check, the LDSS or VA must notify the prospective foster parents and each person over the age of 18 who is currently living in the home that their fingerprints must be taken [SSL §378-a]. Fingerprints are obtained by digital scanning at a vendor approved by the state (see Guidelines for Fingerprinting, (OCFS-4930-1).

A "Request for Fingerprinting Services" (OCFS-4930ASFA) must be provided to foster/adoptive parent applicants and to any household members over the age of 18. They must make an appointment for fingerprinting with the vendor. Instructions are provided on the form, which is also available in Spanish. It is recommended that copies of these forms be provided at the time an application is submitted.

The fingerprint records are forwarded to the New York State Division of Criminal Justice Services (DCJS) and the Federal Bureau of Investigation (FBI) so they can conduct searches of their databases. DCJS checks criminal records in New York State and the FBI checks criminal records from all states and federal territories. Fingerprints are kept on file at DCJS on a search and retain status. This means that after the initial criminal history record search, DCJS retains the fingerprints and notifies OCFS if there are any future arrests within NYS and the LDSS or VA is notified if an arrest or conviction is reported in the future to DCJS.

The fingerprints are not maintained by the FBI on a search and retain basis. The FBI check is a point-in-time check that provides one-time results done as part of the home study. This means if the person is arrested outside of NYS, the arrest will not be reported to OCFS for issuance to the agency.

Hard-to-print applicants and other persons who have a disabling condition that prevents them from leaving the home may need to be printed in the traditional ink-and-roll format. Those

fingerprints, along with form OCFS-4930ASFA, should be mailed to the OCFS Criminal History Review Unit (OCFS CHRU) at:

New York State Office of Children and Family Services
Capital View Office Park
52 Washington Street
Criminal History Review Unit, Room 209 South
Rensselaer, NY 12144

It is recommended that the fingerprints are sent with tracking in case there are issues with mail delivery.

2. Criminal history record findings

OCFS receives and reviews the criminal history record information from both the DCJS and FBI. The information is compiled by OCFS into a criminal history record summary. Where the application for approval as an adoptive parent is made to a LDSS, OCFS will send the criminal history record summary to the LDSS to aid in decision-making related to criminal history and approval of the application. The DCJS and the FBI prohibit dissemination of the actual criminal history record.

OCFS forwards a summary of both DCJS and FBI information to the LDSS when the application was made through the LDSS. Generally, the results from DCJS and the FBI will be returned by OCFS in one summary letter. There may be instances, however, where a fingerprint image is accepted by DCJS but not by the FBI. If this occurs, the LDSS will be notified of resubmission procedures. Depending on the results from DCJS, the LDSS may receive a separate criminal history record summary with the results from the FBI.

Written notification to VAs

When the application was made through a VA, OCFS forwards a summary of the DCJS information, but not the results of the FBI criminal history check. Based on a directive from the FBI, VAs, because they are not public agencies, do not receive a criminal history record summary with the results of the FBI criminal history record check. Instead, OCFS sends VAs a **written notification** for each fingerprinted person.

The written notification includes one of three conclusions reached by OCFS after a review of the FBI criminal history record.

- OCFS has no objection, solely based on the FBI criminal history record check, to the VA proceeding with the application process, based on the standards for approval of an adoptive parent as set forth in OCFS regulations.[9]
- The VA must deny the application, regardless of the results of the DCJS criminal history record check. OCFS will notify the person whose FBI criminal history was the basis for the denial and provide them with:
  - a copy of the results of the FBI criminal history record check upon which the decision is based;
  - a written statement setting forth the reason(s) for such denial; and

[9] OCFS. “Fingerprinting and Criminal History Record Checks for Foster and Adoptive Parents” (16-OCFS-ADM-20).

  - a description of the FBI record review process and any remedial processes provided by OCFS.

  The VA must provide the applicant with "Notice of Results of Fingerprinting Criminal Record Found, Denial-Revocation Letter" (OCFS-2661), which includes information on how the applicant may challenge or appeal the results of the criminal history record check.

- The VA must hold the application in abeyance pending further direction from OCFS. The VA cannot go forward with the approval procedure until further notification from OCFS, regardless of the results of the DCJS criminal history record check. OCFS will advise the applicant that they are obligated to secure acceptable documentation regarding the case in question and to forward it to OCFS within a specified period of time. Failure to provide such information may be a basis for disapproval of the application.

  After a review of the documentation provided by the applicant, OCFS will send an updated notification to the VA, either directing the agency to deny the application or informing it that OCFS has no objection to the VA proceeding with the application process.

3. Criminal history summary letter

The OCFS **summary letter** is sent to both LDSSs and VAs and includes one of the following outcomes, based on its review of the criminal history records supplied by DCJS (and the FBI, if the application was made through an LDSS):

- **No criminal record found:** there are no convictions or open arrests found for felonies or misdemeanors and the agency may proceed with the approval process.
- **History of one or more convictions/mandatory disqualifier:** the application must be denied.
- **History of one or more convictions/discretionary disqualifier:** the agency has the discretion to approve or deny the application based on a thorough assessment of the situation.
- **Pending matters/hold in abeyance:** there may be a charge or conviction of a mandatory disqualifying crime, but further information is needed.

4. Mandatory disqualifying crimes

Agencies are mandated by federal and state law to deny the applications of prospective foster and adoptive parents for certain felony convictions, referred to as "mandatory disqualifying crimes." Further, if already certified or approved foster or adoptive parents are convicted of these crimes after October 1, 2008, they must have their certification or approval revoked. The law does not affect persons who were fully certified or approved as foster or adoptive parents before October 1, 2008, for convictions that occurred before that date.

When crimes have been committed by household members aged 18 and over, the application is subject to discretionary consideration, based upon a safety assessment [SSL §378-a (2)].

The list of disqualifying crimes is updated by the OCFS Counsel's office. For the current list, see "OCFS Criminal History Record ASFA Review Standards."

There is a limited spousal abuse exception to when a crime is considered a mandatory disqualifier. It only applies when the applicant was convicted of the felony assault of their spouse and the applicant is able to demonstrate at an administrative hearing on the denial of such person's application for approval that the applicant was a victim of physical, sexual, or psychological abuse by the victim of the crime and that such abuse was a factor in causing the applicant to commit the crime [18 NYCRR 421.27(h)].

Criminal convictions of prospective adoptive applicants

When a mandatory disqualifying conviction exists for someone applying to adopt, the agency must take the following steps:

- Advise the prospective adoptive parent who has been convicted of a mandatory disqualifying crime that they are ineligible to be approved as an adoptive parent.
- The inquiring LDSS must conduct a safety assessment as required by SSL §378-a(2)(h).
- Provide the applicant with a "Denial/Revocation Letter/Notice of Results of Fingerprinting/Criminal Record Found" form (OCFS-2659).

Resources

A copy of the current list is ASFA attached to the policy directive, "Fingerprinting and Criminal History Record Checks for Foster and Adoptive Parents" (16-OCFS-ADM-20).

Arrests and convictions of approved adoptive parents

If an agency is working with a fully approved adoptive parent who is seeking to adopt a child and it is learned, through the search and retain procedures for criminal background checks, that the adoptive parent has been arrested for a mandatory disqualifying crime, the agency must conduct a safety assessment in accordance with SSL §378-a(2)(h), including:

- whether the subject of the potential mandatory disqualifying conviction lives in the home;
- the extent to which such person may have contact with foster children or other children living in the home;
- the status, date, and nature of the arrest (taken from the criminal history summary provided by OCFS).

If there is a child placed in foster care in the home, the safety assessment is used to determine whether the child can remain in the home. If a decision is made to remove the child, the removal and conference standards outlined in 18 NYCRR 443.5 must be followed. If the arrest results in a conviction for a mandatory disqualifying crime, the agency must revoke the approval, advise the applicant of the revocation, and provide them with the Denial/Revocation Letter/Notice of Results of Fingerprinting/ Criminal Record Found" form (OCFS-2659).

5. Discretionary qualifying crimes

When the prospective adoptive parent, or other person age 18 or older who lives in the home, has a criminal charge or conviction for a crime that is not a mandatory disqualifier, the authorized agency may approve or deny the application and is not required to revoke the approval of a previously approved adoptive parent. The reasons why a prospective or approved adoptive parent is determined to be appropriate and acceptable to adopt in light of the results of

the criminal history record check must be documented in the applicant's or approved adoptive parent's case record in CONNECTIONS.

When the agency becomes aware of the discretionary qualifying crime, a safety assessment must be conducted of the conditions of the household that includes whether the person who was charged or convicted of the crime lives in the household, the extent to which such person may have contact with children living in the home, and the status and nature of the criminal charge or conviction. There are very specific steps for the safety assessment, as well as actions an agency must take if there are children already placed in the home, but not yet adopted. The caseworker must complete the safety assessment in the CONNX system. For more information about the content of the safety assessment and the criteria for deciding whether to approve or deny an application when there is a discretionary criminal history, see 16-OCFS-ADM-20.

Convictions for nonviolent crimes and arrests without convictions may signal caution but should never result in automatic exclusion. They warrant careful exploration of factors more immediately related to parenting and the safety of the children. In the case of an individual with a recent history of arrests for violent actions, it is necessary to determine through interviews with the individual, family members, and others whether resorting to violence is a pattern that might affect family life.

If there is a child who has been placed in foster care in the home, the safety assessment will help the caseworker in determining whether or not the child can remain. If a decision is made to remove the child, the removal and conference standards outlined in 18 NYCRR 443.5 and 16-OCFS-ADM-20 must be followed. If the arrest results in a conviction for a mandatory disqualifying crime, the agency must revoke the approval, advise the applicant of the revocation, and provide them with the "Notice of Results of Fingerprinting Criminal Record Found, Denial-Revocation Letter" (OCFS-2661).

6. Application held in abeyance

An authorized agency must hold in abeyance (delay) the decision on whether to approve an application when informed by OCFS that the applicant's criminal history record reveals a charge or conviction of a mandatory disqualifying crime that requires further review [18 NYCRR 421.27(d)(2)].

This includes in-state charges or convictions that need further review by OCFS or out-of-state crimes about which the agency needs to collect more information. It may involve an open charge for a crime for which a conviction is a mandatory disqualifier or the conviction of a crime which, depending on the victim of the crime, may be a mandatory disqualifier. The agency may proceed with the application process but cannot approve the home until OCFS provides an updated criminal history record summary. If the updated summary reveals that the disposition of the charge was a conviction for a mandatory disqualifying crime, the application must be denied.

Practice Tip: Safety Assessments

All necessary steps must be taken to protect the health and safety and well-being of a child, and, in all situations, this must be the caseworker's primary concern.

The safety assessment is designed to extract information that the caseworker can use (and document) to support a decision to either approve or disapprove an application to become an adoptive parent.

For details on safety assessments, see "Criminal History Checks and Safety Assessments."

7. Confidentiality requirements

The summary of the criminal history record provided by OCFS to the agency is confidential [SSL §378-a(2)(i)]. The agency may not disclose criminal history information to the applicant or current adoptive parent, except when an authorized agency denies an application or revokes an approval pursuant to SSL §378-a (2)(g). In that case, the authorized agency must provide the criminal history record summary to the applicant or current adoptive parent. The exception described above is the *only* circumstance in which the criminal history summary is given in writing to an applicant or current adoptive parent.

It is permissible during the safety assessment to verbally disclose to the fingerprinted individual the following items from the criminal history record summary:

- The crime for which the fingerprinted individual was charged or convicted.
- When such person was arrested or convicted.
- In what court or jurisdiction such person was charged or convicted.

Disclosure of this information to the fingerprinted individual in the presence of other persons is permissible only with the fingerprinted individual's consent.

The criminal history record check summary may not be disclosed by one authorized agency to another authorized agency, even with the consent of the person who was the subject of the criminal history record check. One exception is when an LDSS requests the criminal history record check summary in accordance with a contract it has with a VA.

The authorized agency that received the results of the criminal history record check may release the criminal history record summary it received from OCFS to any administrative or judicial proceeding relating to the denial or revocation of an approval of an adoptive parent. In addition, where there is a pending court case, such as a pending adoption proceeding, the authorized agency that received the criminal history record summary from OCFS must provide a copy of such summary to the Family Court or Surrogate's Court upon request [SSL§ 378-a(2)(i); 18 NYCRR 421.27(g)].

G. NYS Justice Center

Authorized agencies must inquire of the New York State Justice Center for the Protection of People with Special Needs (Justice Center) whether an applicant to adopt and/or any other person over the age of 18 who lives in the applicant's home is listed on the Staff Exclusion List (SEL) maintained by the Justice Center [18 NYCRR 421.16 (r)].

Each authorized agency is required to designate one or more persons who are authorized to submit a request to the Justice Center for an SEL check and to receive the results. The authorized person (AP) requests the SEL check from a portal on the Justice Center website.

The SEL contains names of individuals who have committed serious or repeated acts of abuse or neglect against people with special needs in programs under the Justice Center's jurisdiction. These individuals are barred from being employed in positions requiring regular and substantial contact with people receiving services. The listing of an applicant or another adult household member on the SEL is not an automatic bar to approval of the applicant.

If the applicant or other adult residing in the home of the applicant is on the SEL list, the authorized agency must decide, based on the information it has available, whether to approve the applicant, following the guidelines that OCFS has set forth for SSL §424-a clearances. If the agency decides to approve an applicant who is listed on the SEL list, the agency must document the reason for the decision to approve the applicant in a similar manner as to when an applicant is the subject of an indicated child abuse and maltreatment report under SSL §424-a.

The SEL database check is in addition to criminal history checks required by SSL §378-a (2) and SCR clearances required by SSL §424-a. The authorized agency must retain a copy of the results of the SEL check in the applicant's file.

Resources

Details on the Staff Exclusion List are available at the Justice Center website at https://www.justicecenter.ny.gov/staff-exclusion-list.

OCFS policy directive "Justice Center Staff Exclusion List Clearance Requirements" (13-OCFS-ADM-09).

H. Approval or disapproval of the study

The authorized agency must complete an adoption home study within the time frames specified in OCFS regulation, which is within six months of receiving the application for applicants in the first and second priority groups. Applicants must be notified of the results of the study in writing.

Once the study process has begun, the authorized agency must conclude the study within four months with a decision of discontinuation, approval, or disapproval. Exceptions can be made when:

- *Illness or geographic absence* makes the applicant unavailable for a substantial part of the four-month period. The caseworker must document the applicant's unavailability in the case record and efforts made to contact the applicant.
- *Unavailability of agency staff* may extend the study period, but not to more than six months. The applicant must agree to an extension in writing and the record must show when this agreement was obtained. If the applicant does not accept such delay, the study must be concluded within four months through the use of substitute staff or purchase of service [18 NYCRR 421.15(h)].

1. Discontinuation of the study

An adoption home study can be discontinued with either the mutual consent of the authorized agency and the applicant or unilaterally by the applicant. The applicant's record must reflect the discussion leading to the decision to discontinue the study and must document that the applicant was informed in writing of the discontinuance. When the applicant does not agree to a discontinuation, the applicant must either be approved or disapproved [18 NYCRR 421.15(f)].

2. Final assessment and determination

When the home study is complete, the caseworker must prepare a written summary of the home study findings and activities, including significant characteristics of the applicant's family members, their interactions with each other, their relationships with other persons and the community, their child-rearing practices and experiences, and any other material needed to describe the applicant's suitability as an adoptive parent [18 NYCRR 421.15(e)(1)].

The OCFS form "Final Assessment and Determination: Adoption Only" (OCFS-5200J) is used to prepare the written summary. In addition to documenting the information required during the application process, the caseworker must assess the family's strengths, considerations, and needed supports in these areas:

- Partner relationships
- Parenting
- Family relationships
- Child interviews, if applicable
- Psychosocial

3. Approval of the applicant

When the agency intends to approve an applicant, the caseworker must:

1. Arrange for the applicant to review the written summary of the home study, with the exception of any comments by references who requested confidentiality. The applicant must be encouraged to express their views on the substance of any significant aspect of the written summary and must be given the opportunity to enter their reaction in writing as an addendum to the summary. Both the applicant and the caseworker must sign the summary after it has been reviewed and any addendum has been attached [18 NYCRR 421.15(e)(2)-(5)].
2. The family's review of the summary will help to assure that it represents the family's view of themselves. It should honestly and accurately portray the family's strengths and weaknesses and their potential ability to effectively parent children with special needs [18 NYCRR 421.15(e)(1–6)].
3. Forward the summary to workers in the agency or other agencies who are responsible for making placement decisions about children. The summary is used to facilitate adoptive placements across agencies [18 NYCRR 421.15(e)(1)].
4. Send a dated, written notice of approval to the applicant [18 NYCRR 421.15(e)(6)].

4. Disapproval of the applicant

An applicant may be disapproved if their lack of cooperation does not permit the study to be carried out. While an agency should allow for vacations, ill health, employment requirements, and reasonable interruptions, if an applicant does not keep appointments, fails to produce documents, and does not cooperate with the process, the application should be disapproved. The caseworker must document details about the lack of cooperation in the case record [18 NYCRR 421.15(g)(1)].

An applicant may be disapproved if the authorized agency determines that:

- the applicant is physically incapable of caring for an adopted child;
- the applicant is emotionally incapable of caring for an adopted child; or
- the approval of the applicant(s) would not be in the best interests of the children awaiting adoption [18 NYCRR 421.15(g)(2)].

It would be difficult, if not impossible, to list all of the specific circumstances in which these findings would be appropriate. Caseworkers, in consultation with their supervisors, must consider the way such conditions might weaken a family's ability to care for an adopted child. A decision must be based on the information obtained regarding each area of the home study (18 NYCRR 421.16). The ways in which these abilities were assessed and how they led to the conclusions shown in the summary must be clearly recorded.

The decision to reject an applicant must be made by at least two staff members in conference, one of whom must be at a supervisory level. The names of the participants in the conference and their reasons for the rejection must be stated in the applicant's record. Authorized agencies are also strongly encouraged to consult with agency legal staff.

The applicant must be informed in writing that they have not been approved and the reasons for this decision. The letter also must offer the applicant an opportunity to discuss the decision in person with the caseworker's supervisor.

The letter must include a notice to the applicant of the applicant's right to request and be granted a hearing before OCFS in accordance with SSL §372-e. It must state that the applicant has a right to an administrative fair hearing and should state the procedure to be used for this purpose. The applicant has 60 days from receiving the notice of disapproval to request an administrative hearing [SSL §22(4); 18 NYCRR421.15(g)(3), (4), (5),(6) and (7)].

If the disapproval is based in whole or in part on the existence of an indicated report of child abuse or maltreatment, that fact must also be included in the notice, along with the right to a hearing and how to request a hearing in accordance with SSL §424-a. The letter must contain the following address where the applicant can request a hearing:

New York State Office of Children and Family Services
Bureau of Special Hearings
North Building Room 322
52 Washington Street
Rensselaer, New York 12144-2796

Notification to Criminal History Review Unit (CHRU)

When an application for approval as an adoptive parent is discontinued or disapproved, the authorized agency must inform the OCFS Criminal History Review Unit (CHRU) that it is no longer necessary for OCJS to notify OCFS of future arrests. Timely notification by the agency is necessary to prevent the unauthorized release of criminal history information and to support compliance with applicable statutory and regulatory standards relating to criminal history record checks.

The authorized agency must complete and submit the form "Notice of Foster Home or Adoptive Home Closure" (OCFS-2113) to the OCFS CHRU when the applicant has exhausted their appeal rights to the disapproval.[10] This form must be completed and submitted within 30 days of the disapproval of the application or the closure of a foster or adoptive home.

This notification is also required when a foster home is closed or when a person who was an approved adoptive parent is no longer approved by the authorized agency. This may occur when, prior to the completion of an adoption, the approved adoptive parent decides they will no longer be a client of the agency that approved them.

[10] OCFS. ""Termination of Notification of Subsequent Arrests in Closed Foster and Adoptive Homes" (14-OCFS-ADM-01).

When an adoption has been finalized, the agency should ask the adoptive parent whether they want to maintain their status as an approved adoptive parent with the agency. The adoptive parent may wish to continue that status because, for example, they anticipate adopting a sibling of the child they just adopted (the fact that an adoption has been finalized does not automatically terminate the approved adoptive parent status).

The agency must explain to the adoptive parent that, if they continue their status as an approved adoptive parent, OCFS will continue to send updated criminal history information to the agency. If the person decides not to retain approved adoptive parent status, criminal history notifications will end but the parents will need to repeat the process if they later decide to adopt another child.

Appendix 10.1: The Multiethnic Placement Act

The federal Multiethnic Placement Act of 1994 (MEPA), as amended by the Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, requires voluntary authorized agencies that receive federal funds and provide adoption services to actively recruit prospective adoptive parents. These parents should reflect the ethnic and racial diversity of the children in need of adoptive homes.

Among the major provisions of the MEPA are the following:

- Prohibits state agencies and other entities that receive federal funding and are involved in foster care or adoption placements from delaying, denying, or otherwise discriminating when making a foster care or adoption placement decision on the basis of the parent or child's race, color, or national origin. Note: This includes LDSSs and VAs with foster children in their care.
- Prohibits state agencies and other entities that receive federal funds and are involved in foster care or adoption placements from categorically denying any person the opportunity to become a foster or adoptive parent solely on the basis of race, color, or national origin of the parent or the child.
- Requires states to develop plans for the recruitment of foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom families are needed.
- Prohibits agencies from routinely considering race, color, or national origin in making placement decisions.
- Requires that any consideration of race, national origin, or ethnicity must be done on an individualized basis when special circumstances indicate that their consideration is warranted.
- Has no effect on the provisions of the Indian Child Welfare Act of 1978.
- Makes failure to comply with MEPA a violation of Title VI of the Civil Rights Act.

This means that states, local departments of social services, and voluntary agencies required to comply with MEPA cannot have a stated or unstated policy that requires race, color, or national origin to be a primary or routine condition or determining factor when deciding on the best foster or adoptive home for a child, or when accepting or rejecting an applicant interested in becoming a foster or adoptive parent.

