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Informational Letter

Transmittal:	11-OCFS-INF-05
To:	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies
Issuing Division/Office:	Strategic Planning and Policy Development
Date:	July 11, 2011
Subject:	Clarification of Adoption Study Criteria Related to Length of Marriage and Sexual Orientation
Suggested Distribution:	Directors of Services Adoption Family Home Finders / Trainers Adoption Supervisors Foster Care Supervisors
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Attachments:	No
Attachment Available Online:	N/A

Filing References

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
11-OCFS-INF-01		18 NYCRR 421.16 (e) and (h)	§ 110(1) DRL	Adoption Services Guide	

I. Purpose

The purpose of this Informational Letter (INF) is to provide clarification to local departments of social services (LDSS) and voluntary authorized agencies regarding 18 NYCRR 421.16 (e) and (h) in relation to length of marriage and sexual orientation as adoption study criteria.

II. Background

Upon receiving an Application to Adopt (LDSS Form 857 or other application approved by the Office of Children and Family Services [OCFS]), the LDSS or voluntary authorized agency must conduct an adoption study [18 NYCRR 421.15]. As part of this adoption study process, LDSSs and 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 intrinsic worth of a child, to respect and share his or her past, to understand the meaning of separation he or she has experienced, and to have realistic expectations and goals;
- Flexibility and ability to change;
- Ability to cope with problems, stress and frustrations;
- Feelings around parenting an adopted child and the ability to make a commitment to a child placed in the home; and
- Ability to use community resources to strengthen and enrich family functioning.

[18 NYCRR 421.16 (a)]

At minimum, these are the characteristics needed to be approved to adopt a child. The written adoption study prepared by the LDSS or agency should include information regarding the assessment of these characteristics and on what basis they were determined to be present or absent.

In addition, there are other factors that an LDSS or voluntary authorized agency assesses within its adoption study process. These factors include the applicant’s age, health, marital status, length of marriage (if applicable), fertility, family composition, gender preference with regard to child matching, employment and

education, religion and race, income, employment and geographical stability, child care experience, socialization and community support, child protective services history, alcohol or drug abuse, and criminal history background check.

Within these factors there are two areas that OCFS has recently determined need clarification. One section of regulation that needs to be clarified is 18 NYCRR 421.16 (e), which states: “Agencies shall not reject applicants for study or after study on the basis of the length of time they have been married, provided that time is at least one year.” This regulation was promulgated before the New York State Court of Appeals decisions in *Matter of Jacob* and *Matter of Dana* (86 N.Y.2d 651, 636 N.Y.S.2d 716 [1995]) regarding the ability of unmarried persons to adopt. In those decisions, the court ruled that the unmarried partner of a child’s biological mother, who is raising the child together with the child’s biological parent, has standing to become the child’s second parent through adoption. This regulation also does not take into consideration where two persons have cohabited for a period of time prior to being married, especially in cases where the prospective adoptive parents are seeking approval to adopt a child for whom they have been functioning as the child’s foster parents for the past several years.

The other regulation that we have determined needs to be clarified is 18 NYCRR 421.16 (h) (2), which states: “Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children.” The *Matter of Dana* decision not only ruled that unmarried persons could adopt together, but it extended this ruling to also include homosexual couples.

In addition, both of the regulations cited above were written before the enactment of Chapter 509 of the Laws of 2010, which amended section 110 of the Domestic Relations Law (DRL) in relation to expressly authorizing two unmarried adult intimate partners, whether heterosexual or homosexual, to adopt a child together. In addition, Chapter 509 replaced references to “husband and wife” with the gender-neutral term “married couple” in section 110. See 11-OCFS-INF-01 for more information on the provisions of Chapter 509.

It is important to recognize that all types of families are potential resources for children awaiting adoption and should be considered as potential adoptive parents. Maturity, self-sufficiency, ability to parent, ability to meet the child’s needs, and availability of support systems are the critical assessments in identifying adoptive applicants’ appropriateness for specific children.

III. Program Implications

Length of Marriage

OCFS is hereby providing the following clarification of the standards for the application of 18 NYCRR 421.16 (e) regarding length of marriage in determining whether to approve applicants for approval as adoptive parents. If the applicants have been married for less than one year, the LDSS or voluntary authorized agency **may** take the length into consideration when evaluating the applicants. However, the agency cannot deny an applicant **solely** on the basis that the length of marriage is less than one year.

Applicants do not have to be married to adopt. Therefore, restricting married adoptive applicants to those married for a year or more is inconsistent with adoption policy and practice. This restriction imposes a higher standard on married couples than unmarried couples, which is not the intent of the regulation. In addition, the regulation could be interpreted as penalizing those couples who get married after living together. Rather than just considering length of marriage, LDSSs and voluntary authorized agencies may choose to also consider the length of relationship in its totality, including the period of time a couple has been in a relationship prior to marriage. LDSSs and agencies can examine the commitment and stability of the applicants' relationship and their ability to plan and commit to an adoptive child, without using length of marriage as a determining factor.

Sexual Orientation

This INF also provides clarification to 18 NYCRR 421.16 (h) regarding the consideration of homosexuality when completing an adoption study. The intent of this regulation is to prohibit discrimination based on sexual orientation in the adoption study assessment process. In addition, OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent. The capacity of the prospective adoptive parents to meet the needs of children freed for adoption should be the primary consideration when making approval or rejection decisions of an adoptive applicant.

These clarifications are in line with OCFS policy to facilitate the placement of foster children in permanent caring homes when it is in the best interests of the child. The Adoption Services Guide for caseworkers will be revised to reflect these clarifications.

This guide can be accessed from both the OCFS intranet and Internet website. It is located at:

http://www.ocfs.state.ny.us/adopt/adopt_manual/Adoption%20Services%20Guide%20October%202010%20FULL%20booklet.pdf

Disapproval of an Adoptive Applicant

LDSSs and voluntary authorized agencies are reminded of the criteria and notification process when applicants are disapproved for adoption. After the completion of an adoption study based on sound casework principles, an applicant may be disapproved if the agency determines that:

- The applicant(s) is physically incapable of caring for an adopted child;
- The applicant(s) 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)]

Caseworkers conducting adoption studies must consider the way the bullets above weaken an applicant's ability to care for an adopted child. An approval or rejection must be based on information related to areas of the adoption study listed in 18 NYCRR 421.16. The ways in which these factors were assessed and how they led to the conclusions shown in the adoption study should be carefully and clearly recorded. In addition, caseworkers must consult with their supervisors in relation to the decision to approve or not approve adoptive applicants.

In addition, an applicant must be disapproved if he or she has been convicted of a mandatory disqualifying crime (18 NYCRR 421.27(d)(1)).

If a decision is made to not approve adoptive applicants, the applicants must be informed in writing that they have not been approved and the reasons for the rejection. The notification must offer the applicants an opportunity to discuss the decision in person with the caseworker's supervisor. The notification must also include notice to the applicants in boldface type of their right to request and be granted an administrative hearing in accordance with section 372-e of the Social Services Law and must state the procedure to be used for that purpose. The applicant has 60 days from receiving the notice letter to request an administrative hearing [18 NYCRR 421.15 (g) (3) - (7)].

/s/ Nancy Martinez

Issued By:

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Division/Office: Strategic Planning and Policy Development