

**CRITERIA AND PROCEDURES FOR DETERMINING  
A “COMPELLING REASON” NOT TO FILE A TPR**

**DISCUSSION PAPER  
AND  
APPROVED RECOMMENDATIONS**

Prepared for the Child Welfare Leadership Team of the District of Columbia including the Deputy Mayor for Children, Youth, Families and Elders, the Director of the Child and Family Services Agency, the Attorney General, the Director of the Department of Mental Health, the Presiding Judge of the Family Court of the District of Columbia, the Center for the Study of Social Policy (Court-appointed Monitor for *LaShawn A. v. Williams*) and the Council for Court Excellence (Leadership Team Facilitator)

Prepared by:

Center for the Study of Social Policy  
1575 Eye Street, NW  
Washington, DC 20005

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# Criteria and Procedures for Determining a “Compelling Reason” Not to File a TPR:

## Discussion Paper and Approved Recommendations

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### I. INTRODUCTION AND PURPOSE

This discussion paper was prepared as a guide for the District’s Child and Family Services Agency (CFSA), Office of the Attorney General, and the Family Court of the Superior Court of the District of Columbia as they work together to develop and reach agreement on criteria for determining a compelling reason not to file a termination of parental rights petition (TPR) for children in CFSA custody for 15 of the last 22 months. The paper was prepared by the Center for the Study of Social Policy (CSSP) as a result of a discussion and request by members of the District Child Welfare Leadership Team. The paper addresses three elements of the issue:

- suggested criteria for determining a compelling reason not to file a TPR;
- suggested procedure(s) to identify and periodically review cases that meet the defined criteria; and
- review of compelling reason determinations by the Family Court as part of the Court’s review of a child’s permanency goal and plan.

After reviewing federal laws, the policies and practices of a group of states and recommendations of relevant professional groups, this paper makes preliminary recommendations for consideration by the Child Welfare Leadership Team.

### II. PROCESS/METHOD

The following sources of information informed this discussion paper.

- ***Review of literature and guidance from national and professional organizations***  
CSSP contacted the American Bar Association, the National Clearinghouse on Child Abuse and Neglect, the National Resource Center for Family-Centered Practice and Permanency Planning, the National Center for State Courts, the National Child Welfare Resource Center, and the ABA Center for Children and the Law. We reviewed articles prepared by the U.S. General Accounting Office, and the US Department of Health and Human Services’ Administration for Children and Families, and the American Bar Association.

- ***Review of state statutes and policies to determine how other jurisdictions have defined compelling reasons not to file a TPR***  
CSSP reviewed statutes from 12 states: California, Colorado, Iowa, Montana, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and West Virginia. We reviewed internal policies of five (5) state child welfare agencies: California, Illinois, Oregon, Virginia, Wisconsin and New York City.
- ***Review of state and local practices in implementing established policy***  
CSSP contacted five (5) states: California (Ombudsman’s Office and the Child and Youth Permanency Branch); Illinois (Communications Office and Litigation Counsel’s office); New York (Office of Children and Family Services); Oklahoma (Commission on Children and Youth and Children and Family Services’ Permanency Planning and Policy Program Administrator); Virginia (Permanency Division); and New York City (Division of Foster and Care and Preventive Services and Family Court Special Projects Coordinator) and New York State Department of Social Services.

### III. BACKGROUND

In enacting the Adoption and Safe Families Act of 1997, Public Law 105-89 (ASFA), Congress took note of the substantial and unjustified delays in many states in legally freeing children in foster care for adoption. Congress defined certain situations in which termination of parental rights (TPR) should be sought at the beginning of the case and within specified timeframes and defined circumstances in which states must seek termination. Congress also recognized there are cases in which termination of parental rights is inappropriate or impractical and enacted the following three general exceptions to the requirement to initiate termination of parental rights proceedings<sup>1</sup>:

1. the child is being cared for by a relative (if the state elects to include this exception);
2. a State agency has documented in the case plan (which shall be available for court review) a ***compelling reason*** for determining that filing such a petition would not be in the best interest of the child; or
3. the State determines that certain services identified in the child’s case plan are necessary for the child’s safe return home, but that it has failed to provide them according to the schedule specified in the case plan.