Impermissible activities

Caseworkers and agencies must pay careful attention to MEPA requirements. Failure to comply with the provisions of MEPA could result in serious financial and other penalties for the caseworker, the agency, the state or any other entity that receives federal funds.

MEPA reflects the judgment of the U.S. Congress that children are harmed when placements are delayed for a period longer than is necessary to find qualified families. The legislation seeks to eliminate barriers that delay or prevent the placement of children into qualified homes. In particular, it focuses on the possibility that policies designed to match children with families of the same race, culture or ethnicity may result in delaying, or even preventing, the adoption of children by qualified families. It also intends to ensure that every effort is made to develop a

large and diverse pool of potential foster and adoptive families so that all children can be quickly placed in homes that meet their needs.

Federal law forbids decision-making based on race or ethnicity unless it advances a compelling government interest. Here, the only compelling government interest is to protect the best interests of the child. An adoption agency may take race or ethnicity into account only if it has made an individualized determination that it is necessary, based on the facts and circumstances of the specific case and to advance the best interests of the specific child. Any placement policy that takes race or ethnicity into account is subject to strict scrutiny by the courts to determine whether it satisfies the tests noted above.

Statutes or policies violate MEPA or Title VI of the Civil Rights Act of 1964 if they:

- establish time periods during which only a same race/ethnicity search will occur;
- establish orders of placement preferences based on race, culture, or ethnicity;
- require caseworkers to specially justify transracial placements; or
- otherwise have the effect of delaying placements, either before or after termination of parental rights, in order to find a family of a particular race, culture, or ethnicity.

Other rules, policies or practices that do not meet the constitutional strict scrutiny test noted above would also be illegal.

Race, color, and national origin may not routinely be considered in assessing the capacity of particular prospective foster or adoptive parents to care for specific children. However, assessment by an agency of the capacity of particular adults to serve as foster or adoptive parents for specific children is at the heart of the placement process, and essential to determining what would be in the best interests of a particular child.

An essential component of the recruiting process is having staff present in the community from which the agency wants to recruit. Orientation meetings should be conducted in meeting space available in churches, community centers, community organizations, or national organizations. Use of the media (radio, television, newspapers, and magazines) should be made continually, but the recruitment process goes beyond advertising in the media. Whenever the interest in adoption is found, be it church groups, unions, or work sites, agency staff should be available to speak and offer information about the program, including the need for homes and the availability of subsidy.

Recruitment, especially in rural areas, involves tapping into the natural helping systems. Adoptive parents are frequently a resource in locating other adoptive parents. Having parents who have adopted successfully become a part of the agency's recruiting efforts can facilitate this process [18 NYCRR 421.16(j) and 421.18(d)(2)].

See the OCFS policy directive, "Multiethnic Placement Act of 1994" (96-ADM-02).

Chapter 11

Chapter 11
Adoption Placement and Finalization

As has been stated in previous chapters, most of the children available for adoption in New York State are eventually adopted by foster parents with whom they have been living. When a child has been freed for adoption and an adoptive resource for that child has not yet been identified, caseworkers must begin the task of finding an adoptive placement that will best meet the child's needs.

The caseworker must document in the Child Case Record (CCR) the efforts that have been made to find an appropriate adoptive placement for the child. The record must include all inquiries from potential adoptive parents about the child, the follow-up, and final outcomes of the inquiries.

Permanency hearings must continue to be held for children who were formerly in foster care and have been freed for adoption [FCA §1089(A)(i)]. The hearings are scheduled every six months until the child's adoption is finalized. Documentation required for these hearings is recorded in the CCR Legal Activities window, and may include:

- a description of activities related to exploring of alternative permanency resources, including the child's foster parents, if any;
- a description of activities undertaken to prepare the child for adoption or other permanency plan;
- actions taken to place the child in an adoptive home or other permanent living arrangement, including barriers to placement and activities undertaken to overcome the barriers; and, for children placed in an adoptive home or in another permanent living arrangement, a description of the efforts to finalize the adoption or the other permanent living arrangement.[1]

Caseworkers have tools they can use to find the right families for waiting children: the Family Adoption Registry and the Adoption Album search and match feature. These online resources make it possible for workers to make connections with a wide range of pre-adoptive families.

A. Family Adoption Registry

The Family Adoption Registry is one of the components of the *Adoption Album — Our Children, Our Families* (Adoption Album), a child photolisting and family registry system. The Family Adoption Registry provides local departments of social services (LDSSs) and voluntary authorized agencies (VAs) with a list of adoptive applicants who are willing to adopt children with special needs. Caseworkers also can match a waiting child with registered families, based on specific criteria the families have chosen.

Caseworkers access the Family Adoption Registry, including the child-family and family-child matching features, through the Adoption Album. Caseworkers should consult with their supervisors and information technology staff to obtain needed passwords and access instructions. Caseworkers can contact OCFS/BPS if they have problems accessing the application that cannot be resolved locally.

[1] OCFS CONNECTION Tip Sheet, "Creating a Child Case Record for a Legally Freed Child," Rev. June 2023.

It is recommended that caseworkers use the *Adoption Album Training Manual* to guide them through the details of these processes.

All adoption agencies are required to use the Family Adoption Registry [SSL §372-b(2-a)]. Every person who submits an Adoptive Parent Application and is willing to adopt a photolisted child must be added to the registry by the agency at the time the signed application form is submitted [18 NYCRR Part 424.2(a)].

Authorized agencies are required to inform applicants who are applying to adopt handicapped or hard-to-place children:

- about the existence and purpose of the Family Adoption Registry; and
- that their names and the characteristics of the children whom they wish to adopt will be made available upon request to all adoption agencies in the state; and
- that they cannot be accepted for a home study, pursuant to the application acceptance standards set forth in 18 NYCRR 421.13, unless they are entered in the registry. This does not apply when the applicant is a foster parent who is applying to adopt a foster child residing in their home [18 NYCRR 424.2(b) & (c)].

A caseworker who has permission to access the Family Adoption Registry search functions may enter information about a waiting child on their caseload and search the system for families who have indicated they are willing to consider adopting a child with characteristics that match those of the waiting child.

The information entered in the Family Adoption Registry is based on the information provided on the Adoptive Parent Application (OCFS-5200B) or Family Adoptive Registry Information form (OCFS-5183C). The Family Adoption Registry allows the authorized agency to match the applicant's profile and acceptable child characteristics with children referred for photolisting. Consequently, a prospective adoptive parent can be matched only on information provided to the Family Adoption Registry.

1. Who can be registered?

In determining who should be entered into the registry, the applicant must have informed the caseworker that they are willing to adopt a photolisted child. Most, but not all, photolisted children are considered to be handicapped or hard to place.

According to OCFS regulation, a handicapped child is a child with a specific physical, mental, or emotional condition or disability of such severity that, in the opinion of OCFS, would constitute a significant obstacle to the child's adoption. These conditions include, but are not limited to [18 NYCRR 421.24(a)(2)]:

- any medical or dental condition that will require repeated or frequent hospitalization, treatment, or follow-up care;
- any physical handicap, by reason of physical defect or deformity, whether congenital or acquired by accident, injury, or disease, which makes or may be expected to make a child totally or partially incapacitated for education or for a paid job, as described in Public Health Law §2581;
- any substantial disfigurement, such as the loss or deformation of facial features, torso, or extremities;

- a diagnosed personality or behavioral problem, psychiatric disorder, serious intellectual incapacity, or brain damage that seriously affects the child's ability to relate to their peers and/or authority figures; or
- a child determined to need an extraordinary level of care in accordance with 18 NYCRR 427.6.

A hard-to-place child is a child, other than a handicapped child, who [18 NYCRR 421.24(a)(3)]:

- has not been placed for adoption within six months of being freed for adoption;
- has not been placed for adoption within six months of the termination of a previous adoptive placement;
- has been freed for adoption for less than six months and:
  - is a member of a sibling group (including half-siblings) who has been freed for adoption and it is considered necessary that the group be placed together and who otherwise satisfy certain specified conditions;
  - is 8 years old or older and from a minority ethnic group that is substantially overrepresented in the NYS foster care system;
  - is 10 years old or older; or
  - has been in foster care for 12 months or more before the foster parents sign the adoptive placement agreement and has developed a strong attachment to their foster parents and where separation from the foster parents would adversely affect the child's development.

For details on the characteristics of photolisted children, see the "Family Adoption Registry Information" form (OCFS-5200C).

2. Initial registration process

Prospective adoptive parents should receive information about the Family Adoption Registry and the Adoptive Parent Application when they attend an orientation session or interview. When an applicant applies to adopt a child who is handicapped or hard to place, the agency must enter their information in the Family Adoption Registry. This must be done, even if an SCR screening has not been completed or the adoptive home study has not yet been finished.

Approved applicants living in New York State

Applicants who live in New York State, have an approved home study, and are interested in adopting photolisted children may enter information directly to the Family Adoption Registry (https://hs.ocfs.ny.gov/Adoption/Family/HomeStudy). Families who register online will be instructed to print a copy of the registration and send it, along with verification of their approved home study, to OCFS/BPS.

Information on applicants who do not have an approved home study must be entered in the registry by the authorized agency that took the application. It is recommended that the caseworker work with the applicant to complete form OCFS-5200C (or OCFS-5183C for those applying concurrently as foster/adoptive parents) and then enter the information online. The registration process is completed online with demographic information about the family and information about the child the family is seeking to adopt, including gender, age, language, religion, and special needs. When the home study is complete, the caseworker must update the

Family Adoption Registry either to indicate that the home study was approved or to remove the applicant's name from the registry if the applicant was rejected or the study was discontinued.

At least once a year, the registering authorized agency must contact the approved applicant to confirm that the information in the Family Adoption Registry is accurate and that the applicant is still interested in adopting a photolisted child. The agency must remove the family from the registry when an Adoption Placement Agreement has been signed and a child has been placed in the home for adoption (18 NYCRR 424.3).

Out-of-state applicants

Prospective adoptive parents who live in another state also may register online for the Family Adoption Registry. They have 30 days from the date of registration to submit proof of an approved home study to OCFS/BPS or the initial registration expires.

Updating and inactivating registrations

The agency that received a family's Adoptive Parent Application is responsible for maintaining accurate and up-to-date information on in-state families entered in the Family Adoption Registry (18 NYCRR 424.3). Information must be updated when:

- There is a change in home study status.
- The prospective adoptive parent wants to change the "acceptable child characteristics" that they previously entered. The new description must meet the criteria for hard-to-place or handicapped children.
- There is a change in any information contained in the family's registry.

3. Family photolisting

Prospective adoptive families have the option of adding a photo to the information on file with the Family Adoption Registry.

The family photolisting contains color photographs and family narratives that can be viewed by caseworkers trying to find families for photolisted children. If they meet the criteria for photolisting, the family submits the photo and narrative to their caseworker. The family photolisting option is available to families who:

- Have been approved as adoptive parents by an OCFS-approved authorized agency in accordance with NYS standards.
- Are registered in the Family Adoption Registry.

Families may not meet these criteria when they are first entered into the registry. When all the criteria have been met, the authorized agency can photolist the family. Family photolistings can be accessed by caseworkers through the same permissions and procedures used to access other areas of the Adoption Album.

Edits and updates of family photolistings

Authorized agencies are responsible for maintaining accurate and up-to-date information on photolisted families. The LDSS or VA that photolists the family must maintain the information and make changes as they occur. Once every year, at a minimum, the photolisting agency must contact the family to verify that the family is still interested in adopting a handicapped or hard-to-

place child. In addition, agencies should make changes to the photolisting record as they are made to the information maintained on the Family Adoption Registry.

Inactivating family photolistings

Authorized agencies can inactivate a family photolisting record when:

- a family has indicated it is no longer willing to adopt a special needs or hard-to-place child;
- the family has indicated it no longer wants to be photolisted;
- the Family Adoption Registry has expired; or
- the authorized agency requests that the family's photolisting be removed.

Authorized agencies must submit a request to OCFS/BPS to inactivate a family from the family photolisting by submitting a Change Request as outlined in the *Adoption Album Training Manual*.

Search and match

Caseworkers can use the Adoption Album to search for children who meet the criteria indicated by a prospective adoptive family and then to match a waiting child with registered families. Searches and matches are based on the information in the Family Adoption Registry and the information included in the child's photolisting in the Adoption Album. In addition to searching and matching, this system allows an authorized agency to verify the families registered with their agency.

4. Matching a waiting child with a registered family

To identify adoptive parents who might be willing to adopt a specific child, the caseworker enters the child's referral ID number, Child Identification Number (CIN), or CONNECTIONS (CONNX) Person ID number into the Adoption Album search function. The system will produce a list of potential adoptive families based on a match of the families' demographics and preferences to the characteristics of the child. The caseworker can view each family's information, including a photo if the family has chosen to have it included in the Family Adoption Registry.

If a legally freed handicapped or hard-to-place child is not placed in an adoptive home within six months, the case record must indicate that an inquiry was made through the Family Adoption Registry within three months of the child being freed and the result of the inquiry [18 NYCRR 424.4(a) and 18 NYCRR 430.12 (e)(2)(iii)(a)]. The agency responsible for the care of the child must continue to make inquiries at least once every three months until the child is placed in an adoptive home. Caseworkers may access the Family Adoption Registry at any time in an effort to identify a prospective adoptive home for a handicapped or hard-to-place child in its custody, regardless of the child's legal status.

If the authorized agency finds a prospective adoptive parent registered with the Family Adoption Registry who has expressed an interest in adopting a child with the characteristics of an available child in its custody and care, the agency must contact the authorized agency that registered the potentially suitable parents and do one or more of the following:

- verbally discuss the suitability of the potential home for the child;
- ask the registering agency to send a copy or summary of the home study; or
- make direct contact with the potential adoptive parents, when deemed appropriate by the registering agency.

The registering authorized agency must cooperate with the inquiring authorized agency responsible for the child's care. This can be done by completing the home study, if necessary, and facilitating the placement of the child in the home, when appropriate. The registering agency may report that an approved home is unavailable for the identified child only if it has a specific placement planned for that home within a period of not more than two months from the inquiry date (18 NYCRR 424.4).

5. Finding a child for registered families

A caseworker can search the Adoption Album on behalf of a family to look for a child that matches the family's requirements, such as gender, age range, maximum number of children, willingness to accept a legal risk placement; and the child's needs, such as religion and language. This process must be conducted in a manner compliant with the federal Multiethnic Placement Act.

Caseworkers may refer adoptive parents to *The Adoption Album* website (https://ocfs.ny.gov/programs/adoption/disclaimer.php), where they can search for a child themselves (https://hs.ocfs.ny.gov/Adoption/Child/DemographicSearch).

Cooperation between agencies

The electronic matching process is a valuable tool that allows caseworkers to access key information from agencies across the state. When one or more potential adoptive families for a waiting child are identified, the caseworker contacts the agency or agencies working with each identified family to gather more information and arrange to meet with the family, as appropriate.

The two agencies must work together to provide a potential adoptive family with more information about the child, introduce the child and the family, and initiate visits, if appropriate. Caseworkers from both agencies are responsible for sharing information in a timely fashion and following up on requests. If the child and the family live some distance apart, the two agencies should develop a plan for overcoming this barrier.

When the child is placed with the family, it is helpful to have a supervision agreement between the two agencies that identifies the responsibilities for each agency in facilitating and supervising the adoption placement.

Prospective adoptive parents identified through the Adoption Album matching process may not be selected for the particular child for whom the caseworker began a search. It is possible, however, that those parents might be appropriate for other children in the agency's custody who are waiting for adoption. The caseworker should consult with their supervisor and colleagues about waiting children with characteristics that might match the needs of the identified family.

Caseworkers must comply with OCFS regulations regarding the exchange of summaries between agencies [18 NYCRR 421.17(f)]. The inquiring agency will provide a summary of the prospective adoptive family to the agency responsible for the child. Authorized agencies that receive an inquiry from another agency concerning a child in their care must respond in writing within 10 days by either sending a summary describing the child or by responding that a summary will not be sent because:

- the child has been placed;
- the child's placement is currently being planned;
- a number of summaries are currently under consideration for this child; or
- another reason why this family will not be considered for this child.

The authorized agency must inform any person who is expressing an interest in the adoption of a particular child whether there is a surrender agreement in place relating to such child that provides for the placement of the child with a designated person or persons and/or contains a communication or contact agreement [18 NYCRR 421.17 (e)-(h)].

Practice Tip: Preplacement visits

Preplacement visits should occur before the official placement to help the child and adoptive family become better acquainted and ease the transition.* These visits may provide opportunities for the adoptive parents to interact with the child's foster family and learn more about the child, including routines and preferences. In addition, the child may learn more about the new environment and community in which they will be living.

If possible, these visits should begin with daytime visits in the child's current home, or somewhere they are comfortable, and then progress to visits in the adoptive family's home, beginning with day visits and eventually leading to overnight and weekend visits. If in-person visits are not possible due to geographical distance, online meetings or phone calls may help the child and family get to know each other and build familiarity.

Preplacement visits can be stressful for families, and parents may experience issues or setbacks with the child during these visits. The caseworker should encourage prospective adoptive families to bring up any issues that arise during this period so they can be addressed.

Source: Child Welfare Information Gateway. (2020). Preparing adoptive parents. Department of Health and Human Services, Administration for Children and Families, Children's Bureau.

* Wynne, D. (2016). Child placement best practices to support permanency and preservation across the continuum. Retrieved from https://www.adoptioncouncil.org/publications/2016/07/adoptionadvocate-no-97.

B. Preparation for placement

When a family has been identified as capable of meeting the needs of a specific child, intensive preparation of both the child and the adoptive parents must begin (18 NYCRR 421.18):

- Adoptive parents must be informed of the procedures necessary for finalizing the adoption.
- An effort must be made to place the child with adoptive parents of a similar and compatible religious background. State law requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as the child [SSL §373(3)]. Parents who have voluntarily surrendered their parental rights to a child may have completed a religious preference form (LDSS-3416) that will help guide adoption caseworkers in placement decisions.
- Decisions about placement must be made on the basis of the best interests of the child, including but not limited to the following considerations:

- The appropriateness of placement in terms of the age of the child and of the adoptive parents;
- The physical and emotional needs of the child in relation to the characteristics, capacities, strengths, and weaknesses of the adoptive parents.
- The cultural, ethnic, or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background as one of a number of factors used to determine best interests. Race, color, or national origin of the child or the adoptive parent may be considered only when it can be demonstrated to relate to the specific needs of an individual child. See **Chapter 9, Appendix 1** for a summary of the Multiethnic Placement Act (MEPA).

1. Placement of siblings

When prospective adoptive parents want to adopt a particular child, they must be informed if the child has siblings or half-siblings who are free for adoption. The prospective adoptive parents must be asked if they would also be willing to adopt the child's siblings or half-siblings.

OCFS regulations and policy state that siblings and half-siblings who are freed for adoption must be placed together in a pre-adoptive home unless such a placement is determined to be contrary to the health, safety, or welfare of one or more of the children [18 NYCRR 421.2(e) and 18 NYCRR 421.18(d)(3)]. This requirement is based on the understanding that the sibling bond is important to children's development and emotional well-being. If a sibling or half-sibling to the child becomes free for adoption in the future, the adoptive parents should be considered as a resource for the newly freed child [18 NYCRR 421.18 (b)].

Diligent efforts to keep siblings together

Sibling contact gives children continuity with their family's past, even when circumstances require separation from their parents. The loss experienced by children who must be separated from their parents because of safety or other reasons is compounded by loss of contact with their siblings. Agencies must make diligent efforts to identify an adoptive home that is willing and able to accept the placement. These efforts may include:

- Identifying a relative who is willing to provide kinship care to all of the children (or some of them) while providing opportunities for continuing contact among siblings and half-siblings.
- Informing foster parents when a child placed with them has minor siblings or half-siblings, and, if so, whether they are free for adoption.
- Informing all parents of siblings or half-siblings, including both biological and adoptive parents: the common parent having legal custody of a sibling or half-sibling; the non-common parent having legal custody of a sibling or half-sibling; and the adoptive parent of a sibling or half-sibling. Neither the death of a parent nor the voluntary or involuntary termination of parental rights changes this sibling relationship.[2]
- Group photolisting of siblings or half-siblings who are freed for adoption and have been referred to OCFS/BPS for photolisting (see Section B of this chapter).

[2] OCFS. "Definition of Siblings and Expansion of the Relative Notification Requirements" (15-OCFS-ADM-01).

In recognition of the challenge of placing more than one child at one time in an adoptive home, NYS includes children in a sibling group as one category of "special needs" (hard-to-place) that may qualify for adoption assistance.

Factors indicating siblings should not be placed together

The agency must follow the requirement that minor siblings or half-siblings be placed together, unless the LDSS or the VA with guardianship and custody determines that the placement would be detrimental to the best interests of one or more of the children. This determination must establish that the placement would be contrary to the health, safety, or welfare of one or more of the children. It must be made after consultation with, or an evaluation by, other professional staff, such as a licensed psychologist, psychiatrist, other physician, or certified social worker. Assessments from other providers should be included in the Child's Case Record (CCR).

Factors to be considered must include, but are not limited to [18 NYCRR 421.18(d)(3)]:

- the age differences among the siblings;
- the health and developmental differences among the siblings;
- the emotional relationship of the siblings to each other;
- the individual service needs of the siblings; and
- the attachment of the individual siblings to separate families/locations.

The factors used by the LDSS to determine whether siblings or half-siblings are to be placed separately must be documented in the children's case records. Caseworkers must document the reasons for separating siblings in the case record for each child [SSL §372-b(1)(b); 18 NYCRR 421.8(g)].

The placement of siblings together also may be affected by a recent change in adoption subsidy rate categories. A child in foster care who is eligible for an extraordinary subsidy rate could not be placed in a home with their siblings who are also in LDSS custody.

Maintaining contact among siblings

If it is not feasible for the sibling group to be placed together, the caseworker must ask the adoptive parents if they are willing to facilitate contact between the adopted child and any of their siblings or half-siblings. The caseworker must inform the adoptive parents of any available services to assist in establishing and maintaining sibling contact.

