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Informational Letter

Transmittal:	08-OCFS-INF-07
To:	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies
Issuing Division/Office:	Strategic Planning and Policy Development
Date:	May 21, 2008
Subject:	Preparation for the Elimination of the “Opt-Out” Provision for Conducting Criminal History Record Checks
Suggested Distribution:	Directors of Social Services Foster Care Supervisors Adoption Supervisors Homefinding Supervisors Staff Development Coordinators
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Attachments:	No
Attachment Available Online:	NA

Filing References, if applicable

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
07-OCFS-ADM-01		18 NYCRR Parts 421 & 443	SSL 378-a(2) Adam Walsh Child Protection Act of 2006 (P. L. 109-248)		

I. Purpose

The purpose of this Informational Letter (INF) is to remind social services districts and voluntary authorized agencies of anticipated changes in New York State statute regarding criminal history record check requirements. Such changes will reflect federal statutory mandates that must be enacted by October 1, 2008. These anticipated changes will cause New York State's standard to require that applicants to become foster and adoptive parents who were convicted of certain categories of felonies, or persons who have already been certified or approved to be foster or adoptive parents who are subsequently (after October 1, 2008) convicted of certain categories of felonies, must be disqualified from becoming foster or adoptive parents, or must have their certification or approval revoked. The changes in New York State law have not taken effect as of yet. However, legislation authorizing this change has been introduced in the state legislature, is expected to be enacted, and has an October 1, 2008 effective date. Because the disqualification/revocation will be **mandatory**, this INF offers some recommendations and suggestions on how to avoid situations that may prevent the continued placement of a child in an otherwise suitable home, and to prevent the unnecessary disruption of an otherwise appropriate placement. This guidance is the same as provided in 07-OCFS-ADM-01, issued February 7, 2007 (see pages 29-31).

II. Background

The federal Adam Walsh Child Protection Act of 2006 (P. L. 109-248) (Walsh Protection Act) amended various Title IV-E State Plan requirements that New York State must comply with to continue to receive federal reimbursement for foster care and adoption assistance. Section 152 of the Walsh Protection Act eliminated the ability of states to "opt out" of the Title IV-E criminal history record check requirements for prospective foster and adoptive parents. The federal amendment requires that states comply with the new federal requirements no later than **October 1, 2008**.

In 1999, New York State enacted the federal criminal history record check requirements of the federal Adoption and Safe Families Act (ASFA) by enacting section 378-a(2) of the Social Services Law (SSL). The federal standards set forth in 42 U.S.C. 671(a)

provide that an applicant for certification or approval as a foster or adoptive parent must be denied if such person was convicted of a felony that falls within one of the following categories of crimes: (i) child abuse or neglect; (ii) spousal abuse; (iii) crime against a child; (iv) crime involving violence, including rape, sexual assault or homicide; or (v) drug or assault conviction within five years of the application. In 1999, New York State's criminal history record check statute (section 378-a(2) of the SSL) provided for the **mandatory** disqualification of an applicant to be a foster or adoptive parent if he or she was convicted of one of the preceding categories of felony crimes.

In 2000, New York State "opted out" of the federal criminal history record check requirements. In "opting out," New York State amended section 378-a(2) of the SSL to eliminate mandatory disqualifying crimes and replaced that standard with the category of **presumptive** disqualifying crimes. This standard, which exists today, provides that if a person is convicted of a felony that falls under one of the categories noted above, the person's application for certification or approval as a foster or adoptive parent must be denied unless the person is able to rebut the presumption. A person may rebut the presumption only if he or she is able to demonstrate to the authorized agency to which he or she applied that: (i) such denial will create an unreasonable risk of harm to the physical or mental health of the child; and (ii) approval of the application will not place the child's safety in jeopardy and will be in the best interests of the child.