Contact agreement: A post-adoption contact agreement, executed as part of a conditional surrender, provides for communication, or contact between the child and the child's parents and siblings. The agreement is signed by the adoptive parents, the birth parents, the agency having custody and guardianship of the child, and the attorney for the child. It must be incorporated into the court order and approved by the court to be enforceable. If the contact agreement provides for contact with a child's sibling who is over the age of 14, the sibling must consent, or the agreement is not enforceable as to that sibling [SSL §§383-c(2)(b) and 384(2)(b)].

If the adoptive parent later decides to discontinue the contact between siblings, the parties to the contact agreement or the attorney for the adoptive child may go to court to ask that the agreement be enforced. The law provides enforcement procedures for post-adoption contact agreements based on the best interests of the child. The law also provides that failure to comply with the terms of a post-adoption contact agreement cannot disrupt an adoption [DRL §112-b(4)].

Court order: A judge who finalizes the adoption may order that contact between the child and the child's birth family be allowed after the child has been adopted in accordance with the terms set forth in a post-adoption contact agreement [DRL §112-b(4)]. An informal arrangement between adoptive parents and birth parents may allow contact between the child and birth family, but, by statute, such an agreement is not enforceable. OCFS encourages contact with the birth family to take place through formal, court-approved agreements where the rights of the parties may be enforced.

Petition by siblings: Where a contact agreement does not provide for sibling visitation, a sibling (or a person acting on their behalf, if the sibling is a minor) may petition the court to allow visits with an adopted sibling (DRL §71). A significant consideration in such cases is whether there had been a substantial and meaningful relationship between the siblings before the adoption.

Termination or surrender of parental rights does not terminate the rights of the child's siblings. Older youth who are adopted or who wish to locate a sibling who is adopted can contact the Adoption Information Registry of the New York State Department of Health. The registry can help locate family members and even facilitate a reunion. There are age requirements associated with registering.

Resources

"Keeping Siblings Connected: A White Paper on Siblings in Foster Care and Adoptive Placements in New York State" (07-OCFS-INF-04).

"Placement, Visitation, and Contact for Siblings in Foster Care" (16-OCFS-ADM-18).

2. Adoption subsidy eligibility

The LDSS or VA responsible for the adoption placement must provide information to the foster parent(s) or prospective adoptive parents regarding the adoption subsidy program. When a child has been identified for placement with the adoptive parents, the caseworker must indicate whether the child is eligible for subsidy and answer any questions the parent(s) may have about the subsidy program [18 NYCRR 421.24 (b)(1)].

Prior to placing a child in an adoptive home or approving foster parents as adoptive parents for a child, the agency must document whether the person(s) with whom the child will be placed or the foster parent(s) with whom the child is living will adopt the child with or without an adoption subsidy [18 NYCRR 421.24(b)(1)(i)].

To satisfy federal Title IV-E adoption assistance eligibility requirements, authorized agencies are required to show that a reasonable but unsuccessful attempt was made to place a child without subsidy, except when it has been determined not to be in the best interest of the child "because of such factors as the existence of significant emotional ties with the prospective adoptive parents while in the care of those parents as a foster child. The exception also extends to other circumstances that are not in the child's best interest, as well as adoption by a relative . . ."[3]

If the child is being placed for adoption with their current foster parents, an Adoption Subsidy Agreement may be signed and submitted at any time after the TPR petition has been filed or a plan has been made to free the child. If the child is placed in a new pre-adoptive home, the Adoption Subsidy Agreement is signed at the time of the adoptive placement.

[3] OCFS. (2018) Eligibility Manual for Child Welfare Programs, p. 76.

If the prospective adoptive parents are approved adoptive parent(s) and not certified or approved foster parents, the Adoption Subsidy Agreement is to be signed before the child is placed in the home and a pre-finalization subsidy must be paid upon placement [18 NYCRR 421.24(c)(2)(iii)]. In this circumstance, the caseworker must submit the Adoption Subsidy Agreement to OCFS/BPS as soon as prospective adoptive parents have been identified for a child who is freed for adoption.

Adoptive parents should be informed that an application for subsidy may be made after the adoption is finalized **only** if they become aware that the child has an eligible physical or emotional condition or disability after the finalization. A physician must certify that the physical or emotional condition or disability existed prior to the adoption.

See **Chapter 13** for details on adoption assistance and subsidy.

3. Medical histories

To the extent possible, the authorized agency must give the prospective adoptive parents the medical and psychological histories of both the child and the child's birth parents. Identifying information must be deleted from the parents' histories [SSL §373-a; 18 NYCRR 357.3(b)(3) and 18 NYCRR 421.18(m)]. Confidential HIV-related information in the child's medical history must be provided to prospective adoptive parent, as defined in 18 NYCRR 421.1(k), or to the child's adoptive parents [18 NYCRR 431.7(a)(4)(iii)].

Information about the Adoption and Medical Information Registry should be given to the prospective adoptive parents. The registry is operated by the NYS Department of Health (DOH) and includes an option for birth parents to submit medical information at any time after the adoption. Adoptive parents and adults who have been adopted may inquire and request subsequent information if it is on file [PHL 4138-c(6-a)].

More information about the Adoption Information Registry is available on the DOH website.

C. Adoptive placement agreement

The prospective adoptive parents and an authorized agency representative must sign an adoptive placement agreement (APA) (LDSS-0570) that contains a statement of the rights and responsibilities of the adoptive parents and the authorized agency. This is signed at the time the child is placed in the home of the prospective adoptive parents or, if the child has been residing in the home in a foster care placement, at the time the foster parents make the decision to adopt the child. The placement agreement should be discussed with the adoptive parents before it is signed [18 NYCRR 421.18(k)].

In the agreement, the prospective adoptive parent:

- Agrees to care for the child and meet the child's needs; the child will, where eligible, continue to receive medical, psychological, and surgical services in accordance with the medical assistance or medical subsidy programs to the extent permitted by law.
- Indicates they intend to adopt the child, although legal custody remains with the agency until the adoption is finalized.
- Understands that the legal adoption will take place when both the adoptive parents and the agency agree that it is in the child's best interest.

- Acknowledges that, prior to legal adoption, an agency caseworker will visit them and the child periodically and that they may call on the agency for consultation.
- Agrees that if at any time prior to legal adoption it is determined by the agency or by the adoptive parent that the child should be removed from the home, they will cooperate with the agency in carrying this out in a way that serves the best interest of the child.
- Acknowledges, along with the agency, that the prospective adoptive parent has the right to intervene as an interested party in any court proceeding to set aside a surrender that transfers guardianship and custody of the child to the agency. Such intervention can be made anonymously or in the adoptive parent's true name.
- Informs the prospective adoptive parent whether the child is or is not eligible for adoption subsidy and whether a signed adoption subsidy agreement is being forwarded to OCFS for review and a determination of eligibility.

Prospective adoptive parents must be notified in writing of their right to a fair hearing when an LDSS fails to provide adoption services or assistance on behalf of a child freed for adoption when such services or assistance are authorized to be provided pursuant to SSL §372-b or the State Consolidated Services Plan [18 NYCRR 421.18(h)].

The caseworker should document an adoptive placement only when the adoptive parents have signed an APA. It is not considered to be an adoptive placement if foster parents have expressed an interest in adopting a foster child by signing an Intent to Adopt form but have not yet signed an APA [18 NYCRR 421.1(d) & 18 NYCRR 430.12(e)].

In the case of a Native American child placed for adoption, the case record must document the efforts made to comply with the order of preference required in the federal Indian Child Welfare Act (ICWA) and OCFS regulation 18 NYCRR 431.18(g). This information must include efforts made by the agency to comply with the order of preference required by ICWA and must be made available to the child's Indian tribe and the Secretary of Interior upon request [18 NYCRR 430.12(e)(2)(iii)(b)]. See **Chapter 12** for more information on ICWA.

1. The agency's "bound book"

At the time of the adoptive placement, the following information must be entered in a bound book/bound volume maintained by the agency, in accordance with SSL §§383-c and 384(5) and 18 NYCRR 421.18(l):

- Fact of the adoptive placement
- Date of adoptive placement
- Date of the placement agreement
- Name and address of the adoptive parents
- First name of the child

The pages must be firmly attached to the book binding (not a loose-leaf style) with pre-numbered pages and no lines skipped as information is entered. These protections are in place so all information recorded in the book is permanent and it would be readily apparent if any information in the book were removed or altered. This indicates the importance of the information being recorded in the book in chronological order.

According to state law, a child will be considered to have been placed in an adoptive home only when this information has been recorded in the bound volume. This information is used to determine the 30 days during which a parent can file an action to revoke an SSL §384 non-judicial surrender of parental rights and the 45 days during which a parent can revoke a SSL §383-c non-judicial surrender.

2. Contacts and supervision

The caseworker must contact the adoptive parents within five working days after the child is placed in the home for an initial supervision assessment [18 NYCRR 421.18(i)]. The supervision process involves individual and group interviews to support the mutual adjustment of the child and family, to enable the agency to keep informed on the progress and well-being of the child in the adoptive home, and to help the family and child to obtain services that may be needed. Supervision begins on the date a child is placed in a home and concludes on the date of the adoption decree [18 NYCRR 421.8(h)(2)(ii)].

When two agencies are involved, supervision agreements can be arranged between them so that the authorized agency that placed the child is not doing the direct supervisory visits with the family. However, the agency that has legal custody of the child is responsible for making sure the supervision occurs and is completed in accordance with all requirements. Such agreements can be especially helpful when the child is placed with a family at a distance from the caseworker's office.

Some LDSSs have agreements with other LDSSs to provide supervision for one another when placements cross county borders. If a child is placed out of state, supervision of the adoption placement is done through the Interstate Compact on the Placement of Children (see **Chapter 12**). Similarly, LDSS caseworkers may be assigned to supervise the adoptive placement of a child from out of state who has been placed with a family residing in the caseworker's county of employment.

Frequency and purposes of supervision assessments

For children who are in the legal custody of the LDSS, the requirements for supervisory contacts are the same as the requirements for casework contacts with caretakers and children prior to the adoptive placement. During this stage of the adoption process, children are still considered to be in foster care.

Casework contact requirements for children in foster care are summarized below (18 NYCRR 441.21). Caseworkers must document the supervisory contacts made with the child and the adoptive family in the child's case record progress notes in CONNX, including services provided, visits, interviews, and other relevant information.

Casework contacts with the child are defined as individual or group face-to-face contacts between the child and the case manager, the case planner, or the caseworker assigned to the child, as directed by the case planner. The purpose of the contacts is to assess the child's current safety and well-being, to evaluate or reevaluate the child's permanency needs and permanency goal, and to guide the child toward a course of action aimed at resolving problems of a social, emotional, or developmental nature that are contributing toward the reasons why such child is in foster care [18 NYCRR 441.21(c)].

Practice Tip: Effective casework contacts

A casework contact is not just a casual visit or an observation of the child or family. Casework contacts must be related to the pre-adoptive family's progress toward a legal adoption, the safety and well-being of the child, and needs to be addressed.

Effective casework contacts are:

- Primarily held in the child's placement location at times convenient for children and pre-adoptive parents.
- Planned in advance, with issues noted for exploration and goals established for the time spent together, but open enough to allow meaningful contributions from each participant.
- Individualized, with separate times for discussion with children and parents. This provides the opportunity for each to privately share experiences and concerns.
- Focused on the child and arranging for services necessary to meet their needs.
- Exploratory in nature, examining changes in the child's or pre-adoptive family's circumstances on an ongoing basis.
- Supportive and skill-generating, so that children and families feel safe in dealing with challenges and change and have the tools to take advantage of new opportunities.

Source: OCFS *Foster Care Practice Guide for Caseworkers and Supervisors*, **Chapter 10**, p. A-4.

As children in pre-adoptive placements have almost always been in foster care for more than 30 days, casework contacts with the child must be made at least once a month. At least two of the monthly contacts must take place within 90 days of each other in the pre-adoptive home.

Contacts with out-of-state placements

When the child has been placed out of state, contacts must be made either by the authorized agency with case management and/or case planning responsibility for the child, a public agency in the state in which the foster home or facility is located, or a private agency under contract with either the authorized agency or the other public agency [18 NYCRR 441.21(c)(3)(i)].

Every month, the entity conducting the casework contacts in the state where the child is placed must record information regarding contacts with the adoptive family. This information must include whether the contacts occurred monthly or more frequently, the location of the contacts, and details of what was discussed and observed during the contacts. This information must be provided monthly to the LDSS or VA that is responsible for maintaining the child's case record.[4]

Documentation of contacts

The LDSS or VA caseworker must enter the casework contact as a progress note in the child's case record in CONNX. OCFS regulation (18 NYCRR 428.5(a)) requires that

[4] OCFS. "Casework Contacts for Children in Foster Care" (23-OCFS-ADM-11).

progress notes must be entered as contemporaneously as possible with the occurrence of the event or the receipt of the information, which is to be recorded. Contemporaneous documentation is defined as within 30 days from when the face-to-face casework contact occurred. See "Contemporaneous Documentation of Casework Contacts With Children in Foster Care" (20-OCFS-INF-11) for more details.

Casework contacts with the pre-adoptive parent (child's caretaker) are defined as face-to-face contacts by the case manager, the case planner, or the caseworker assigned to the child, as directed by the case planner for the purpose of obtaining information regarding the child's adjustment to the pre-adoptive home and facilitating the caretaker's role in achieving a legal adoption [18 NYCRR 441.21(d)].

3. Subsidy payments

When foster parents are adopting a child who has been in care in their home, they will continue to receive monthly foster care payments until the date of the court order finalizing the adoption. After that date, the monthly payments will be made as adoption subsidy payments if the child is eligible for adoption subsidy [18 NYCRR 421.24(c)(2)(i)].

The same is true when a child is being adopted by foster parents with whom they have not previously lived, and the child is eligible for adoption subsidy. Payments are made as foster care payments, starting from the date of placement until the date of the court order finalizing the adoption. When the adoption placement of a child presents a foster home capacity issue, however, the caregivers are considered to be approved adoptive parents [18 NYCRR 421.24(c)(2)(ii)]. Monthly payments will be made as an adoption subsidy, starting on the date the adoption placement agreement is signed.

When a child who is eligible for an adoption subsidy and is in the guardianship and custody or care and custody of an LDSS, is being adopted by approved adoptive parents who are not also certified or approved foster parents, the monthly payment must be made as an adoption subsidy payment from the date of placement with the approved adoptive parents [18 NYCRR 421.24(c)(2)(iii)].

If the child being adopted is in the direct legal guardianship and custody of a VA and is eligible for adoption subsidy, adoption subsidy payments will be made by OCFS to the prospective adoptive parents from the date that OCFS approves the subsidy application if:

- the home study has been completed and approved; and
- a placement agreement has been signed and the child has been placed in the home.

For more information about adoption subsidy payments, see **Chapter 13** of this guide.

4. Federal adoption income tax credit

Agencies must inform adoptive parents about the availability of an adoption income tax credit. This is done during orientation programs and training for prospective adoptive parents. As income limits and tax credit amounts vary from year to year, agencies are advised to refer families to tax professionals who can determine if they are eligible and instruct them on the process for filing for the tax credit, if appropriate.

Upon adoptive placement, the caseworker should remind the adoptive parents about the availability of a federal tax credit. A sample notice that can be used as a model for the required

notification is included as an attachment to the policy directive "Notification to Prospective Adoptive Families of the Federal Adoption Tax Credit" (13-OCFS-ADM-05).

In addition, information on the availability of an adoption tax credit is included in the Adoption Subsidy Agreement Summary and the OCFS website. Adoptive parents may be eligible to take this tax credit for qualifying expenses paid to adopt eligible children.

D. Adoption finalization

The child must be placed in an adoptive home for a minimum of three months before the adoption can be finalized, unless the court issues an order dispensing this requirement. When foster parents who have cared for a child for more than three months are adopting the child, this satisfies the required period of residence [DRL §112 (6)].

Pre-adoptive parents are responsible for filing the petition to adopt in the appropriate court. It is highly recommended they hire an attorney with experience in adoption to guide them through the process. Some or all of the attorney's fees may be reimbursable to the adoptive parent as a "nonrecurring adoption expense" adoption subsidy (see **Chapter 13**).

The child's case record must include a description of the efforts made to finalize the adoption. If the child has been in the adoptive placement for more than 12 months and the adoption has not been finalized, the next required permanency review must include documentation as to the reasons for the delay [18 NYCRR 428.6(a)(8) and18 NYCRR 430.12(e)(3)].

The adoptive parent's lawyer submits the adoption petition and other documents to the appropriate Family or Surrogate's Court. This may include results of a criminal history records check and SCR database inquiry and information about the child and their birth parents. The caseworker should assist adoptive parents in obtaining these records, if needed.

1. Finalizing an adoption in CONNX

The court order granting the petition to adopt marks the culmination of the agency's efforts to achieve permanency for a child who came into foster care with an uncertain future and a lack of resources. It also means that the child's case record stage must be closed and sealed.

Key elements of this process:

- Make sure that all necessary documentation has been completed (progress notes, case contacts, etc.).
- If the child will be receiving an adoption subsidy, an Adoption Subsidy Stage must be opened.
- A new Child Identification Number (CIN) must be created to keep adoption records confidential. There are several system features designed to prevent connections between the pre- and post-adoption case records.
- The CRR stage can be closed only by the case manager or case planner.

For detailed information, refer to the CONNX Tip Sheet, "Finalizing an Adoption."

E. Death of a prospective adoptive parent before final adoption

When one prospective adoptive parent dies after the adoption petition is filed but before the adoption is legally complete, this is to be treated as a change in circumstances and does not require the filing of a new petition for adoption. The deceased adoptive parent shall be considered one of the legal parents, unless the surviving adoptive parent requests otherwise. The court may review this change in the circumstances to assess if the adoption is still in the best interests of the child. The agency should conduct a similar assessment for case planning purposes (DRL §§113-a & 115-e).[5]

Resources

An OCFS brochure, "What to Expect From an Adoption Attorney" is a valuable resource for pre-adoptive parents and is available in English, Spanish, Russian, and Arabic. This brochure provides suggestions on finding an experienced adoption attorney and explains what a parent can expect from their attorney during the adoption process.

F. Expedited adoptions

There are court procedures that are intended to expedite the adoption of children from foster care. These procedures permit the judge to schedule an adoption hearing at the time an authorized agency assumes guardianship and custody of the child through TPR, a judicial surrender, or approval of an extra-judicial surrender.

The law requires that the judge at the TPR or surrender proceeding inquire whether there is any person interested in adopting the child. If there is such a person, the judge must accept the petition for adoption along with the home study completed by an authorized agency or a disinterested party, as defined in law. The court must then establish a schedule for completion of any inquiries and investigations necessary to review the adoption petition and also set a schedule for completion of the adoption [SSL§§383-c(10)(a) and 384-b(11)].

To further expedite the process, state law requires that, if the adoption petition is filed pursuant to DRL §112(8), SSL §383-c(10) or SSL §384-b(11), such petition must be filed in the county where the TPR proceeding or the judicial surrender proceeding is pending and, wherever practicable, before the same judge [DRL §113(3)(b)(i)]. Also, to the extent possible, the court must appoint an attorney for the child who previously represented the child [SSL §384-b(3)(c)].

If the child in an expedited adoption is eligible for an adoption subsidy, the application may be submitted before they are freed. The subsidy application must be fully executed before the adoption is finalized.

G. Post-adoption services

Children in adoptive families do better when their families are fully prepared and supported to address needs or issues as they arise rather than waiting for challenges to reach a crisis level. Pre-adoption services and support, such as family and child preparation both on adoption in

[5] OCFS. "The Impact of the Death of a Prospective Adoptive Parent Before the Completion of the Adoption" (08-OCFS-INF-12).

general and on child- and family-specific information, can help promote the long-term stability of an adoption.

Post-adoption services can include preventive services (to prevent instability, disruption, or dissolution) as well as intensive services that help maintain the stability of an adoption. Families who are preparing to adopt or who have adopted may find it helpful to find out about what supports and services are available at various points in the process to help promote long-term stability and well-being.[6]

Services needed by the family should be identified and initiated, to the extent possible, before the adoption is finalized so there is continuity of services and service providers throughout the adoption process and beyond. Linking adoptive families, children being adopted, and their siblings to services, before and after finalization, can be critical to successful adoptions.

OCFS regulations require that the adoptive parents be provided with post-adoption services, defined as counseling, training parents on how to care for children with special needs, providing clinical and consultative services, and coordinating access to community supportive services for the purpose of ensuring permanence of the placement. Post-adoption services may extend for three years from the date of the adoption decree [18 NYCRR 421.8(h)(2)(ii)].

Practice Tip: Regional Permanency Resource Centers (PRCs)

PRCs are located throughout New York State and work in partnership with OCFS to:

- prevent post-adoptive and post-guardianship dissolutions/disruptions;
- assist families so that children may be cared for in their own homes with their adoptive parents or legal guardians;
- strengthen post-adoptive and post-guardianship families; and
- avoid foster care or other out-of-home placements.

PRCs serve post-adoptive families and post-guardianship families. Post-adoptive families are families who have finalized the adoption of their child and include any adoptive family member. Post-guardianship families include families with legal guardianship of the child, with or without an approved KinGAP agreement.

Caregivers should make families aware of the availability of PRCs and refer them to this web page.

Adoptive families have different needs based on a number of factors, including the past histories of their children, the foster care experiences of their children, and the intensity of the children's physical, social, and emotional needs. A family's needs may change as the child develops and adoption-related issues may surface for a child at different stages of development.

[6] Child Welfare Information Gateway. (2018). "Accessing Adoption Support and Preservation Services." U.S. Department of Health and Human Services, Children's Bureau.

1. Types of post-adoptive services

"Post adoption support comes in many forms and families are encouraged to use these supports as much as needed to keep their family healthy. It's normal, natural, healthy, and expected that all adoptive families will need to reach out and seek assistance and support during multiple time frames as their family matures and grows."[7]

The following are the most common types of adoption support and preservation services, including those that families often identify as most helpful.

Support groups

Groups provide members with support systems, social interaction, and information resources. Groups for adoptive parents are often organized by adoptive parent volunteers, support groups bring together experienced and new adoptive parents to share experiences. Peer support groups for adopted children and youth give them an opportunity to interact with other children and youth who were adopted. Online support groups, blogs, and other social media resources are a recent development that allow adoptive families to access support and information from people who understand their journey and experiences.

Camps and social events

Overnight camps or retreats are a way for members of adoptive families to connect not only with others like themselves but also with their own family members. Such events, which may take place over a weekend or a full week, often combine adoption and ethnic heritage support with traditional camping activities.

Therapy / counseling

Members of adoptive families may need professional assistance as concerns or problems arise. Needs will differ from family to family and may include the following:

- Guidance on children's attachment, trust, emotional, or behavioral issues.
- Assistance in working through the impact of adoption on the family and strains in marriages, partnerships, and other relationships.
- Support in working through feelings when the reality of adoption does not match expectations.
- Healing from traumatic experiences of abuse and neglect.
- Permanency support that addresses parent-child conflicts.

If possible, adoptive parents should be given contact information for therapists in their area who are familiar with the unique issues and dynamics of adoption (often referred to as "adoption-competent" professionals).

Respite care

Respite care offers families a temporary break by a carefully selected and trained provider. It is meant for families with children who require more skilled care than babysitters can provide, foster parents whose program requires a licensed provider, or families going through a crisis of their own.

[7] Adoptive and Foster Family Coalition New York. "Finding Post Adoptive Services in New York," retrieved from https://affcny.org/adoption-in-new-york/post-adoption-services/find-nys-post-adoption-services/.

2. Preventive services

Preventive services are supportive and rehabilitative services provided to children and their families for the purpose of: averting a disruption of a family which will or could result in placement of a child in foster care; enabling a child who has been placed in foster care to return to their family at an earlier time than would otherwise be possible; or reducing the likelihood that a child who has been discharged from foster care would return to such care (18 NYCRR 423.2).

Preventive services can be mandated when these services are considered essential to improve family relationships and prevent the placement of a child into foster care (18 NYCRR 430.9).

Resources

Adoptive families can use these resources for more information about post-adoptive services.

North American Council on Adoptable Children (NACAC). Find Local Adoption Support. https://nacac.org/connect/find-local-adoption-support/.

Dave Thomas Foundation for Adoption. (2023). Strengthen Your Forever Family. A step-by-step guide to post adoption services.

Child Welfare Information Gateway. (2018). Accessing Adoption Support and Preservation Services. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

Chapter 12

Chapter 12
Adoptions with Special Circumstances

There are several categories of adoptions involving children for which federal and/or state laws dictate specific steps or unique requirements that must be followed. This chapter discusses placements involving Native American children, placements of children between states, and intercountry adoptions.

A. Adoptive placement of Native American children

The federal Indian Child Welfare Act (ICWA) was passed in 1978 in response to concerns about the treatment of American Indian children and families [25 USC §§1901-1923]. The legislation was intended to prevent unnecessary removals and placements of Native American children into non-Native-American homes. The underlying principle of ICWA, as expressed by Congress, is to "protect the best interests of Indian children" by supporting their cultural identity, both in foster care and in adoptive homes, and to "promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families."

ICWA established minimum standards for the placement of Native American children in foster or adoptive homes that are compatible with their culture and previous environment. ICWA also clarified a tribe's jurisdiction over child welfare proceedings involving Native American children. New York State law was amended (SSL §39) and OCFS regulations were promulgated (18 NYCRR 431.18) to comply with the federal standards, including, but not limited to, standards for the removal of Native American children from their families.

RESOURCES

The ICWA Compliance Desk Aid (OCFS-5046) outlines the major provisions of ICWA and New York statutory and regulatory requirements, including tribal notification procedures.

"A Guide to Compliance with the Federal Indian Child Welfare Act in New York State" (OCFS-4757).

The policy directive, "Implementing Federal and Corresponding New York State Indian Child Welfare Act (ICWA) Regulations" (21-OCFS-ADM-02) contains the most recent information on ICWA requirements.

1. Definitions

An "Indian child" is defined in ICWA as any unmarried person who is under the age of 18 and is either (a) a member of an Indian tribe, or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe (25 U.S.C. §1903; 25 CFR §23.2).

New York State defines an "Indian child" in OCFS regulation 18 NYCRR 431.18(a)(1)(i) as any unmarried person who:

- is either under the age of 18 or is between the ages of 18 and 21, is in foster care and is a student attending a school, college, or university, or is regularly attending a course of vocational or technical training, or is unable to live independently; and

- is either a member of an Indian tribe/nation or eligible for membership or is the biological child of a member of an Indian tribe/nation who resides on or is domiciled within the reservation of such tribe/nation.

An "Indian tribe" is defined in OCFS regulation as any tribe, band, nation, or other organized group or community of Native Americans recognized as eligible for the services provided to Native Americans by the federal Secretary of the Interior or by the State of New York or any other state because of their status as Native Americans [18 NYCRR 431.18(a)(2)]. The impact of the New York State definition of an Indian tribe is that the standards set forth in SSL §39 and 18 NYCRR 431.18 apply to Native American tribes/nations that are recognized by the state, even when they are not recognized by the federal government.

The following nations/tribes are recognized in NYS:

Iroquois Nations (NYS and federally recognized)

- Cayuga Nation
- Oneida Indian Nation
- St. Regis Mohawk Tribe
- Seneca Nation
- Tonawanda Band of Senecas
- Tuscarora Nation

Algonquin Nations (NYS recognized only)

- Shinnecock Indian Nation
- Unkechaug Indian Nation

2. ICWA compliance steps

The *ICWA Case Process Checklist* (OCFS-5500) is designed to guide caseworkers in their efforts to adhere to ICWA requirements. This checklist is required for any case where there is reason to know the child is a Native American.

The checklist must be updated as warranted by case circumstances. For example, when a child is adopted, the checklist would be updated to reflect that event in the case. The checklist is maintained in the child's case record and each update to the checklist should be documented in progress notes.

Compliance with ICWA is mandatory. There are specific, necessary steps that must be taken, in a specific sequence, when the caseworker has reason to believe that a child in a child custody proceeding pursuant to SSL §358-a, SSL §384-b, or FCA Articles 7, 10, or 10-C may be Native American. For the purpose of the applicability of the ICWA standards, a child custody proceeding includes not only foster care cases but also includes a proceeding that may culminate in "an adoptive placement, which means the permanent placement of an Indian child for adoption, including any action for a final decree of adoption" [18 NYCRR 431.18(a)(4)]. These steps, in the order they must be taken, are:

1. Identify the Native American nation/tribe.
2. Provide notification.

3. Engage the child's nation/tribe in service plan development.
4. Follow placement preferences.

Identify nation/tribal membership

The provisions of ICWA apply to a child if there is "reason to know" that the child is an Indian child. This means that if there is reason to know that the child is an Indian child, all protections afforded under ICWA to an Indian child apply until it has been determined by the court that the child does not meet the definition of an Indian child. For every child custody case and every emergency removal, there must be a determination whether there is reason to know that the child is an Indian child. The same determination must be made when an agency is accepting a surrender.

The caseworker must inquire of the child's parents, extended family members, where applicable, the child's Indian custodian, and the child (depending on age and capacity) whether there is reason to know that the child is an Indian child. Clan identification can help caseworkers identify extended family members for placement.

Additional steps to determine whether a child is an Indian child include:

- Find out if a parent or grandparent has a tribal enrollment card.
- Develop a family tree indicating the mother's and grandmothers' maiden names and the names of the father and paternal grandparents.
- Contact the appropriate Tribal Office directly. See *A Guide to Compliance with the Federal Indian Child Welfare Act in New York State* (OCFS-4757) to obtain information for each tribe/nation.
- The OCFS Native American Services (NAS) office can assist in identifying the tribe.

If there is reason to know that a child is an Indian child, treating the case as an ICWA case from the early stages prevents delays and possible changes in foster care or adoptive placement to comply with the ICWA placement preferences that could result from a later application of ICWA. ICWA does not apply simply based on a child or parent's Indian ancestry. The court's decision as to whether a child is an Indian child is dependent on tribal membership/citizenship or eligibility for such membership/citizenship. The Indian tribe/nation alone determines whether the child is a member/citizen or eligible for membership/citizen in the tribe/nation. This determination is solely within the jurisdiction and authority of the tribe/nation.

ICWA requires that, in any child custody proceeding that involves a Native American child and is initiated by the LDSS pursuant to SSL §358-a or §384-b or Article 7, 10, or 10-C of the Family Court Act (FCA), the LDSS must demonstrate to the court that, before beginning such proceeding, **active efforts** were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Native American family and that these efforts proved unsuccessful.

Active efforts differ from reasonable efforts. Reasonable efforts, for example, may include referrals for services. Active efforts include arranging for the most culturally appropriate services to help families overcome obstacles to engaging in those services. They include such activities as assisting the parents or Indian custodian in accessing the resources necessary to satisfy the case plan. Caseworkers must work actively to involve the child's tribe/nation, parents, and extended family in the process, employing available and culturally appropriate family preservation strategies, and facilitating the use of remedial and rehabilitative services provided

by the child's tribe/nation. Active efforts must be tailored to the facts and circumstances of the individual case [25 CFR §23.2; 18 NYCRR 431.18(d)].

Provide notification

If there is reason to know in a child custody proceeding that a child is a member or citizen of a tribe/nation, the LDSS must notify the Family Court of this in writing [25 CFR §23.11; 18 NYCRR 431.18(e)].

ICWA requires that in any involuntary proceeding in state court (with the exception of FCA Article 3 juvenile delinquency cases), where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement or the termination of parental rights for an Indian child must notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings and the right of intervention by registered mail with return receipt requested [25 USC 1912].

The notice must be sent by registered or certified mail with return receipt requested [25 USC 1912]. A model *Notice of Child Custody Proceeding for an Indian Child* is available for this purpose.

A copy of the notice also must also be sent by registered or certified mail, return receipt requested, to the federal Bureau of Indian Affairs (BIA) Eastern Regional Office (545 Marriott Drive, Suite 700, Nashville, TN 37214) and the OCFS Bureau of Native American Services (295 Main St., Suite 545, Buffalo, NY 14203). If the identity or location of the parent, Indian custodian, or the tribe/nation cannot be determined, the notice must request the assistance of the BIA regional office and the OCFS NAS bureau.

To contact a federally recognized tribe/nation outside of New York State that has been named as a possible affiliation for a child, notice can be sent to the designated tribal address identified in the federal BIA *Tribal Leaders Directory*. If contact information is unavailable, or if the tribe/nation fails to respond to inquiries, assistance can be provided by the OCFS/NAS or the BIA Eastern Regional Office.

The notification must include the following information [18 NYCRR 431.18(c)]:

- The Native American child's name, date of birth, and place of birth.
- The name of each tribe/nation in which the child is a member/citizen or may be eligible for membership if a biological parent is a member/citizen.
- All names known, including maiden, married, and former names or aliases of the parents (or Native American custodian, if applicable), the parents' birth dates and birth places, and tribal enrollment numbers, if known.
- If known, the names, birth dates, birth places, and tribal enrollment information of other direct lineal ancestors of the child (e.g., grandparents).
- A copy of the petition, complaint or other document filed with the court to initiate the child custody proceeding and, if a hearing has been scheduled, information on the date, time, and location of the hearing.
- A statement setting out:
  - the name of the petitioning LDSS, and the name and address of the LDSS attorney;
  - the right of any parent or Indian custodian of the child, if not already a party to the child custody proceeding, to intervene in the proceeding;

- the Indian tribe's right to intervene at any time in the proceeding for the foster care placement of or termination of parental rights to an Indian child;
- that, if the Indian child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court appointed counsel;
- the right to be granted, upon request, up to 20 additional days to prepare for the child custody proceeding;
- the right of the parent or Indian custodian and the Indian child's tribe to petition the court for transfer of the foster care placement or termination of parental rights proceeding to the Tribal court as provided in ICWA and applicable federal regulations;
- the mailing address and telephone numbers of the court and information related to all parties to the child custody proceeding and individuals notified under 18 NYCRR 431.18(c);
- the potential legal consequences to the child custody proceeding on the future parental and custodial rights of the parent or Indian custodian; and
- that all parties must keep confidential the information contained in the notice, and notice should not be accessed by anyone not needing the information to exercise rights under ICWA.

If the nation/tribe wants to intervene in the proceeding, it must notify the court using the mailing address and the telephone number of the court, as provided by the LDSS in the required written notification. Once the tribe intervenes, the LDSS must provide the tribe with any notices or petitions it would otherwise serve on a party.

If the identity or location of the parent or Native American custodian and the nation/tribe cannot be found, the LDSS must notify OCFS/NAS and the federal government. The notification must be sent by registered or certified mail with a return receipt requested. For the notice to the federal government, caseworkers should use the ICWA *Secretary of the Interior Notification Letter* at the mailing address included in the model letter.

Engage the nation/tribe in service plan development

Caseworkers must work actively to involve the child's tribe/nation, parents, and extended family in the service plan development process, employing available and culturally appropriate family preservation strategies, and facilitating the use of remedial and rehabilitative services provided by the child's tribe/nation. Active efforts must be tailored to the facts and circumstances of the individual case [25 CFR §23.2; 18 NYCRR 431.18(d)].

LDSSs are required to make efforts to involve the child's tribe/nation and, when possible, engage a qualified expert witness in the development and review of the service plan [18 NYCRR 428.9(b)(3) and 430.12(c)(2)(i)(a)(4)].

Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness [18 NYCRR 431.18(a)(5)(i-iii)]:

- A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.

- A lay expert having substantial experience in the delivery of child and family services to Native Americans, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the child's tribe.
- A professional person having substantial education and experience in the provision of services to Native American children and families.

Follow placement preferences

In the absence of good cause to the contrary, a caseworker must identify a foster care, pre-adoptive, or adoptive placement for a Native American child that follows the required order of preference set forth in OCFS regulation [18 NYCRR 431.18(f)(2)]. A pre-adoptive placement is a temporary placement of an Indian child in a foster home or child care facility after termination of parental rights, but prior to or in lieu of an adoptive placement.

The order of preference for foster care placements and adoption placements are listed below. The nation/tribe may establish a different order of preference, which will take precedence [25 U.S.C. §1915, 25 CFR §§23.130 and 23.131; 18 NYCRR 431.18(f)(4) and (g)(3)].

Foster Care Placement Preferences: An LDSS or VA that provides foster care to a Native American child must place that child in the least-restrictive setting that [18 NYCRR 431.18(f)(1)]:

- most approximates a family, taking into consideration sibling attachment;
- allows the child's special needs, if any, to be met; and
- is in reasonable proximity to the child's home, extended family, or siblings.

An agency providing foster care to a Native American child, in the absence of good cause to the contrary, is required to place the child with [18 NYCRR 431.18(f)(2)]:

- *First*, a member of the child's extended family as defined by the law or custom of the child's tribe/nation. If such law or custom does not exist in the tribe/nation, this person is defined in federal and OCFS regulation as a person who has reached the age of 18 years and is the child's grandparent, aunt or uncle, brother or sister, brother-in-law/sister-in-law, niece, or nephew, first or second cousin, or stepparent;
- *Second*, a foster home licensed, certified, approved or specified by the Native American child's nation/tribe;
- *Third*, a Native American foster home approved, licensed, or certified by an LDSS or VA to provide foster care services;
- *Fourth*, in a foster care facility for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the needs of the child.

Adoption Placement Preferences: An agency providing adoption services to a Native American child is required, in the absence of good cause to the contrary, to place the child with [25 USC §1915, 25 CFR §23.130; 18 NYCRR 431.18(g)(1)]:

- *First*, a member of the child's extended family, as such term is defined by the law or custom of the child's tribe or, in the absence of such law or custom, with a person who has reached the age of 18 and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin or step-parent;

- *Second*, other members of the child's tribe/nation; or
- *Third*, other Native American families.

If the child is not placed according to these preferences, agencies must show good cause that must be based on the following [18 NYCRR 431.18(f)(3) &(g)(2); 25 CFR §23.132]:

- the request of one or both of the biological parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference, or of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- the child has extraordinary mental, physical, or emotional needs, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria and not one has been located. The standards for determining whether a placement is unavailable must conform with prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties. A diligent attempt to find a suitable family must include at a minimum, contact with the child's tribal social services program, a search of all state or county listings of available Indian homes and contact with nationally or locally known Indian programs with available placement resources; or
- the presence of a sibling attachment that can be maintained only through a particular placement.

3. Jurisdiction of tribal and state courts

To promote the best interest of Native American children and the stability and security of Native American families, ICWA states that a tribal court is responsible for conducting certain child custody proceedings.

A tribal court has exclusive jurisdiction over child welfare proceedings involving Native American children who live on the reservation. There is an exception where such jurisdiction is otherwise vested in the state by existing federal law. For example, federal law gives jurisdiction to NYS courts in civil actions and proceedings between Native Americans and between a Native American and any other person to the same extent as they have jurisdiction in other civil actions or proceedings (25 USC §233).

In any foster care or TPR proceeding involving a Native American child who is not domiciled or residing on the reservation, either the child's parent, the Native American custodian, or the child's tribe/nation may petition the Family Court to transfer the proceeding to the jurisdiction of the tribe/nation. The Family Court must transfer the proceeding to the jurisdiction of the tribe/nation unless the Family Court determines that one or more of the following criteria are met: the parent objects to the transfer, the tribal/nation court declines the transfer, or good cause exists to deny the transfer [25 USC §1911(a) and (b); 25 CFR §23.117].

A tribe has the right to intervene in foster care and TPR proceedings in state courts involving Native American children. Full faith and credit must be given in court to the tribe's culture, laws, records, and customs [25 USC §1911(c)&(d); 25 USC §1912(a)].

A Native American parent involved in custody proceedings has the right to counsel when the court determines there is an indigent parent/custodian [25 USC §1912 (b)].

4. Higher standards of evidence

Child custody proceedings for non-Native American children require a preponderance of evidence that placement is in their best interests. A higher standard of evidence is required in court proceedings involving Native American children [25 USC 1912(e)&(f)]. The following higher standards of evidence apply in foster care and adoption proceedings involving Native American children:

- No foster care placement of a Native American child may be ordered by the court unless there is a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the child.
- No termination of parental rights of a Native American child may be ordered by a court unless there is a determination supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that the continued custody of the child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the child [25 USC §1912(e)&(f); 18 NYCRR 431.18(b) (1)&(2)].

5. Related provisions of state law

Social Services Law includes provisions in relation to the foster care and adoption of Native American children. The law:

- Permits OCFS to enter into an agreement with a Native American nation/tribe for the provision of foster care, preventive services, adoption, child protective services, and adult protective services to Native American children and families [SSL §39(2)].
- Authorizes OCFS to reimburse the nation/tribe for the cost of services pursuant to SSL §153.
- Permits nations/tribes recognized by the state or federal government to resume jurisdiction over child custody proceedings involving Native American children, so long as the Native American nation/tribe receives approval from the U.S. Department of the Interior.
- Allows a Native American nation/tribe to assume exclusive jurisdiction over any child custody proceeding involving a Native American child who lives within a reservation except where state jurisdiction is otherwise vested by existing federal law [SSL §39(3)(a)].
- Requires a court in any child custody proceeding involving a Native American child not domiciled or living on the reservation, in the absence of good cause to the contrary, to transfer the proceeding to the jurisdiction of the nation/tribe.
- Gives the child's Native American nation/tribe the right to intervene in a court proceeding involving a Native American child [SSL §39(7)].

6. Voluntary surrenders involving Native American children

When a parent or Native American custodian voluntarily consents to a surrender of parental rights, such a surrender must be executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and

consequences of the consent were fully explained in detail and were fully understood by the parent or Native American custodian.

The court must also certify that the parent or Native American custodian fully understood the explanation in English or that it was interpreted into a language that they understood. Any consent given prior to, or within 10 days after, the birth of the Native American child shall not be valid. In any voluntary surrender of a Native American child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent. Federal law provides that no adoption that has been effective for at least two years may be invalidated by ICWA, unless otherwise permitted under State law (25 USC §1913).

In cases where Native American parents are voluntarily surrendering their parental rights, ICWA does not specify that the tribe/nation must be notified. Caseworkers may still need to make an inquiry of a tribe/nation in order to determine whether the child is an Indian child.

B. Interstate adoptions

The Interstate Compact on the Placement of Children (ICPC) is a law enacted by all 50 states, the District of Columbia, and the U.S. Virgin Islands to provide for the protection and services to children placed across state lines. It establishes uniform guidelines and procedures intended to safeguard the best interests of each child. New York was the first state to enact the ICPC in 1960 (SSL §374-a). The ICPC is based on reciprocity of services between states for children entering NYS and children being placed outside of NYS. Good relationships between states are crucial to the ICPC process.

In general, the ICPC applies to the following types of interstate placements:

- Placement preliminary to an adoption.
- Placements into foster care, including foster homes, group homes, residential treatment facilities, and institutions.
- Placements with relatives when a parent or relative does not hold legal custody of the child.

For more information about the Articles and Regulations that govern the ICPC and define ICPC placement types, go to the American Public Human Services Association website.

The ICPC **does not apply** to interstate placements made in medical or psychiatric hospitals, institutions for the mentally ill, or in boarding schools, or any institution primarily educational in nature.

Due to a recent decision by the New York State Court of Appeals, New York State no longer has the legal authority to process incoming or outgoing parent home study requests via the ICPC. Accordingly, OCFS no longer accepts ICPC applications/requests for the placement of a child with the child's parent whether the parent resides in New York or in another state. For more information:

- "New York State Court of Appeals Decision on Applicability of the ICPC on Parent Placements" (23-OCFS-INF-05).
- New York State Court of Appeals Decision on Applicability of the ICPC on Parent Placements and New York State Court of Appeals Opinion: In the Matter of D.L. v. S.B. et al.