III. Program Implications

Effective October 1, 2008, in order for New York State to have a compliant Title IV-E State Plan, New York State will have to have in place the federal criminal history record check standards set forth in 42 U.S.C. 671(a)(20), including standards that provide for **mandatory** disqualification for certain felony convictions. This means New York State will no longer be able to have a presumptive disqualification standard that may be rebutted by the applicant under certain situations. New York State must revert to the standards that were originally in place in 1999 with the enactment of ASFA. An amendment to current state law (section 378-a(2) of the SSL) will have to be made. Based on the information provided by the federal government to date, the changes to federal law will only apply to new applicants, and will not be applied retroactively to persons already certified or approved. In addition, the mandatory disqualification requirements will not apply to other persons (non-applicants) over the age of 18 who reside in the home of the applicant.

As noted above, the impact of implementation of the Walsh Protection Act by October 1, 2008, will be that both social services districts and voluntary authorized agencies will have to deny an applicant for certification or approval as a foster or adoptive parent if the person was convicted of a mandatory disqualifying crime. There will no longer be an option to approve or certify that person, even if the person could have otherwise rebutted the presumption against denial, regardless of whether the placement would be supported with Title IV-E funds.

This change in federal requirements will mean for example, if a foster parent is certified or approved before the amendments to state law implementing the federal standard takes

effect (i.e., prior to October 1, 2008) and the person has a presumptive disqualifying conviction, the person would be evaluated and could be approved under the existing standard. However, if that person applied to be an adoptive parent after the effective date of New York State's implementation of the new federal standards, the person's application for approval as an adoptive parent would have to be denied and the denial would not be subject to an ability of the applicant to correct or rebut the denial. In 1999, when New York State enacted the federal ASFA provision, there were cases where a child had been in a foster home for a significant period of time, but when the foster parent applied for approval as an adoptive parent, the application had to be denied because the applicant had a mandatory disqualifying conviction, and the foster child had to be removed from the home.

This prospective change in state law to reflect federal requirements will also apply when a person seeks to function as a foster parent where the person has been a direct caregiver of the child or where the agency has been directed pursuant to section 1017 of the Family Court Act to identify relatives who are willing and able to function as foster parents of a child involved in an abuse or neglect proceeding. In addition, the new standards will apply to care provided to a child by a non-relative who thereafter seeks to function as the foster parent or adoptive parent of the child.

Given the potential impact this new federal requirement may have for prospective foster and adoptive parents beginning October 1, 2008, the Office of Children and Family Services (OCFS) offers some recommendations and suggestions on how to avoid situations that may prevent the continued placement of a child in an otherwise suitable home, and to prevent the unnecessary disruption of an otherwise appropriate placement. Before addressing them, OCFS wants to make it clear that in making decisions whether a home should be certified or approved and whether a child should be placed in a particular home, the safety of the child is the paramount concern.

- OCFS recommends that authorized agencies ascertain if they have any foster homes where the foster parent has a conviction for what is now a presumptive disqualifying crime based on the criminal history summary letter received from OCFS. Authorized agencies should ascertain if the permanency goal for the child is adoption by the current foster parent, or even if there is the potential that the foster parent will adopt the child. If that is a possibility, consider completing the adoption approval process before the new federal standards take effect on October 1, 2008. However, if a choice is made not to approve the current foster parent as an adoptive parent, and if the foster parent applies to be an adoptive parent after the effective date of New York State's implementation of the new federal standards, the authorized agency will be required to deny the person's application.
- Another option available to authorized agencies prior to the implementation of the revised criminal history record check standards is to concurrently certify or approve a person as a foster and adoptive parent, as authorized in OCFS regulation 18 NYCRR 443.9. If this is done before the effective date of the

revision to the criminal history record check standards, the person would have already been approved as an adoptive parent and no new approval would be required at the time of the adoptive placement.

- In addition to evaluating current caseloads, it is also important that authorized agencies advise new applicants for certification or approval as foster or adoptive parents early in the application process of the potential impact the new standards may have on them, especially those for whom an emergency certification or approval is sought and the child's placement in the home occurs prior to completing the criminal history record check. Such information may be helpful in the applicant's decision whether to pursue certification or approval based on his/her criminal history.

Please note that when submitting new fingerprint cards, multiple sets should be sent to OCFS to avoid having to retake the prints if they are rejected.

/s/ Nancy W. Martinez

Issued By:

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Title: Director

Division/Office: Strategic Planning and Policy Development