The general steps for an ICPC case are:

1. ICPC requests

All NYS LDSSs and VAs submit ICPC requests via the National Electronic Interstate Compact Enterprise (NEICE). NEICE is a web-based system that allows participating states to share records swiftly and securely and to exchange information. New York joined NEICE in August 2018. Each NYS agency is required to have two to six active NEICE users, including a designated NEICE liaison, who have completed mandatory training. If you do not know who the NEICE Liaison or authorized users are at your agency, ask your manager or contact the NYS ICPC office.

Please see "Requirements for Use of the National Electronic Interstate Compact Enterprise (NEICE) 2.0" (22-OCFS-ADM-11).

The required documentation for an ICPC request is dependent on the type of placement request. Placement requests are defined by ICPC regulations. Specific documents must be included in each ICPC request. OCFS has developed checklists and links to required forms to assist caseworkers in preparing ICPC packets for children in foster care or under court jurisdiction. The checklists and forms are found at https://ocfs.ny.gov/programs/adoption/ICPC/.

In ICPC cases, the **receiving state** is the state where the placement resource resides. The **sending state** is the state seeking a home study/assessment of a placement resource in the receiving state for consideration to place a child in that home.

NEICE allows for easy, secure messaging within a case. NEICE users can send case questions, progress updates, and challenges via NEICE messaging. Caseworkers also may contact the local worker in the other state directly (outside of the NEICE system) with case/child specific questions. The local worker's contact information will be included in the request packet.

Caseworkers should not contact another state's ICPC office directly. The NYS ICPC will communicate with the other state's ICPC office on their behalf.

2. Decision and placement

The worker in the receiving state reviews the packet and conducts a child-specific home study in accordance with required time frames, state laws, and regulations. The worker will then provide a recommendation about the suitability of the potential placement. The home study with placement recommendation will be reviewed by the ICPC offices in both the sending and receiving states.

The sending state ICPC office will either approve or deny the request and transmit that decision to the local agency. A favorable finding means that the placement can be made. A child may not be placed in an adoptive home until ICPC approval has been granted by the receiving state.

If the ICPC request is approved, the local agency is responsible for making the final decision on whether or not to place the child with the out-of-state resource. The agency placing the child is responsible for notifying their state ICPC office of the placement date (ICPC 100B form) so the ICPC office in the receiving state can be properly notified. The NYS ICPC office must be notified promptly should problems occur.

3. Supervision

When the child is placed with the approved resource in the receiving state, the local agency must begin monthly contacts, confirm that requested services are in place, and open Title IV-E Medicaid, if applicable. Monthly casework contacts are required and ICPC requires submission of quarterly supervision reports.

A child that has been placed from out of state with a local adoptive family must receive the same services as a child who is in the care and custody of the LDSS or VA. The receiving agency must conduct oversight and supervision, document casework contacts, and prepare reports to be sent to the sending agency. The *ICPC Quarterly Supervision Report* Form (OCFS-5052) is recommended for use as a cover sheet when submitting quarterly supervision reports.

4. Closure

Jurisdiction must be retained by the agency in the sending state and supervision must continue by the agency in the receiving state until the child is adopted, reaches the age of majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state.

The New York State ICPC Office is located within the OCFS/BPS. This office administers the ICPC and serves as the central clearing point for all incoming and outgoing ICPC referrals. Questions related to ICPC should be directed to the OCFS Regional Office or by email to the NYS ICPC office at ocfs.sm.NYSICPC@ocfs.ny.gov.

RESOURCES

Click here for the full text of the ICPC regulations.

Refer to this section of the OCFS website for a wide range of information and resource materials on ICPC.

5. Voluntary authorized agencies

For the purpose of ICPC adoptions, a private agency adoption is an adoption arranged by a licensed or approved agency that has been given legal custody or responsibility for the child, including the right to place the child for adoption. These adoptions take place under ICPC **Regulation 12**.

A checklist for private agencies (OCFS-5050h) details the documentation that must be sent to OCFS/BPS to submit a request for an interstate adoption.

C. Intercountry adoptions

An intercountry adoption involves a child (not a public foster child) from another country who is being adopted by parents living in the U.S. The most common type of intercountry adoption is through a voluntary adoption agency (VA). A list of VAs on the OCFS website identifies those that are accredited to provide intercountry adoption services.

There could be occasions, however, when an LDSS places children in foster care for adoption with adoptive parents who live outside of the U.S. For example, a child in foster care might be adopted by relatives living in another country, or prospective adoptive parents might learn about a freed New York child on a photolisting website.

1. The Hague Convention Agreement

Intercountry adoptions are governed by the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions, or "the Hague Convention." The Hague Convention is the first-ever agreement designed to govern the adoption process and protect children who are adopted across national boundaries. The United States signed the Hague Convention in 1994.

Adoptive placements between Hague Convention member countries must meet all requirements of the convention. The goal of the Hague Convention is to protect the children, birth parents, and adoptive parents involved in intercountry adoptions and to prevent abuses, such as abduction, sale, or trafficking of children across country borders. To accomplish this goal, the Hague Convention adoption process generally involves six primary steps:

1. A Hague accredited/approved service provider is chosen.
2. A prospective adoptive family applies and is found to be eligible to adopt.
3. A prospective adoptive family is referred for a child.
4. An application is completed to determine if the child is eligible to immigrate/emigrate.
5. The child is adopted.
6. Any required visas or other travel documents are obtained for the child.

LDSSs may provide adoption services in Hague Convention cases without additional accreditation. However, nonpublic adoption service providers that provide adoption services in Hague Convention cases must be accredited, temporarily accredited, or approved, with some exceptions. This requirement is in addition to state licensing requirements for adoption programs. State requirements limiting who can place children for adoption and what fees may be charged for adoptive placements still apply [SSL §§371(10), 374(2) and 374(6)].

2. Adoptions into Hague Convention countries

When a child is placed for adoption from the U.S. to another Hague Convention country, the process must conform to:

- Hague Convention standards set forth in the federal Intercountry Adoption Act of 2000;
- Applicable federal regulations (22 CFR Parts 96 and 97); and
- Applicable NYS statutes and regulations, including 18 NYCRR Part 421.

Before considering the placement of a legally freed child in New York with adoptive parents in another country, the Hague Convention requires the agency to make reasonable efforts to find a timely placement for the child within the U.S. Exceptions are when the child would be placed with relatives living in another country, the birth parent has identified a specific prospective adoptive parent in another country, or there are other special circumstances.

These efforts must include disseminating information about the child through print, media, and internet resources, listing the child on a national or state adoption exchange or registry (such as photolisting) for at least 60 days, responding to inquiries about adoption of the child, and providing written information about the child to prospective adoptive parents in the U.S. [22 CFR §96.54;09-OCFS-ADM-12].

3. Adoptions into non-Hague Convention countries

Intercountry adoptions also can occur between countries that are not members of the Hague Convention. The uniform standards set forth in the Hague Convention do not apply to the adoptive placement of a child in a non-Hague member country.

These adoptions have similar procedures but lack the assurances of Hague Convention adoptions. When a non-Hague member country is involved in the adoption of a child from New York, state laws and regulations still apply, as do U.S. immigration and naturalization laws and regulations and the laws of the foreign country. Due to the lack of uniform controls and protections, OCFS only approves adoption programs that limit placements of U.S. children with adoptive parents who reside in a non-Hague Convention member country and who are relatives of the child (09-OCFS-ADM-12).

4. Special considerations

Whether an adoption involves a Hague Convention country or a non-Hague Convention country, the agency must make intercountry adoption placement decisions based on the best interests of the child, as described in OCFS regulation 18 NYCRR 421.18(d).

Intercountry adoptions pose unique factors that must be assessed on a case-by-case basis. Special consideration must be given to the impact on the child of living in another country, such as potential language issues, distance from other family members, cultural differences, and services available in the other country to meet the child's needs. In particular, older children may have more difficulty adjusting to a foreign country and, therefore, their opinion should be considered regarding a possible intercountry adoption.

Intercountry adoption of a New York State child must follow the same internal processes as a domestic adoption. All adoption forms and casework documentation should be completed and kept in the child's case file. This documentation includes the Application to Adopt, Adoptive Placement Agreement, and Adoption Subsidy Agreement (if applicable). The OCFS Administrative Directive, "Intercountry Adoptions" (09-OCFS-ADM-12) provides for more specific information about these requirements.

Practice Tip: Complexity of intercountry adoptions

The information in this guide is just a brief overview of a complex process of intercountry adoption. If a caseworker is assigned an adoption case that may involve another country, they will need to work closely with a supervisor and the agency attorney. The agency attorney is likely to seek guidance from the U.S. Department of State or from other attorneys with knowledge of and experience with applying the laws and policies of two countries, the Hague Convention requirements, and NYS laws and regulations.

RESOURCES

Child Welfare Information Gateway. "The Hague Convention on Intercountry Adoption."

U.S. Department of State. "Understanding the Hague Convention."

Chapter 13

Chapter 13
Adoption Assistance/Adoption Subsidy

Adoption assistance payments are made to adoptive parents for the care, maintenance, and/or medical needs of a child who meets the federal Title IV-E definition of a child with special needs [42 USC §673]. Adoption subsidies are payments to adoptive parents for the care, maintenance, and/or medical needs of a child who meets the definition of handicapped or hard to place, as defined by state law and regulations [SSL §§450-458 and 18 NYCRR 421.24]. A child's eligibility for the state-funded program should be determined and applied for only **after** it has been determined that they are not eligible for Title IV-E adoption assistance.

The vast majority of children adopted from foster care in New York State receive an adoption subsidy. Of the children adopted from foster care in New York State in 2022, 99% received a subsidy.[1]

In this chapter, the term "adoption subsidy" is used for the NYS adoption subsidy program and "adoption assistance" is used for the federal Title IV-E adoption assistance program. There are three components to adoption assistance or subsidy for which a child or adoptive family may be eligible:

- Adoption maintenance assistance/subsidy payments
- Reimbursement to adoptive parents for one-time, nonrecurring adoption expenses
- Medical assistance/medical subsidy

A. Informing parents about adoption subsidy

Caseworkers should discuss the availability of an adoption subsidy during the initial orientation session with prospective adoptive parents. The local department of social services (LDSS) or voluntary authorized agency (VA) responsible for an adoption placement must provide information to both foster parents and prospective adoptive parents about adoption subsidy, including an explanation of the criteria to be used to determine whether a particular child is eligible for a subsidy. This information must also include the requirement that the subsidy application be approved at the LDSS and state levels.

Such information must be provided when prospective adoptive parents indicate an interest in adopting a particular child and to foster parents at the time that they are told that a proceeding has been started to free a foster child in their home. The caseworker should verify with the foster parents that the child is receiving the correct foster care board rate.

Not every child is eligible for an adoption subsidy. As early as possible, and prior to placing the child in an adoptive home or approving the foster parents as adoptive parents for the child, the caseworker must discuss with the prospective adoptive parents or the foster parents whether they will adopt the child with or without an adoption subsidy. **The results of this discussion must be documented in the case record.** The caseworker must also assess whether the child may be eligible for adoption subsidy and document this in the case record (see sections **B** and **C** of this chapter).

[1] OCFS. *Monitoring and Analysis Profiles with Selected Trend Data: 2018-2022*, p. 20.

If a child does not appear to be eligible for the adoption subsidy and the prospective adoptive parents or the foster parents say they are unable or unwilling to adopt the child without subsidy, the caseworker must seek an alternative adoptive placement for the child. Efforts to locate adoptive parents willing to accept the adoptive placement of the child without payment of an adoption subsidy must be documented by the caseworker.

B. Eligibility for Title IV-E adoption assistance

Correctly determining and documenting Title IV-E eligibility for an adoption assistance case is required and crucial. Without the proper determination, or if the documentation is incorrect or missing, New York State and the applicable LDSS will not be reimbursed by the federal government. The result is that the state and the LDSS must cover the costs associated with such cases without federal participation or reimbursement.

The OCFS Eligibility Manual for Child Welfare Programs provides detailed eligibility criteria in Chapter 1B, "Title IV-E Eligibility Adoption." There are specific procedures that must be followed to establish Title IV-E eligibility. Caseworkers should become familiar with these procedures and consult the manual as needed, as these procedures are not included in detail in this guide. The manual includes information and procedures related to subsidy eligibility for both Title IV-E assistance and state adoption subsidy, as well as Medical Assistance and Medical Subsidy.

To complete the adoption assistance application, the caseworker must work with and complete the Adoption Assistance Eligibility Checklist (LDSS- 3912, rev. 7/18) and collect the supporting documentation for each Title IV-E eligibility requirement for the child being considered for adoption assistance. The checklist should be used in conjunction with the Eligibility Manual.

To be eligible for Title IV-E adoption assistance, the child must meet four key eligibility requirements, and each must be appropriately documented:

- Citizenship
- Age
- Special Needs
- Financial Need

1. Citizenship

States are required to verify citizenship or immigration status of all children receiving federal adoption assistance payments. The child must be either a U.S. citizen or a qualified immigrant as defined by federal law. Citizenship can be documented with a birth certificate, a passport, or a naturalization certificate. Refer to page 168 of the Eligibility Manual for a list of qualified immigrants and documentation.

2. Age

The age requirement for Title IV-E Adoption Assistance is divided into two separate standards. The first standard requires a child to be under 18 years of age. The second standard is for a legally freed youth aged 18 years or older (but under the age of 21 years) when they are:

- completing secondary education or a program leading to an equivalent credential; or
- enrolled in an institution that provides post-secondary or vocational education; or

- participating in a program or activity designed to promote, or remove barriers to employment; or
- employed for at least 80 hours per month; or
- incapable of any of the activities described above due to a medical condition that is supported by regularly updated or recorded information in the child's case plan.

3. Special needs

To be eligible for Title IV-E adoption assistance, the child must meet the criteria of a child with special needs as outlined in OCFS regulations defining a handicapped child [18 NYCRR 421.24(a)(2)] or a hard-to-place child [18 NYCRR 421.24(a)(3)(iii)]. This includes situations where a special condition or factor exists and it is reasonable to conclude that, because of this condition or factor, the child cannot be placed with adoptive parents without the provision of medical and financial assistance.

Handicapped child

In state law and OCFS regulation, a handicapped child has a specific physical, mental, or emotional condition or disability that is severe enough to be a significant obstacle to the child's adoption. Such conditions include, but are not limited to [SSL §451; 18 NYCRR 421.24(a)] the following:

- Any medical or dental condition that requires repeated or frequent hospitalization, treatment, or follow-up care.
- A physical handicap, by reason of physical defect or deformity, whether congenital or acquired by accident, injury, or disease, which makes or may be expected to make a child totally or partially incapacitated for education or for remunerative occupation (paid employment), as set forth in Sections 1002 and 4001 of the Education Law or makes or may be expected to make a child handicapped, as set forth in Section 2581 of the Public Health Law.
- A substantial disfigurement, such as the loss or deformation of facial features, torso, or extremities.
- A diagnosed personality or behavioral problem, psychiatric disorder, serious intellectual incapacity, or brain damage that seriously affects the child's ability to relate to their peers and/or authority figures, including mental retardation or developmental disability.
- The child was determined to need an extraordinary level of care in accordance with the standards set forth in 18 NYCRR 427.6(f)(1).

The definition of a handicapped child is not all-inclusive: it would be impossible to include all of the possible conditions covered by these definitions. A caseworker who is not sure about classifying the child as handicapped should refer to the Eligibility Manual or contact OCFS/BPS for clarification before completing the subsidy application.

Hard-to-place child

This term refers to a child, other than a handicapped child:

- Who is one of a group of two siblings (including half-siblings) who are free for adoption, and it is considered necessary for the group to be placed together; and

  - at least one of the children is 5 years old or older; or
  - at least one of the children is a member of a minority group which is substantially overrepresented in NYS foster care in relation to the percentage of that group to the state's total population; or
  - at least one of the children is otherwise eligible for subsidy.
- Who is the sibling or half-sibling of a child already adopted by a family and it is considered necessary for the children to be placed together pursuant to 18 NYCRR 421.2(e) and 421.18(d); and
  - the child to be adopted is 5 years old or older; or
  - the child is a member of a minority group which is substantially overrepresented in NYS foster care in terms of the percentage of that group in foster care versus its percentage of the state's total population; or
  - the siblings or half-siblings already adopted are eligible for subsidy or would have been eligible for subsidy if an application had been made at the time of or before adoption.
- Who is one of a group of three or more siblings (including half-siblings) who are free for adoption, and it is considered necessary for the group be placed together pursuant to 18 NYCRR 421.2(e) and 421.18(d). For more information on placement of siblings, see **Chapter 11** of this guide.
- Who is 8 years old or older and is a member of a minority group which is substantially overrepresented in NYS foster care, in terms of the percentage of that group in foster care versus its percentage of the state's total population.
- Who is 10 years old or older.
- Who has been in the care of the same foster parents for 12 months or more before the signing of the Adoption Placement Agreement by such foster parents, the child has developed a strong attachment to those foster parents, and separation from them would adversely affect the child's development [18 NYCRR 421.24(f)]. See **Section C.2** of this chapter.

4. Financial need

Before 2008, the Title IV-E eligibility process required that the child to be adopted received or was eligible for the former Assistance to Families with Dependent Children (AFDC) at the time of the removal of the child from the child's home, in accordance with the program rules in effect on Sept. 16, 1996, or was eligible for SSI prior to finalization of the child's adoption.

The federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) amended the Social Security Act by "delinking" the AFDC income requirements from Title IV-E Adoption Assistance eligibility, thereby expanding eligibility for Title IV-E adoption assistance for certain foster children. Satisfaction of AFDC requirements still are part of the eligibility standards for Title IV-E foster care.

The delinking of Title IV-E Adoptive Assistance and the AFDC income-related criteria for applicable children has been phased in over a period of years, with a new age group added to the first requirement each year. An extension was approved in 2018, so the change will apply to

all children with special needs as of July 1, 2024. Before that date, caseworkers must refer to the OCFS Eligibility Manual for Child Welfare Programs, pp. 82-91, to determine eligibility on the basis of financial need.

Title IV-E eligible children whose adoption dissolves or whose adoptive parents die are eligible for adoption subsidy if they are placed with an authorized agency, are readopted, and are determined to have special needs. These children retain their eligibility status for purposes of adoption as long as they meet the definition of a special needs child.

5. Children surrendered directly to a VA

Federal standards require that where a child is placed pursuant to a surrender of parental rights, the child must have been under the care and custody of a public agency in order to be eligible for Title IV-E foster care assistance. Accordingly, children who are placed directly into the legal custody of a VA through a voluntary placement agreement are not Title IV-E eligible, unless the child is determined to be eligible for Supplemental Security Income Benefits (SSI) prior to or at the time the adoption petition is filed.

Children surrendered directly to the guardianship and custody of a voluntary authorized agency may be eligible for Title IV-E Adoption Assistance in two situations:

- When a child is eligible for SSI payments at the time the adoption proceeding is initiated and OCFS determines that the child meets the federal statutory definition of special needs before finalization of the adoption; or
- When the child received Title IV-E Adoption Assistance in a previous adoption that either dissolved or in which the adoptive parent died, the child may be eligible for adoption assistance in a readoption if OCFS determines that the child continues to be a child with special needs.

Whenever a VA is submitting an adoption subsidy agreement to OCFS for a handicapped child at a special or exceptional rate, the agency must submit an application to the local Social Security Administration (SSA) office for a determination of the child's eligibility for SSI. Copies of the application or the official response/determination of eligibility from SSI must be included in the documentation submitted with the subsidy application.

If an agency fails to apply for SSI and the submitted documentation indicates that the child may be eligible for SSI, the application will not be approved and will be returned as incomplete.[2]

C. Eligibility for NYS adoption subsidy

The OCFS Eligibility Manual for Child Welfare Programs provides eligibility criteria in Chapter 1B, “The State Adoption Subsidy.” The subsidy provides ongoing financial and medical assistance for adopted children with special needs but only when it is determined that the child is ineligible for Title IV-E funding.

The Title IV-E Adoption Assistance section of the Adoption Assistance Eligibility Checklist (LDSS- 3912) (rev. 7/18) must have been completed with the determination that the child was found to be ineligible. The caseworker must then use the next section of the checklist to determine eligibility for the State Adoption Subsidy and collect the supporting documentation.

[2] OCFS. “Title IV-E Adoption Assistance Eligibility for Children in the Guardianship and Custody of Voluntary Authorized Agencies” (01-OCFS-INF-03).

The availability of an NYS adoption subsidy depends solely on the child's eligibility, based on their condition or circumstances. There is no means test to determine subsidy eligibility for adoptive parents. To be eligible to receive adoption subsidy in NYS, the child must be:

- Under 21 years of age and in the guardianship and custody of an LDSS or VA, or whose guardianship and custody was transferred pursuant to a court order to a certified or approved foster parent. Guardianship and custody must have been transferred before the child's 18th birthday or, if the transfer occurred after the child's 18th birthday, the TPR petition must have been filed before the child's 18th birthday; or
- Under 21 years of age and whose care and custody was transferred to an LDSS or VA before the child's 18th birthday pursuant to FCA §1055 or SSL §384-a and the child's parents are deceased or one parent is deceased, and the other parent is not entitled to notice under DRL §111-a and where such LDSS or VA consents to the adoption in accordance with DRL §113.

1. Handicapped child

Applications for adoption subsidy for a handicapped child must include medical documentation that the child fits the definition of a handicapped child and must support the rate level being requested.

Resources

A brief summary of the documentation required in the subsidy application for a handicapped child is provided below. Caseworkers should carefully review "Changes in Adoption Subsidy: Medicaid under the Provisions of COBRA, Subsidy Eligibility, and the Review and Approval of the Subsidy Agreement" (09-OCFS-ADM-14), as revised in 2019.

The policy directive "Payment of Adoption Subsidies to Certain Approved Adoptive Parent(s) Prior to Finalization of the Adoption" (10-OCFS-ADM-11) describes the circumstances in which adoptive parent(s) may receive payment of an adoption subsidy prior to finalization of the adoption of a child in the guardianship and custody of the LDSS, and advises LDSS and VAs on how to implement these changes to adoption subsidy requirements.

An application for a basic-rate subsidy must include a one-page document from a physician, psychologist, psychiatrist, or other qualified professional that includes the diagnosis or assessment of the child's physical, mental, or emotional condition or disability that would be a significant obstacle to the child's adoption. This is considered to be sufficient documentation to support an application for a handicapped subsidy that is at the same rate as the foster care board rate for the child before adoption. The diagnosis or assessment must meet one of the criteria outlined in 18 NYCRR 421.24(a)(2).

Where OCFS regulations do not specify that a diagnosis must be made by a physician, psychiatrist, or psychologist, OCFS/BPS will accept an assessment of a handicapped child from a "qualified professional" for a subsidy application at the basic rate. A "qualified professional" includes an NYS-licensed nurse practitioner or physician assistant; or a professional staff member from the NYS Office for Persons With Developmental Disabilities (OPWDD), the NYS Office of Mental Health (OMH), or the Social Security Administration (SSA) who meets the

credentials required by their organization to make an assessment or diagnosis of a child's condition and eligibility for services.

Presumptive eligibility

OCFS has established a standard of "presumptive eligibility" to streamline the application and review of adoption subsidies for handicapped children. This standard applies to subsidy applications for children who were previously diagnosed with a condition that is permanent or long-term, or for which no current cure is available.

The documentation accompanying the subsidy application in these cases does not have to be current: it can be dated more than 12 months before submission of the subsidy application. A one-page document from a physician, psychologist, psychiatrist, or qualified professional (if the rate requested is for a basic handicapped subsidy) that includes a diagnosis or description of the child's condition and an indication that the condition is permanent or considered to be incurable is sufficient documentation that the child is handicapped, irrespective of the date the assessment/diagnosis was made.

OCFS has established a list of pediatric conditions and illnesses that are considered to be permanent or incurable and meet the requirements for presumptive eligibility for a basic handicapped subsidy. The list is available in 09-OCFS-ADM-14, but it is not all-inclusive. When a child is diagnosed with a permanent condition that is not on the list, they may be eligible for subsidy if the documentation indicates that the child's condition is permanent or considered to be incurable. Examples of conditions on the list: total or severe deafness, permanent or legal blindness, autism, cerebral palsy, HIV/AIDS, and Down syndrome.

If the subsidy application is being made for a higher rate than the child's foster care board rate, a one-page document is required that includes the child's handicapping condition, the severity of the condition, and the degree or level of treatment required to care for the child. When a diagnosis or documentation is required for a special or exceptional request for adoption subsidy, it must be documented by a licensed physician, psychiatrist, or psychologist and must support the rate level being requested in accordance with the standards set forth in 18 NYCRR 427.6(c) and (d).

2. Hard-to-place child

For the most part, the criteria for children in this category are the same as those of Title IV-E adoption assistance. For state purposes, however, a hard-to-place child also can be [18 NYCRR 421.24(a)(3)(i) and (ii)]:

- A child who has not been placed for adoption within six months from the date a previous adoption placement was terminated, and the child was returned to the care of the LDSS or VA; or
- A child who has not been placed for adoption within six months from the date their guardianship and custody were committed to the LDSS or VA.

A child also is considered to be hard to place with parents other than their present foster parents because they have been in the care of the same foster parents for 12 months or more before the signing of the Adoption Placement Agreement by such foster parents, the child has developed a strong attachment to those foster parents, and separation from them would adversely affect the child's development [18 NYCRR 421.24(f)].

The 12 months do not have to be consecutive, as long as the child's absence from the foster parent's home was due to trial discharge for less than six months, placement in a residential facility or hospital for less than 90 days, or a runaway episode during which the child remained in the care and custody, or custody and guardianship, of the LDSS. The freeing of a child for adoption or the signing of the Adoption Placement Agreement cannot be delayed so the child may qualify for subsidy under the 12-month time frame (see 09-OCFS-ADM-14 for more information).

D. Adoption subsidy rates

The amount of the adoption maintenance subsidy payment is equal to the applicable foster board rate which was paid or would have been paid for the child if they were in a foster boarding home. Subsidy payments are established according to the four rate categories used for foster family boarding home payments: basic, special, exceptional, and extraordinary.

Foster boarding home rates are calculated by OCFS (rates differ between the NYC metropolitan area and the rest of the state) and are published about once a year. Current rates can be viewed at https://ocfs.ny.gov/main/rates/fostercare/boarding.php.

Prior to September 1, 2023, LDSSs could, at their discretion, use the income and size of the adoptive family in determining an adoption subsidy rate, as long as the amount of the monthly payment was not less than 75% of the foster care board rate. As of September 1, 2023, all initial adoption subsidy agreements must provide payments at 100% of the applicable foster care board rate [18 NYCRR 421.24(a)(6)]. If an initial adoption subsidy agreement was entered into and approved prior to September 1, 2023, and reflects a rate less than 100% of the foster care board rate, that rate will continue.

1. Basic rate

This is the lowest level of payment and is made for children who do not meet the criteria for special, exceptional, or extraordinary rates.

2. Special rate

This rate is paid for children who:

- suffer from pronounced physical conditions and a physician certifies that the child requires a high degree of physical care;
- are awaiting family court hearings on PINS or juvenile delinquency petitions, or have been adjudicated as PINS or juvenile delinquents;
- have been diagnosed by a qualified psychiatrist or psychologist as being moderately developmentally disabled, emotionally disturbed, or having a behavioral disorder to the extent that they require a high degree of supervision;
- are refugees or Cuban/Haitian entrants, as defined in 18 NYCRR 427.2(p) and (q) and are unable to function successfully in their communities because of factors related to their status as refugees or entrants. Such factors include but are not limited to, inability to communicate effectively in English, lack of effective daily living skills and inability of the child to relate to others in the child's community;
- enter foster care directly from inpatient hospital care. Such a child is eligible for the special rate for a period of one year and retains eligibility only if they otherwise meet one

of the other eligibility criteria set forth in 18 NYCRR 427.6(c)(2)-(5) or (7) or who, in the judgment of the LDSS, has a condition equivalent to those listed above. A special rate for foster children who have the equivalent conditions may be approved only when:

- a list of equivalent conditions has been developed by the LDSS and approved by OCFS as eligible for special foster care services; or
- individual, child-specific requests for special foster care services have been approved by the LDSS. Such child-specific requests must be approved by OCFS within 60 days after approval by the LDSS [18 NYCRR 426.6(c)].

3. Exceptional rate

This rate is paid for a child who:

- requires, as certified by a physician, 24-hour-a-day care provided by qualified nurses or persons closely supervised by qualified nurses or physicians;
- has a severe behavior problem characterized by the infliction of violence on themselves, other persons, or their physical surroundings, and who has been certified by a qualified psychiatrist or psychologist as requiring high levels of individual supervision in the home;
- has been diagnosed by a qualified physician as having severe mental illnesses, such as childhood schizophrenia, severe developmental disabilities, brain damage, or autism;
- has been diagnosed by a physician as having acquired immune deficiency syndrome (AIDS) or HIV-related illness, as defined by the AIDS Institute of the NYS Department of Health. A child who tested positive for HIV infection and subsequently tested negative for HIV infection due to seroconversion, remains eligible for the exceptional subsidy rate for one year after the date of the test that indicated seroconversion. At the end of that period, the child's condition must be evaluated and the LDSS must determine the child's continued need for the exceptional rate;
- in the judgment of the LDSS, have a condition equivalent to those listed above. An exceptional rate for foster children who have equivalent conditions may be approved only if:
  - a list of equivalent conditions has been developed by the LDSS commissioner and approved by OCFS as eligible for exceptional foster care services; or
  - individual, child-specific requests for exceptional foster care services have been approved by the LDSS commissioner. Such child-specific requests must be approved by OCFS within 60 days after approval by the LDSS commissioner.

4. Extraordinary rate

This rate is provided for children who require care from trained and experienced foster parents who are readily accessible on an ongoing and emergency basis. Only one foster child can be placed at a time in a foster home that is receiving an extraordinary board rate. Additional criteria that the foster parent must satisfy in order for the extraordinary rate to be paid are set forth in 18 NYCRR 427.6(f)(2).

The definition of a handicapped child includes a child who needs an extraordinary level of care in accordance with the standards set forth in 18 NYCRR 427.6(f)(1). The definition of a handicapped child relating to the need for the extraordinary level of care does not mandate that

the adoptive parent satisfy the criteria the foster parent must satisfy in 18 NYCRR 427.6(f)(2). A child who is receiving the extraordinary rate at the time the adoption subsidy application is submitted would also be eligible to receive the extraordinary rate for adoption subsidy purposes [SSL §451(4); 18 NYCRR 421.24(a)(2)(v)].

The extraordinary rate is not applicable in adoption subsidy cases where the child was not in foster care or was placed with an approved adoptive-only parent. The extraordinary rate also is not available through an amendment of an initial adoption subsidy agreement that was fully executed prior to the effective date of the OCFS regulations that enacted the extraordinary rate category (August 9, 2023).

5. Increases in subsidy payments

Adoption subsidy payments must be increased by the LDSS whenever there is an increase in the foster care board rate and/or the clothing replacement allowance or whenever a change in the age of the adopted child would qualify the child to receive an increased foster care rate. The amount of the payment is reduced when a young child no longer qualifies for a diaper allowance. The adjustment must be included in the subsidy payment to the adoptive parents along with notice of the adjustment. The notice constitutes an amendment to the agreement and must be attached to the agency's copy of the agreement [SSL §451(4)(a); 18 NYCRR 421.24(a)(4)].

Any change in the amount of the monthly payment for reasons other than an adjustment due to a change in the applicable foster care board rate, must be made by an amendment to the written adoption subsidy agreement and requires the consent of the adoptive parents and the approval of OCFS [18 NYCRR 421.24 (b)(16)].

6. Applicable board rate

An applicable board rate is used when two possible rates may apply [18 NYCRR 421.24 (a)(5); 18 NYCRR 421.24 (c)(11)]:

- When an LDSS places a child for adoption with parents who live in a different LDSS, the subsidy rate is applied at the discretion of the placing LDSS.
- When an LDSS places a child for adoption with parents living outside the state, the subsidy rate of the LDSS with custody of the child will apply.
- When a child in the guardianship and custody of a VA is placed with adoptive parents living in the same LDSS, the board rate of that LDSS will apply.
- When a child in the guardianship and custody of a VA is placed for adoption with adoptive parents living in another LDSS, the board rate of the LDSS in which the adoptive parents live will apply.
- When a child in the guardianship and custody of a VA is placed with adoptive parents living outside the state, the board rate of the LDSS where the VA has its principal office or business will apply.

E. Applying for an adoption subsidy

At the time of an adoptive placement (whether with a foster parent or a prospective adoptive parent), the caseworker must give the prospective adoptive parents a copy of the Adoption Subsidy and Non-Recurring Expenses Agreement (LDSS-4623A) and a summary of the subsidy

program (Appendix A), which includes a description of the criteria for determining the child's eligibility. A copy of LDSS-4623A also must be provided, where appropriate, to foster parents who have been approved as adoptive parents for a child in their home, but the child has not yet been freed [18 NYCRR 421.19(i)(3)(iii)(c); 18 NYCRR 421.24(b)(2)].

The caseworker must complete the initial adoption subsidy agreement form (LDSS-4623A) as soon as possible after the Adoptive Placement Agreement (APA) is signed, or, in the case of the child being adopted by foster parents, as soon as action is taken to free the child. The caseworker must review the form with the prospective adoptive parents, verifying that they understand it [18 NYCRR 421.24(b)(2)(i)(a)]. The caseworker should encourage adoptive parents to consult with an adoption attorney and review the form before signing it. The completed adoption subsidy agreement must then be signed and dated by the prospective adoptive parents.

If the child is being placed for adoption with approved adoptive parents who are not also certified or approved foster parents, the initial subsidy agreement must be completed by the caseworker, reviewed, and signed by the adoptive parents, and submitted electronically before the child is placed in the home. This is because, once approved, the adoption subsidy will be paid from the date of placement.

The caseworker must also give the prospective adoptive parents written notice that the signed adoption subsidy agreement form must be submitted as soon as possible, so it can be approved before the finalization of the child's adoption. Title IV-E adoption assistance reimbursement is not available if the adoption subsidy agreement is not approved before finalization of the adoption [SSL §453.1(a); 18 NYCRR 421.24 (b)(2)(i)].

1. Applying for state subsidy after finalization

Adoptive parents may be eligible to receive a state adoption subsidy through an agreement signed after finalization of the adoption if they first became aware of a condition or disability after the child was adopted. A physician must certify that the condition or disability existed before the adoption. While this would authorize the availability of state adoption subsidy, it would not render the case eligible for Title IV-E adoption assistance [45 CFR §1356.40]. The agreement form LDSS-4623B should be used in such cases.

2. Review and approval

The LDSS must review and approve or deny the completed agreement within 15 working days. If the agreement is approved, the LDSS then sends the agreement to OCFS/BPS. In the case of a child that was surrendered directly to a VA, the agency must send the subsidy agreement directly to OCFS/BPS for review and approval. Supporting documentation must be scanned, uploaded, and submitted electronically along with the agreement. If the subsidy level requested is different than the foster care board rate for the child, OCFS will review the application and supporting documentation to verify that it supports both the standard for the subsidy rate level requested, whether the requested rate is higher or lower than the foster care rate.

OCFS/BPS must approve or deny the agreement within 30 days of receiving it. If OCFS does not make a written decision within 30 days, the application is considered to be approved [18 NYCRR 421.24(b)]. OCFS may authorize an LDSS to approve or disapprove the written subsidy agreement on OCFS's behalf [18 NYCRR 421.24(c)(13)].

The caseworker must give the adoptive parents a copy of the approved adoption subsidy agreement after it has been signed by OCFS, along with Appendix A. Parents should be reminded to keep all documents related to adoption subsidy in a safe place so they are available throughout the term of the agreement.

If the adoption subsidy agreement is approved, the case information, date of approval, type of subsidy, medical coverage, and eligibility status for Title IV-E are entered into CONNX by the agency that submitted the agreement.

If the application is denied, the adoptive parent has the right to request a fair hearing. The LDSS must send a notice of the right to request a fair hearing to the adoptive parents if the child is in foster care. The notice is sent by OCFS/BPS if the child is in the care and custody of a VA. See **Section K** of this chapter.

F. Creating a subsidy eligibility case file

A **separate** eligibility case file must be maintained for each child and must include the completed, signed and dated applicable checklist, the signed and approved adoption subsidy agreement, and copies of all appropriate documents that support the eligibility decision by the LDSS. The eligibility file must be made available when requested for state monitoring or federal case reviews. The OCFS Eligibility Manual for Child Welfare Programs specifies which checklists are required for each program and the necessary documents to support the eligibility decision made by the LDSS. The eligibility case file and all supporting documents are confidential and must be protected to prevent disclosure.

The “Adoption Subsidy Eligibility Documentation File” (OCFS-4401) provides the checklist for acceptable documentation for eligibility claiming in the child’s individual adoption subsidy eligibility folder. It also supports accurate eligibility determinations [19-OCFS-LCM-20].

Caseworkers can access the adoption subsidy database using their NYS Directory Services account. The online process allows caseworkers to complete the adoption subsidy agreement, upload the page with the parent’s signature, submit an electronic subsidy application to supervisors, and, upon supervisory approval, forward it to OCFS/BPS.

All records must be maintained confidentially. In the case of an adopted child, the adoption subsidy eligibility documents of that child must be copied from the adoption file and maintained in a separate, confidential eligibility file that is accessible if requested for review. All documents identified on the OCFS-4401 to substantiate eligibility must be included in the child’s eligibility file.

G. Medical assistance/medical subsidy

Medical assistance covers some or all of the costs related to a child’s specific medical condition, as well as associated therapy, rehabilitation, and special education. There are two types of medical assistance for adopted children, based on specific eligibility criteria.

1. Medical assistance for Title IV-E eligible children

Children who are eligible for Title IV-E adoption maintenance assistance are categorically (automatically) eligible for Medical Assistance through Medicaid (MA). The child continues to be eligible for MA under this category as long as the child continues to receive Title IV-E Adoption Assistance. In these instances, there is no review of the parents’ or child’s income or resources to continue MA.

2. Medical assistance for children who are not Title IV-E eligible

State regulation 18 NYCRR 360-3.3 (a)(6) sets forth the standards to be used by LDSSs and VAs to determine whether a child who is ineligible for Title IV-E Adoption Assistance is eligible for Medicaid under the provisions of COBRA, as long as the child meets the citizenship or appropriate immigration status requirements for Medicaid:

- The child must be approved for a non-Title IV-E (state-funded) adoption subsidy. This means that an adoption subsidy agreement has been executed on behalf of the child. The child must be under the age of 21 and their guardianship and custody must have been committed to a social services official, or a voluntary authorized agency, or to a certified or approved foster parent; and
- A determination has been made that the child has a special need for medical or rehabilitative care and the child cannot be placed with adoptive parents without medical assistance. A child who meets the state's definitions of handicapped or hard-to-place for purposes of adoption subsidy is considered to have medical and rehabilitative needs in accordance with the federal Medicaid eligibility criteria for COBRA; and
- The child received Medicaid during the three-month period prior to the adoption subsidy agreement being signed or would have been eligible for Medicaid during that period of time, based on the Title IV-E post-eligibility financial requirements or AFDC standards and methodologies. For these cases, only the child's income and resources are used to determine eligibility for Medicaid. Unlike determining initial eligibility for Title IV-E foster care recipients, only financial determinations apply. Therefore, the child does not have to be deprived of parental support and care, as the income and resources of adoptive parents are not considered.

LDSSs must refer cases to the Medicaid Unit that involve adopted children who are deemed eligible for Medicaid under the COBRA provisions. Medicaid should be authorized for these children following current procedures.[3]

3. State medical subsidy

As stated above, virtually all children adopted from foster care who are not Title IV-E eligible should be eligible for MA through the COBRA provisions.

However, there may be children eligible for state adoption subsidy who are not eligible for Medicaid through either Title IV-E eligibility or COBRA. If a child's birth parents are deceased and the child is in the guardianship and custody of an LDSS or a certified or approved foster parent, the child is eligible for subsidy but ineligible for MA under the COBRA provision. In this case, the LDSS or VA must determine if the child is eligible for state medical subsidy. The child must be:

- A handicapped child and ineligible for MA under Title IV-E or COBRA; or
- A hard-to-place child who is ineligible for MA under Title IV-E or COBRA and is being adopted by parents aged 62 or older or within five years of mandatory retirement age (very few children fall into this category) [18 NYCRR 421.24(a)(2) and (3)].

[3] OCFS. "Changes in Adoption Subsidy: Medicaid under the Provisions of COBRA, Subsidy Eligibility, and the Review and Approval of the Subsidy Agreement" (09-OCFS-ADM-14), as revised in 2019.

This program provides for reimbursement for the costs of medical care, services, and supplies as may be authorized under the Medical Assistance (Medicaid) program, after any third-party health insurance has been billed. State medical subsidy is available until the adopted child reaches age 21, as long as the adoptive parents continue to be responsible for and provide any support for the child.

New York's medical subsidy program does not involve a medical insurance card or a network of participating providers similar to those provided by Medicaid or other third-party insurers. The LDSS makes payments directly to a provider or reimburses the adoptive parents for an adopted child's medical expenses that are not covered by third-party health insurance or any other source.

H. Payment for nonrecurring adoption expenses

Payments for nonrecurring adoption expenses are made on a one-time basis for reasonable and necessary expenses directly related to the adoption of a child with special needs that have not been reimbursed from other sources or funds. Reimbursable expenses may include home study fees, attorney fees, replacement of the birth certificate, and travel for visits to the child (including mileage, lodging, and meals). The maximum amount for this type of reimbursement is $2,000 for each placed child. Some expenses in excess of this amount may be tax-deductible. See **Chapter 11** of this guide for information about the adoption-related tax credit.

The application for nonrecurring adoption expenses is combined with the signed adoption subsidy agreement (LDSS-4623A). The prospective adoptive parents and the LDSS official must sign the agreement for nonrecurring adoption expenses before the adoption is finalized. Agreements that are signed after the date the adoption becomes final are not eligible for nonrecurring adoption expenses payment. Documentation of expenses is not due at the time the signed agreement is submitted.

The adoptive parents have two years from the date the adoption becomes final to submit documentation of their nonrecurring adoption expenses. For children adopted from foster care, the approved application is retained by the LDSS along with the receipts. The LDSS is responsible for the review and approval of receipts for nonrecurring adoption expenses and the one-time payment to the adoptive parents and/or the adoptive parents' attorney.

The process for nonrecurring adoption expenses for children who were surrendered directly to the guardianship and custody of a VA (children not in foster care) is similar, but the receipts for expenses must be sent to OCFS/BPS for approval and payment.

I. Adoption subsidy payments

Except in cases where the adopted child was surrendered directly to a VA, monthly payments are made by the LDSS or, in New York City, the Administration for Children's Services (ACS). The maximum payment amount may not exceed the amount that would have been paid for maintenance if the child had remained in a foster home. Medical benefits must be continued for all children placed for adoption until the adoption is final because the child is still in the custody of the commissioner of the LDSS [18 NYCRR 421.24(c)].

These payments continue until the child's 21st birthday, provided that the adoptive parents remain legally responsible for the support of the child and provide any support to the child. Adoption subsidy payments are discontinued only when it is determined by an official at the LDSS or OCFS that the adoptive parents are no longer legally responsible for the support of the

child or that the child is no longer receiving any support from the adoptive parents. The payments continue even if the adoptive family moves to another state or country [SSL §451(1)(a) and (c); 18 NYCRR 421.24(c)(5)].

1. When payments begin

The monthly maintenance adoption subsidy and/or medical subsidy payments begin at different times, depending on the details of the case.

When a child is being adopted by the foster parents with whom the child has lived, foster care payments must continue until the date the court finalizes the adoption. Monthly payments for the care and maintenance of the child as an adopted child begin on the date of the court order finalizing the adoption.

When a child in foster care is placed with and is expected to be adopted by foster parents other than the foster parents with whom the child has previously lived, and who is eligible for an adoption subsidy payment, the payments are initially made as foster care payments starting from the day of placement for adoption with the foster parents. There are some exceptions to this standard where the placement of the foster child into the foster home for adoption would raise foster home capacity issues; caseworkers should refer to 18 NYCRR 421.24(c)(2)(ii) for a description of the exceptions.

When a child is freed for and placed for adoption, is otherwise eligible for adoption subsidy payments, and is to be adopted by approved adoptive parents who are not also certified or approved foster parents, adoption subsidy payments must be made from the date of placement with the approved adoptive parents.

For children in the guardianship and custody of a VA and not in LDSS custody, payments are made directly by OCFS in accordance with an approved subsidy agreement with the adoptive parents.

When a child who is in the guardianship and custody of a VA is freed and placed for adoption, and is eligible for an adoption subsidy, an adoption subsidy payment is made from the date OCFS approves the subsidy agreement if:

- an approved home study has been completed; and
- an adoptive placement agreement has been signed and the child has been placed in the home.

2. Authorizing subsidy payments in WMS

Adoption assistance/subsidy and adoption services must be authorized in the OCFS Welfare Management System (WMS). Accurate and appropriate entries must be made to reduce claiming errors and maximize federal reimbursement. These systems include CONNECTIONS (CONNX), the Welfare Management System (WMS), and the Benefit Issuance and Control System (BICS).

CONNX activity windows are used to record legal activities, placement and movement activities, and adoption activities. For example, the caseworker enters the child's placement in the adoptive home as part of the child's permanency plan and includes the appropriate approvals. WMS is the system of record for authorizing the adoption assistance and adoption services. BICS maintains a record of all payments; it operates based on information that is entered into WMS and CONNX.

When assistance/subsidy is authorized in WMS, the system will produce the Services Authorization Form (LDSS-2970); this authorization is generated initially for a 12-month period. The case must be reauthorized in WMS every 12 months thereafter. Please refer to the resources below.

Resources

OCFS CONNECTIONS Tip Sheet, "The CONNECTIONS-WMS Interface" (February 2021).

OCFS Eligibility for Child Welfare Programs Manual. "Systems Instructions," p. 102.

J. Post-finalization amendments to the agreement

In certain circumstances, adoptive parents may apply to amend the approved adoption subsidy agreement after the adoption has been finalized. These include:

- Changes in the child's condition.
- Changes in the parents' personal circumstances.
- Fair hearing decisions, such as an OCFS administrative fair hearing written decision determining that the decision of the LDSS or OCFS to deny an adoption subsidy was not appropriate.
- Changes in federal and state statutes that impact eligibility.
- Correction of an error made on the initial application.

1. Technical amendment

A technical amendment to the adoption subsidy agreement may be requested when there is a need to change the names on the original adoption subsidy agreement due to the adoptive parents changing their names or a transfer of guardianship or legal custody due to the death of the adoptive parents.

2. Subsidy upgrade amendment

Adoptive parents may request an increase in their subsidy payment after finalization of the adoption in the form of an amendment to the original adoption subsidy agreement. This request must be based on the worsening of a pre-existing condition which was not known by the adoptive parents before finalization of the adoption, or on the worsening of a known condition.

A request for an increase in the amount of the adoption subsidy payment must be accompanied by an amended adoption subsidy agreement, along with documentation of the child's disabilities. The documentation must show that after finalization, there was a worsening of a subsidy-eligible condition that now qualifies the child for a higher subsidy level.

The following are examples of cases for which an upgrade can be requested:

- Subsidy was approved for a child before finalization at a basic hard-to-place rate, but
  - after finalization, there is a worsening of a condition known to the parents at the time of finalization but for which there was insufficient medical documentation. Current medical documentation now supports the rate being requested; or

  - after finalization, current medical documentation establishes a pre-existing condition that was unknown to the parents at the time of finalization and supports the new rate.
- Subsidy was approved for a child before finalization was at the handicapped rate, but
  - after finalization, current medical documentation confirms that the original known condition has worsened; or
  - after finalization, current medical documentation confirms a pre-existing condition unknown to the parents at the time of finalization, which supports the new rate being requested.

A request from the adoptive parents for an adjustment to the original completed adoption subsidy agreement must be accompanied by an amended adoption subsidy agreement, not a new application. This is an important clarification related to the federal Title IV-E adoption assistance eligibility requirements. The original adoption subsidy agreement signed before finalization of the adoption is the official agreement, and it remains in effect for the lifetime of the subsidy.

The amended adoption subsidy agreement modifies the relevant terms of the original adoption subsidy agreement to reflect the approved change in the level of the subsidy payment. To the extent not modified by the amended agreement, the original adoption subsidy agreement otherwise remains in effect. The amended agreement also specifies when the approved increase will begin.

K. Reconsideration of eligibility for adoptive assistance

Federal policy provides that if a child was denied adoption subsidy before finalization of the adoption, or extenuating circumstances prevented the child from qualifying for adoption subsidy, the child could be reconsidered for adoption assistance if an administrative fair hearing establishes that “all of the facts relevant to the child’s eligibility were not presented at the time of the request for assistance.” The types of situations that would constitute grounds for a fair hearing include:

- Relevant facts about the child, the birth family, or child’s background were known but were not presented to the adoptive parents before the legalization of the adoption.
- Denial of adoption subsidy was based on a means test of the adoptive family.
- The LDSS or state agency made an error in determining that a child was ineligible for adoption subsidy.
- The state agency failed to advise the adoptive parents that adoption subsidy was available.

1. Fair hearing rights of adoptive parents

Social Services Law provides that any person aggrieved by the decision of a social services official not to approve a subsidy payment, or by an inadequate or inappropriate payment amount, or the failure to issue a written disapproval of the completed agreement within 30 days after the application was filed, may make a request to OCFS for a fair hearing. The request must be made within 60 days after receiving the written notice of disapproval of the subsidy or approval at a lower rate [SSL §455; 18 NYCRR 421.24(g)].

According to statute, only the following issues may be raised at such hearings:

- whether the social services official has improperly denied an application for payments to be made, including the failure of the social services official to issue a determination of an application within 30 days of its filing; or
- whether the social services official has determined the amount of payment to be made in violation of the SSL or OCFS regulations; or
- whether the social services official has improperly discontinued payments made in the agreement; or
- whether the social services official improperly refused to certify the individual preferred by a child for certification as the representative payee or improperly denied a request by a child to revoke the certification of a representative payee.

The statute further states that OCFS must affirm the denial if:

- the child for whom payments would be made is not a handicapped or hard-to- place child; or
- other approved adoptive parents were or are willing to accept the placement of the child without payment within 60 days of such denial and placement of the child with the other parents would not be contrary to the best interests of the child.

A written notice of the hearing must be sent to the prospective adoptive parents and their representatives at least six working days before the scheduled date of the hearing. OCFS must render a decision within 30 days after the completion of the administrative fair hearing.

2. Fair hearing decision

If the fair hearing decision results in approval of the subsidy, the subsidy must be paid to the adoptive parent based on the effective date and the amount of the subsidy specified in the written fair hearing decision. Title IV-E adoption assistance is available only in those situations in which a fair hearing determines that the child was wrongfully denied benefits and the child meets all federal eligibility requirements.

L. Continuing adoption subsidy eligibility

As part of the written adoption subsidy agreement, the adoptive parent is required to notify the LDSS (or OCFS, if the child was adopted after being surrendered to a VA) of any changes in the residential or dependency status of the child, including circumstances that would make them ineligible for adoption subsidy.

OCFS regulation 18 NYCRR 421.24(c)(19) requires the LDSS to send a written notice each year to the adoptive parents receiving adoption subsidy reminding them of their obligation to support the adopted child and to notify the LDSS if they are no longer providing any support or are no longer legally responsible for the support of the child.

OCFS provides a Model Letter for the LDSS to use for notification to adoptive parents, and a Model Certification form for the adoptive parents to complete and return to the LDSS. Comparable documents may be used by the LDSS.

1. Education certification

Adoptive parents who are receiving an adoption subsidy for a school-age child must certify that the child is a full-time elementary or secondary student or has completed secondary education. The status as a full-time elementary or secondary student is satisfied by one of the following:

- the child is enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; or
- the child is instructed in elementary or secondary education at home, in accordance with the laws in which the adopted child's home is located; or
- the child is in independent study elementary or secondary education program, in accordance with the laws in which the adopted child's education program is located, which is administered by the local school or school district; or
- the child is incapable of attending school on a full-time basis due to their medical condition, which incapacity is supported by annual information submitted by the adoptive parents as part of the certification. If the adoptive parent indicates that the child is unable to attend school due to a medical condition, the LDSS must ask the adoptive parent for documentation of the condition by a physician, physician assistant, nurse practitioner under the supervision of a physician, or a licensed psychologist.

2. Continuing Title IV-E eligibility for older youth

The LDSS must send a letter and certification form to the adoptive parents of a Title IV-E eligible hard-to-place adopted child who was 16 years old before the adoption agreement became effective. The letter and form must be sent at least one month before the child's 18th birthday and asks the adoptive parents to provide the necessary information to verify that the adopted child satisfies employment, education, or medical conditions to maintain Title IV-E eligibility.

This procedure must be repeated on the child's 19th and 20th birthdays, as long as the adoptive parents continue to be legally responsible for the support of the child or the child continues to receive any support from the parents.

A reasonable time for the return of the certification form should be indicated in the letter or on the certification form. If the form is not returned by the suggested due date, it is recommended that the form be sent a second time. If there is no response to the second inquiry, the adoptive parents are to be informed in writing that authorization of adoption subsidy payment will be withheld until the necessary certification is received. Adoption subsidy payments will resume as of the date of the receipt of the required certification.[4]

Copies of all inquiry letters, and all certifications replying to the inquiry, are to be retained as part of the adoption subsidy payment record for at least six years from issuance of the inquiry letter, and accessible for potential audit purposes.

3. Continuing subsidy after death of adoptive parents

Upon notification of the death of the sole or surviving adoptive parent who was receiving adoption subsidy payments on behalf of the child who is over the age of 18 at the time of death, the LDSS responsible for the adoption subsidy payment must notify the child of the procedures for continuing adoption subsidy and the child's right to be involved in the process. Because the

[4] OCFS. "Changes Impacting Adoption Assistance Payments" (16-OCFS-LCM-02).

child is no longer eligible for Title IV-E adoption assistance because of the death of the last surviving adoptive parent, the subsidy must be changed to a state adoption subsidy.

If the adoptive parents die after the youth turns 18 but before the youth turns 21, subsidy payments must continue to be made to [SSL §453(1)(e)-(g)]:

- A legal guardian, preferably a relative or other adult who has a relationship with the youth, is willing to take responsibility for the youth, and the youth consents to their appointment as legal guardian; or
- The adopted youth, if a legal guardian cannot be appointed: if there is no person to serve as the legal guardian or the courts will not appoint a youth over 18 a legal guardian, or the youth does not consent to the appointment of a guardian, and the social services district determines that the youth "demonstrates the ability to manage such direct payments;" or
- A representative payee designated by the LDSS with instructions that the payments must be used strictly for the adopted youth.

The representative payee may be:

- an employee of the LDSS (when there is no conflict of interest); or
- an employee of the LDSS where the youth lives, if it is different than the LDSS responsible for making the payments; or
- a voluntary authorized agency with a previous history with the youth when the LDSS does not have sufficient or appropriate staff to serve as the payee; or
- an individual other than an employee of a LDSS or a voluntary authorized agency.

The process for identifying a representative payee is outlined in "Changes in Adoption Subsidy: Medicaid under the Provisions of COBRA, Subsidy Eligibility, and the Review and Approval of the Subsidy Agreement" (09-OCFS-ADM-14), page 14. The LDSS **may not** select a youth's biological parent whose rights were terminated or who executed a surrender.

When the sole or surviving adoptive parent with whom an adoption subsidy agreement was made dies before the adoptive child reaches the age of 18, maintenance subsidy payments will be made to a court-appointed legal guardian or custodian of the child until the child reaches the age of 21. However, the child would no longer be eligible for Title IV-E adoption assistance, and the subsidy must be changed to a state adoption subsidy [SSL §453(1)(a); 18 NYCRR 421.24(e)(4)].

Medical assistance

Upon the death of persons who have adopted the child prior to the child's 21st birthday, medical assistance in the form of an NYS medical subsidy payment continues and must be made to the legal guardian of the child until the child reaches 21 years of age, as long as the child would have been eligible for a medical subsidy at the time the adoptive parents applied for an adoption subsidy.

For Title IV-E medical assistance coverage, the LDSS must determine the child's continued eligibility or non-eligibility before these payments can continue. If the child is handicapped, medical assistance may continue [18 NYCRR 421.24(e)(4)(i-ii)].

If a child is ineligible for Title IV-E medical assistance, NYS medical subsidy payments can be made if, before the death of the adoptive parents, the child was eligible for and the adoptive parents received Title IV-E adoption assistance payments, or if the child was not Title IV-E

eligible but had been eligible for a medical subsidy at the time the adoption placement agreement was signed [SSL §454.5]. Such payments may be paid to the legal guardian of the child until the child has attained the age of 21 or may be paid directly to a provider of medical care, services, or supplies [18 NYCRR 421.24(e)(4)(iii)].

4. Suspension or termination of subsidy

Although adoptive parents are expected to verify the continuation of the adoptive subsidy, the LDSS may not suspend or terminate the subsidy if the parent does not respond. There are very specific, narrow federal criteria under which an adoption subsidy may be suspended or terminated, and they do not include failure by the adoptive parent to respond to the request for certification.

If the adoptive parent does not respond to the first letter sent by the LDSS, a second letter should be sent. If there is no response to the second letter, OCFS recommends that, if possible, the LDSS place a phone call to the adoptive parents. The LDSS is not allowed to make any intensive or intrusive inquiry into the adoptive family's life.

If, however, the LDSS becomes aware that the adoptive parents are no longer legally responsible for the adopted child or that they do not provide any support for the adopted child, the adoption subsidy payments must stop as of the date of the change in circumstances [SSL §453(1)(c)].

Practice Tip: Verifying adoptive parents' support for the child

There are cases where an adoptee, current caregiver, court, attorneys, or other concerned individuals notify the LDSS that an adopted child is no longer receiving any support from the adoptive parents. When the LDSS has reasonable cause to suspect that the adoptive parents are no longer providing any support, the LDSS must follow up to verify that the adoptive parents are continuing to provide support to the adopted child.

Follow-up may include contacting the adoptive parents by letter or phone, or a visit to the home when other means of contact have not been successful. In these cases, the adoptive parents will be required, as a condition for the continuation of the subsidy payments, to produce evidence of the support that is being provided to the adopted child. A mere statement from the adoptive parents is not adequate verification.

The federal and state standard is "any support," so the LDSS cannot mandate a dollar-for-dollar accounting of the subsidy payment. The operational definition of "any support" is support that is directly for the benefit of the adopted child to meet needs with an identifiable value, such as food, clothing, education, medical care, and shelter. Acceptable evidence may include receipts or other written documentation that demonstrates that the adoptive parent is providing direct financial support to the adopted child.

The adoptive parents' failure to produce such evidence would be the basis for termination of adoption subsidy payments.

Source: "Changes Impacting Adoption Assistance Payments" 16-OCFS-LCM-02.

Examples of a change in circumstances that warrant termination of the payments include a child's marriage, death, or entry into the military, and any other circumstance whereby adoptive parents are not providing any support to the child. The adoptive parents must be given written

notice of the termination of subsidy payments and their right to a fair hearing to challenge termination of the payments.

According to the U.S. Department of Health and Human Services (HHS), "a parent is considered no longer legally responsible for the support of a child when parental rights have been terminated or when the child becomes an emancipated minor, marries, or enlists in the military. 'Any support' includes various forms of financial support. The state may determine that payments for family therapy, tuition, clothing, maintenance of special equipment in the home, or services for the child's special needs, are acceptable forms of financial support."[5]

Adoption subsidy is not suspended or terminated if the adopted child returns to foster care. The subsidy must continue as long as the parent is legally responsible for the support of the child and provides any support. Adoptive parents are not categorically exempted from the obligation to contribute toward the support of their child in foster care (18 NYCRR Part 422). Therefore, if a child receiving adoption subsidy re-enters foster care, the LDSS must make a case-by-case evaluation to determine the appropriateness of a referral to the child support enforcement unit.

M. Subsidy across state lines

Federal law requires that states protect the interests of children who are receiving Title IV-E adoption assistance and move to another state. The state where the Title IV-E eligible child and the child's family live, rather than the state of origin, is responsible for providing Medical Assistance through Medicaid (MA). In addition, the state responsible for the adoption subsidy agreement must provide health insurance coverage for children with special needs who are receiving state-funded adoption subsidy (P.L. 96-272).

When a NYS child who is handicapped or hard to place is adopted by a resident of another state, the adoptive parent may be eligible for adoption subsidy, based on the same criteria used for children adopted in-state. Also, when a child adopted with subsidy in NYS moves to another state with their adoptive parents, the adoption subsidy is continued in accordance with the adoption subsidy agreement [18 NYCRR 421.24(d)(7)].

1. Medical assistance

The state in which the child lives is responsible for providing MA to the child, even when another state is providing the Title IV-E Adoption Assistance payments. LDSSs in NYS are not responsible for providing MA to Title IV-E eligible children if they live in another state. Similarly, LDSSs in NYS must provide MA to Title IV-E eligible children from other states who live within their district.

If the adoptive parents have difficulty obtaining medical coverage for the child in their new state of residence, they have the right to request a fair hearing in that state. OCFS regulations provide that if the request for a fair hearing is timely (at least 10 days before the date of discontinuing MA), the medical payment will be continued until the fair hearing decision is issued in the new state.

The LDSS responsible for the adoption subsidy/assistance payment still must contact the adoptive parents to verify continuing eligibility for adoption subsidy when the adoptive family lives out-of-state. If it is determined that the adoptive parents are no longer legally responsible for the child or are no longer providing any financial support for the child, the district must notify

[5] HHS. Office of the Administration for Children & Families. *Child Welfare Policy Manual*. ACYF-CB-PIQ-98–02.

the adoptive parents' state of residence that the child is no longer eligible for medical assistance and adoption subsidy/adoption maintenance payments must cease [SSL §453(1)(a) & (c); 18 NYCRR 421.24(c)(5)].

2. Interstate Compact on Adoption and Medical Assistance (ICAMA)

Close coordination among states is essential to serve children who are receiving adoption assistance. The process for facilitating this is the Interstate Compact on Adoption and Medical Assistance (ICAMA).

ICAMA provides specific guidelines to states that must coordinate benefits and services for children who are receiving federal adoption assistance or state adoption subsidy and are moving to another state. ICAMA is different from, and not connected in any way to, the Interstate Compact on the Placement of Children (ICPC).

Through ICAMA, NYS participates in reciprocal agreements with many, but not all states, to authorize Medicaid for non-Title IV-E eligible children who move into NYS and are eligible for Medicaid under the COBRA provisions. LDSSs must authorize Medicaid for such adopted children. Adoptive parents must complete a Medicaid application with sufficient information to establish a case (i.e., name, date of birth, Social Security number, and address). Cases must be renewed annually without a financial determination unless OCFS/BPS informs the Medicaid program that the adopted child's status has changed.

If an adopted child who is living in NYS with an adoption assistance/subsidy agreement from another state loses Title IV-E eligibility for adoption assistance or eligibility for Medicaid under COBRA, the LDSS must make a full Medicaid eligibility determination based on the individual's current circumstances. Continuous coverage provisions apply.

There are specific procedures and forms that caseworkers must use to initiate the ICAMA process, which is coordinated in NYS by OCFS/BPS. These are described in the OCFS policy directive, "Interstate Compact on Adoption and Medical Assistance (ICAMA)" (08-OCFS-INF-06). Caseworkers working with adoptive families planning to move into or out of New York State should refer to the directive and follow the specified process, OCFS/BPS is the coordinating body within New York State for ICAMA and can assist caseworkers if needed.

Glossary

Certain terms are defined in this glossary using statutory or regulatory language. Citations for the statute or regulation appear in parentheses or brackets. Abbreviations are as follows:

DRL: NYS Domestic Relations Law

FCA: NYS Family Court Act

SSL: NYS Social Services Law

PL: NYS Penal Law

P.L.: Public Law (federal)

NYCRR: NYS Codes, Rules, and Regulations

LDSS: Local Department of Social Services

VA: Voluntary Authorized Agency

Abandonment: One of the legal grounds for termination of parental rights, where the parent or parents whose consent to the child's adoption would otherwise be required has abandoned the child for the period of six months immediately prior to the date on which the TPR petition is filed in court [SSL §384-b(4)(b)].

Abused Child: A child less than 18 years of age whose parent or other person legally responsible for their care, as cited in FCA §1012(e):

- inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; or
- creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; or
- commits, or allows to be committed, an act of sexual abuse against such child as defined in the Penal Law.

Adoption: The legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person. (DRL §110)

Adoption Album Photolisting: Online service that allows prospective adoptive parents to view and search a database of children legally freed for adoption.

Adoption Assistance and Child Welfare Act of 1980: Federal law that established foster care as a temporary service. Family involvement, prevention of foster care placement, assessment, planning, and permanency became core elements of child welfare practice. Established first federal funding of subsidies for adoptive placements (P.L. 96–272).

Adoption and Safe Families Act of 1997 (ASFA): Federal law that emphasized the health and safety of children as the paramount concern that must guide all child welfare services. ASFA set the time limits within which children in foster care should be placed with permanent families and enacted a system of accountability for child welfare services (P.L. 105-89).

Adoption Information Registry: Registry maintained by the New York State Department of Health (DOH) that allows a person who is age 18 and over who was born and adopted in New York State, birth parent(s), and adult biological sibling(s) of an adult adoptee to receive non-identifying information or identifying information (with corresponding registration and mutual consents from the parties).

Adoption Planning: A process that includes identifying the needs of the child, selecting a potential adoptive family, completing a home study of that family, beginning the placement process, supervising the placement, and finalizing the adoption.

Adoption Subsidy: A monthly payment made to adoptive parents who have adopted a child who meets New York State eligibility standards as a handicapped or hard-to-place child. See **Chapter 13** of this guide.

Adoptive Placement Agreement (APA): Form LDSS-0570 that must be signed by prospective adoptive parents and the agency placing the child for adoption. It is signed at the time the child is placed in the home of the prospective adoptive parents for adoption or, if the child has been residing in the home in a foster care placement, at the time the foster parents make the decision to adopt the child.

Adult Permanency Resource: A caring, committed adult who has been determined by a LDSS to be an appropriate and acceptable resource for a youth and is committed to providing emotional support, advice, and guidance to the youth and to assist the youth as the youth makes the transition from foster care to responsible adulthood [18 NYCRR 430.12(f)].

Another Planned Permanent Living Arrangement (APPLA): A permanency planning goal to assist foster care youth 16 years of age or older in their transition to self-sufficiency by connecting the youth to an adult permanency resource, equipping the youth with life skills, and, upon discharge, connecting the youth with any needed community and/or specialized services [18 NYCRR 430.12(f)].

Approved Foster Home: A home that has received approval to provide foster care for a *specific* child by a relative, as defined in 18 NYCRR 443.1(h) after an agency home study finds that the home has met approval requirements [18 NYCRR 443.1(f)].

Attorney for the Child: An independent attorney appointed by the Family Court and paid by the county to solely represent the child's interests. Each child in care is appointed their own attorney by the court.

Best Interests of the Child: The best possible decision from the available options for the child, taking into account their physical, psychological, cognitive, and emotional needs. This term, undefined in statute, is used by Family Court, particularly in justifying child removals and by agencies that are filing a petition to terminate parental rights.

Birth Parent: The child's biological parent.

Case Consultation: A discussion held to prepare for a permanency hearing unless a Service Plan Review is scheduled within 60 days of the next permanency hearing. The purpose is to assist with development of the permanency hearing report and to address case issues such as

progress, status, safety, appropriateness of placement and permanency goal, service plan, and visiting plan. Participants must include the case planner/caseworker, birth parent, child age 10 and older if in the child's best interests, and foster parent, pre-adoptive parent, or relative/other person with whom the child has been placed by the court [18 NYCRR 428.9(b)].

Certified Foster Home: A home that has received a certificate to provide foster care after an agency home study finds that the family meets the certification requirements. The certificate limits the number of children to be placed in the home and states any restrictions on child characteristics [SSL §376; 18 NYCRR 443.1(b)].

Child Case Record (CCR): The record opened in CONNECTIONS when a child is freed for adoption. Once a child is legally freed for adoption, the child's information must be maintained in a stage separate from the Family Services Stage used for documentation when the child was in foster care. The CCR is an individual stage, created to document casework activities and services for each legally freed child. A separate CCR must be created for each legally freed child in a family.

Concurrent Foster Parent Certification/Approval and Adoptive Parent Approval: Application for approval as an adoptive parent at the same time as an application to become a certified or approved foster parent. The applicant is not required to submit dual documentation to the authorized agency for such approval, but they must apply either through an LDSS or through a VA that provides both foster care and adoptive services.

Concurrent Planning: Planning that works toward returning the child home while simultaneously developing an alternative permanency plan for the child. Concurrent planning recognizes that the parent(s) may be unable or unwilling to establish a safe environment for the child and pursues another permanent goal for the child.

Conditional Surrender: A form of voluntary surrender of parental rights, in which the birth parent designates someone who can adopt the child and/or provide contact between the birth parent and the child after the surrender and after the adoption of the child.

Confidentiality: A basic principle and legal requirement for foster and adoptive parents, caseworkers, and others involved in providing foster care and/or adoptive services to not discuss a child's family background, personal history, or special needs with anyone other than those who have professional responsibility for some aspect of a child's care and supervision or are otherwise authorized by law to have access to such information.

Court Order: Written or oral directive of the court requiring a party to take a particular action or refrain from taking an action. An oral order of the court is only effective if made in open court and on the record.

Custody: Physical and legal responsibility for a child and authority to act in place of the parent, granted by the court. Examples of physical responsibility are food, shelter, and necessary transportation. A foster child is in the care and custody of the commissioner of an LDSS. A child who is freed for adoption is in the custody and guardianship of the commissioner of the LDSS.

Date Certain: A specific day set by the court when a permanency hearing will be held, not just a general time frame such as within six months. The court must set a date certain for each initial and every subsequent permanency hearing.

Diligent Efforts: Attempts by an agency to assist, develop, and encourage a meaningful relationship between the child and their parents through activities such as assessing what services the family needs, providing, or arranging for those services, and making arrangements for child/parent visits.

Diligent Search: The attempt to locate a missing mother, legal or alleged father, legal guardian, or responsible relative of a child placed in foster care. The purpose is to locate and involve missing parents in the planning process or to free the child for adoption. It may be necessary to satisfy the court that adequate efforts were made to locate the parents and help the court decide how to handle notifying the parents about an upcoming court proceeding.

Disruption: When foster parents decide they are unable to continue caring for a particular child (for a variety of reasons) and that child must leave their home. Disruption also occurs when the child has been placed for adoption but leaves the pre-adoptive home before finalization.

Family Adoption Registry: Part of the Adoption Album where adoption staff or approved adoptive parents enter family demographic information that can be used to match the family's profile with photolisted children. Caseworkers also can search the Family Adoption Registry, using specific criteria, to find families for children.

Family Assessment and Service Plan (FASP): Documentation of assessment and service planning within specific time frames required by OCFS regulations.

Family Court: A court designated to hear matters related to family members. This court handles abuse and neglect proceedings and reviews voluntary placements, Person in Need of Supervision, juvenile delinquency, destitute child and return to foster care cases, termination of parental rights, child support, paternity, adoption, guardianship, custody, and family offenses.

Family Photolisting: An option to include a photo with the information on file with the Family Adoption Registry, available to families that have been approved as adoptive parents by an OCFS-approved authorized agency and are registered in the Family Adoption Registry.

Finalization: The final step of the adoption process. The attorney, on behalf of the adoptive parents, files the appropriate legal documents, including the adoption petition, to finalize the adoption. After a court hearing, the custody and guardianship of the child are legally transferred to the adoptive parents.

Finding: What the court determines the facts of the case to be, based on the evidence presented.

Foster Board Rate: Monthly payment to foster parents who are caring for children in foster care. Adoption subsidy payments to adoptive families are equal to the applicable foster board rate which was paid or would have been paid for the child if they were in a foster boarding home. Subsidy payments are established according to the four rate categories: basic, special, exceptional, and extraordinary [SSL §451(4); 18 NYCRR 421.24(a)(4)].

Foster Care: Foster care of children means all activities and functions provided concerning the care of a child away from their home 24 hours per day in a foster family free home or a duly certified or approved foster family boarding home or a duly certified group home; agency boarding home; child-care institution; supervised setting; qualified residential treatment program; program for youth who have been sex trafficked or are at risk of sex trafficking; specialized program to serve prenatal, postpartum or parenting youth; health care facility; or any combination thereof [18 NYCRR 427.2(a)].

Fostering Connections to Success and Increasing Adoptions Act of 2008: Federal legislation that expanded adoption incentives to states and extended eligibility for Title IV-E foster care, adoption assistance, and kinship guardianship assistance payments.

Freed for Adoption: When a foster child's custody and guardianship are committed to a LDSS or VA through a surrender or a termination of parental rights proceeding based on grounds of abandonment, permanent neglect, mental illness, or intellectual disability, severe or repeated abuse, or death. This also includes a child whose parent or parents have died during the period in which the child was in foster care and for whom there is no surviving parent who would be entitled to notice or consent [SSL §§383-c, 384, 384-b; FCA §1087(b)].

Guardianship: Physical and legal responsibility of a child granted to a person or authorized agency to act as parents by court order. Guardianship may be granted by the court when parental rights have been terminated. A guardian of the person has the right to make decisions concerning the child (FCA §661).

Hague Convention Agreement: International treaty approved in 1993 as the "Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions." It governs the adoption process and protects children who are adopted across national borders.

Handicapped Child: A child who possesses a specific physical, mental, or emotional condition or disability of such severity or kind which, in the opinion of the OCFS, would constitute a significant obstacle to the child's adoption. As cited in 18 NYCRR 421.24, such conditions include, but are not limited to:

- any medical or dental condition which will require repeated or frequent hospitalization, treatment, or follow-up care;
- any physical handicap, by reason of physical defect or deformity, whether congenital or acquired by accident, injury, or disease, which makes or may be expected to make a child totally or partially incapacitated for education or for remunerative occupation, as described in sections 1002 and 4001of the Education Law; or makes or may be expected to make a child handicapped, as described in section 2581 of the Public Health Law;
- any substantial disfigurement, such as the loss or deformation of facial features, torso, or extremities; or
- a diagnosed personality or behavioral problem, psychiatric disorder, serious intellectual incapacity, or brain damage which seriously affects the child's ability to relate to his peers and/or authority figures, including mental retardation or developmental disability.
- The child was determined to need an extraordinary level of care in accordance with 18 NYCRR 427.6(f)(1).

Hard-to-place Child: As cited in 18 NYCRR 421.24(a)(3), a child, other than a handicapped child:

- who has not been placed for adoption within six months from the date the child's guardianship and custody were committed to the LDSS official or the VA; or
- who has not been placed for adoption within six months from the date a previous adoption placement terminated, and the child was returned to the care of the LDSS official or the VA; or

- who meets any of the conditions listed in 18 NYCRR 421.24(a)(3)(a)-(f), which OCFS has identified as constituting a significant obstacle to a child's adoption, notwithstanding that the child has been in the guardianship and custody of the LDSS official or the VA for less than six months; or
- is one of a group of two siblings (including half-siblings) who are free for adoption, and it is considered necessary that the group be placed together pursuant to sections 18 NYCRR 421.2(e) and 421.18(d); and
  - at least one of the children is 5 years old or older; or
  - at least one of the children is a member of a minority group which is substantially overrepresented in New York State foster care in relation to the percentage of that group to the State's total population; or
  - at least one of the children is otherwise eligible for subsidy in accordance with the provisions of this subdivision; or
- is the sibling or half-sibling of a child already adopted and it is considered necessary that such children be placed together pursuant to 18 NYCRR 421.2(e) and 421.18 (d); and
  - the child to be adopted is 5 years old or older; or
  - the child is a member of a minority group which is substantially overrepresented in New York State foster care in relation to the percentage of that group to the State's total population; or
  - the sibling or half-sibling already adopted is eligible for subsidy or would have been eligible for subsidy if application had been made at the time of or prior to the adoption; or
- is one of a group of three or more siblings (including half- siblings) who are free for adoption, and it is considered necessary that the group be placed together pursuant to 18 NYCRR 421.2(e) and 421.18(d); or
- is 8 years old or older and is a member of a minority group which is substantially overrepresented in New York State foster care in relation to the percentage of that group to the State's total population; or
- is 10 years old or older; or
- is hard to place with parents other than the child's present foster parent because the child has been in care with the same foster parent for 12 months or more prior to the signing of the adoption placement agreement by such foster parent and has developed a strong attachment to the child's foster parent while in such care and separation from the foster parent would adversely affect the child's development.

Home Study: The process of gathering information to determine if prospective adoptive parents can be approved as adoptive parents to adopt a child. Agency workers (homefinders) visit the home and collect detailed information about the applicants, as well as other household members and potential caregivers for the child.

Indian Child Welfare Act (ICWA): Federal law intended to prevent unnecessary removals and placements of Native American children into non-Native-American homes. ICWA established minimum standards for the placement of Native American children in foster or adoptive homes

and also clarified a tribe's/nation's jurisdiction over child welfare proceedings involving Native American children.

Interstate Compact on Adoption and Medical Assistance (ICAMA): A compact involving 49 states (including New York), the District of Columbia and Puerto Rico. It is the mechanism used to coordinate health care in interstate adoption cases. Interstate cooperation is essential in light of the ever-increasing numbers of children placed for adoption across state lines and for families with adopted children relocating outside of the state from which they receive Title IV-E Adoption Assistance or, in many cases, non-Title IV-E adoption subsidy.

Interstate Compact on the Placement of Children (ICPC): Establishes responsibility for agencies in the "sending" and "receiving" states for interstate placement of a child in foster care or as a preliminary to a possible interstate adoption and requires placement of the child only after the designated Compact authority (OCFS in New York State) in the receiving state has approved the placement.

Kinship Caregiver: Relatives, godparents, neighbors, family friends, or adults with a positive relationship to the child or the child's family, an unrelated person where placement with such person allows half siblings to remain together, and the parents or stepparents of one of the half siblings is a relative of such person who are providing care to a child.

Justice Center: The New York State Justice Center for the Protection of People with Special Needs, which maintains a Staff Exclusion List (SEL) of individuals who have committed serious or repeated acts of abuse or neglect against people with special needs in programs under the Justice Center's jurisdiction. As part of an adoptive home study, the LDSS or VA must submit an inquiry to determine whether an applicant to adopt and/or any other person over the age of 18 who lives in the applicant's home is on the SEL [18 NYCRR 421.16(q)].

Life Book: A combination of a story, diary, and scrapbook that has information about a foster child's life experiences, with such items as pictures of birth family and foster families, report cards, souvenirs of special events, and medical history. Children take their Life Books with them when they are discharged from foster care.

Mental Illness or Intellectual Disability: Two distinct grounds for terminating parental rights. Although they are separate grounds, the same statutory sections govern them and the evidentiary elements of each are essentially the same. The child's parent or parents are presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately before the date on which the petition has been filed in court. Requires testimony of a psychiatrist or a psychologist [SSL §384-b (4)(c)].

National Training and Development Curriculum (NTDC): The OCFS-approved training program for both foster and adoptive parents. It is expected that it will be used statewide by 2025. The program replaces GPSII/MAPP training and features a combination of self-assessment, classroom sessions, and online modules.

Neglected Child: As cited in FCA §1012(f), a child less than 18 years of age:

- whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of a parent or other person legally responsible for the child to exercise a minimum degree of care:

  - in supplying the child with adequate food, clothing, shelter, education, medical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or
  - in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; by misusing a drug or drugs; by misusing alcoholic beverages to the extent that the person loses self-control of their actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that the respondent loses self-control of their actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in FCA §1012(f)(i); or
- who has been abandoned by the child's parents or other person legally responsible for the child's care, in accordance with the definition and other criteria set forth in SSL §384-b(5).

National Electronic Interstate Compact Enterprise (NEICE): A web-based system that allows participating states to share records swiftly and securely and to exchange information in interstate adoptions and foster care placements.

Order of Disposition: An order of the court detailing the result of a judicial proceeding by withdrawal, settlement, order, judgment, or sentence.

Parent Locator Services: The Federal Parent Locator Service (FPLS) and the State Parent Locator Service (SPLS) are part of a computerized network of information designed to locate individuals who owe child support. LDSSs can request information from these databases as part of their diligent efforts to locate parents of children.

Permanency Hearing: A hearing held for the purpose of reviewing the foster care status of the child and the appropriateness of the permanency plan developed by the LDSS or VA. The standards for permanency hearings for abused or neglected children, destitute children, children voluntarily placed in foster care, and completely freed foster children are set forth in Article 10-A of the Family Court Act. The initial hearing must be held no later than eight months after removal, and subsequent permanency hearings must be held every six months thereafter. When a child is freed for adoption at a court hearing, the initial freed child permanency hearing must be held within 30 days unless the court determines that it should be held immediately upon completion of the hearing at which the child was freed, provided adequate notice has been given (FCA §1089). The period between permanency hearings differs for children placed as PINS or JDs (unless they are completely freed for adoption), but generally are held annually.

Permanency Hearing Report: A report submitted by the LDSS or VA to the court and the parties prior to each permanency hearing regarding the health and well-being of the child, the reasonable efforts that have been made since the last hearing to promote permanency for the child, and the recommended permanency plan for the child [FCA § 1087(e)].

Permanency Planning: Planning by agencies to protect a child's right to grow up within a permanent family. Agencies develop plans to place children in living situations that are safe, will meet their needs, and give them stability for the longest period of time.

Permanent Neglect: One of the legal grounds for termination of parental rights. A permanently neglected child is a child in the care of an authorized agency whose parent or custodian has failed to substantially and continuously or repeatedly maintain contact with the child, or to plan for the future of the child, although physically and financially able to do so. This must have occurred for a period of either at least one year following the date the child came into the care of an authorized agency or 15 out of the most recent 22 months following the date the child came into the care of the agency, and despite the authorized agency's diligent efforts to encourage and strengthen the parental relationship when such efforts would not be detrimental to the best interests of the child [SSL §384-b(7)(a)].

Petition: Formal written application to the court requesting action by the court.

Preventive Services: Those supportive and rehabilitative services provided to children and their families for the purpose of: averting a disruption of a family which will or could result in placement of a child in foster care; enabling a child who has been placed in foster care to return to their family at an earlier time than would otherwise be possible; or reducing the likelihood that a child who has been discharged from foster care would return to such care [SSL §409; 18 NYCRR 423.2(b)].

Putative Father Registry/Putative Parent Registry: A confidential registry of fathers and other parents of children born out of wedlock. The registry maintains names and addresses of any person who has filed a notice to claim parentage, have acknowledged paternity of a child, or have been determined by a court to be the parent of a child born out of wedlock [SSL §372-c; 23-0CFS-ADM-19].

Reasonable Efforts: A finding by the court that reasonable efforts were made to prevent a child's removal from the child's home, or that reasonable efforts were made to enable a foster child to safely return home (or to finalize the child's permanency plan if it is not to return home). In both cases, the health and safety of the child are the paramount concern in determining reasonable efforts. A court may find that reasonable efforts are not required due to certain circumstances, which are spelled out in the law [FCA §1039(b)].

Repeatedly Abused: A legal ground for termination of parental rights, applicable when the parent has abused the child or another child in their care more than once over the previous five years [SSL §384-b(8)(b)].

Service Plan Review (SPR): A periodic formal meeting to review how each case of a child in foster care is progressing. The purpose of the case review is to address whether the family and others are taking the steps they agreed to in the service plan and whether the child will be able to live in a safe, permanent home by returning home, living with relatives, being freed for adoption, or being discharged to another planned living arrangement with a permanency resource. The review must occur between 60 to 90 days from removal and every six months thereafter [18 NYCRR 428.9 and 430.12(c)(2)].

Severely Abused: One of the legal grounds for termination of parental rights. A child is considered to have been severely abused by their parent if:

- The child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances showing a depraved indifference to human life, which resulted in serious physical injury to the child, as defined in PL §10.00(10); or

- The child has been found in Family Court to be an abused child, as defined in FCA §1012(e)(iii), as a result of the parent's acts. The parent must have committed or knowingly have allowed to be committed a felony sex offense as defined in certain sections of the PL listed in SSL §384-b(8)(a)(ii); or
- The parent has been convicted of murder in the first degree, murder in the second degree, manslaughter in the first degree, or manslaughter in the second degree and the victim was another child of the parent, another child for whom the parent was legally responsible, or another parent of the child. This requirement also applies to a parent who has been convicted of an attempt to commit any of the foregoing crimes; or
- The parent has been convicted of criminal solicitation, conspiracy, or criminal facilitation, as defined in penal law, for conspiring, soliciting, or facilitating any of the foregoing crimes and the victim or intended victim was the child or another child of the parent or another child for whom the parent was legally responsible; or
- The parent has been convicted of assault in the second degree, assault in the first degree, or aggravated assault, as defined in penal law, upon a person under 11 years of age and the victim of any such crime was the child, another child of the parent, or another child for whom the parent was legally responsible. This requirement also applies to a parent who has been convicted of an attempt to commit any of the foregoing crimes; or
- The parent has been convicted in another jurisdiction of an offense which includes all of the essential elements of any crime listed above.

The LDSS or VA must have made diligent efforts to encourage and strengthen the parental relationship unless the court has made a previous finding that reasonable efforts for the child to return safely to the child's home are not required [SSL §384-b(8)(a)].

Special Needs: A category for determining whether a child is eligible for adoption assistance under the federal Title IV-E Adoption Assistance Program and state non-recurring adoption expenses. A child meets the definition of this category when:

- the state has determined that the child cannot or shall not be returned to the home of their parents;
- the child is handicapped under 18 NYCRR 421.24(a)(2) or hard to place under 18 NYCRR 421.24(a)(3)(iii) ; and
- a reasonable but unsuccessful effort has been made to place the child with appropriate adoptive parents without adoption assistance, except where such an effort would not be in the best interests of the child [42 U.S.C. §673; SSL §453-a].

Surrender: A signed and notarized document transferring custody and guardianship of the child to a LDSS or VA. In the case of a child in foster care, the child is voluntarily surrendered to the LDSS commissioner, who is empowered to consent to the child's adoption. The parent who executes the surrender no longer has control over the child's adoption nor the right to visit or plan for the child. A surrender can be judicial (executed before a judge) or extra-judicial (executed by the parent with two witnesses in the presence of a notary public). See definition of a conditional surrender.

Termination of Parental Rights (TPR): Involuntary commitment of the guardianship and custody of a child to a LDSS or VA by a court proceeding. Grounds for TPR include abandonment, permanent neglect, mental illness, or intellectual disability of the parent, severe or repeated abuse of the child, or death. Each ground has specific statutory standards when the court may terminate parental rights [SSL §384(b)]. See **Chapter 5** of this guide.

Title IV-E of the Social Security Act: an important federal funding stream for both foster care and assistance to adoptive families. It provides federal reimbursement for 50% of the maintenance and administrative costs of foster care for children who meet individual eligibility requirements. When a Title IV-E eligible child is adopted, reimbursement is provided for adoption assistance/subsidy. In order to be eligible for Title IV-E adoption assistance, the adoption subsidy agreement must be signed and in effect before the adoption is finalized.

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