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<sup>1</sup> ASFA, §302(4), 42 U.S.C. §675(5)(E).

#### **IV. COMPELLING REASON NOT TO FILE A TERMINATION OF PARENTAL RIGHTS PETITION - DEFINITION**

This paper focuses on the second of the three general exceptions to the requirement to initiate a termination of parental rights proceeding allowed by federal regulation. Federal law or regulations do not specifically define a compelling reason but do provide limited guidance. First, a "compelling reason" must be based on the individual circumstances of the child and the family, on a case-by-case basis, with an emphasis on what is in the best interest of the child. Second, a compelling reason has to be documented in the case plan to ensure continued eligibility for the receipt of Title IV-E federal funds. Third, there is no federal requirement for the juvenile or family court to make a judicial finding that a compelling reason exists. The requirement is that the State make a determination and that the documentation of the compelling reason be "available for court review." (45 CFR 1356.21 and 63 FR 50058).

According to federal regulations (45 CFR 1356.21), compelling reasons for not filing a petition to terminate parental rights include, but are not limited to:

1. Adoption is not the appropriate permanency goal for the child;
2. There are no legal grounds to file a petition to terminate parental rights;
3. The child is an unaccompanied refugee minor as defined in 45 CFR 400.11; or
4. There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights.

As states were implementing ASFA in 1999, Mark Hardin of the American Bar Association's Center on Children and the Law cautioned about the vagueness of the compelling reasons exception and the risk of its overuse. He said States had two major tasks. "First, they must establish a procedure to identify cases where a termination petition is required and then decide whether there is a valid exception. Second, they must clarify and explicitly limit circumstances in which an exception is appropriate,"<sup>2</sup> in order that the exception not become the rule.

In June 2002, the General Accounting Office (GAO) issued a report entitled "Recent Legislation Helps States Focus on Finding Permanent Homes for Children but Long-Standing Barriers Remain" (GAO-02-585, Washington, D.C.: June 28, 2002.) The report noted most states did not collect data on the use of ASFA's 15 of 22-month provision. In 2002, eight (8) states and the District of Columbia responded to a question requested for the GAO report on the number of children in care 15 of 22 months who were exempted from the requirement to file a TPR. Although the report is now more than two years old and was prepared relatively early in the process of most states' ASFA implementation, the results point to the possible risk of overuse of the exemptions. Oregon reported there were almost 1500 children in that state who met one of

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<sup>2</sup> Hardin, Mark (1999). *Mandatory Termination of Parental Rights Petitions: "Compelling Reasons" and Other Exceptions Under the Adoption and Safe Families Act*. Washington, DC: American Bar Association

the compelling reason criteria.<sup>3</sup> Oklahoma reported that 74% of children in care for 15 of the past 22 months qualified for the exemption; the District of Columbia reported that 94% of children in care meeting the ASFA time provision qualified for the exemption and 60% of them were expected to be reunified with their parent soon.

Based on CSSP's review of statutes, no state has comprehensively defined in law the "compelling reasons" why termination of parental rights would not be in the child's best interest, although some state statutes include things that should be considered in making the determination. Some states, including Iowa, West Virginia, and Oregon, provide examples in their state law. Iowa's law says that a compelling reason shall include but is not limited to documentation indicating a reasonable likelihood that completion of services will make it possible for the child to safely remain home or return home within six months.<sup>4</sup> In West Virginia,<sup>5</sup> New York<sup>6</sup> and California<sup>7</sup> compelling reasons include the child's age and preference regarding termination of parental rights. California also provides an exception when the parent has maintained contact and the child would benefit from continuing the relationship.

## **V. COMPELLING REASON NOT TO FILE A TERMINATION OF PARENTAL RIGHTS PETITION – STATE POLICY AND PRACTICE**

Mark Hardin of the ABA Center for Children and the Law (1999) provided suggestions for how caseworkers and agency attorneys can collaborate in making these sensitive decisions including: (1) workers should carefully document the reasons for the exception by preparing in writing specific, detailed reasons based on the facts of the case, why they do not wish to file a TPR; (2) there should be oversight of the caseworker's decision not to file a TPR by supervisors, managers, attorneys and courts; and (3) states should track the reasons provided for the exceptions, how often the exceptions are requested and granted, and compare different offices' use of the exception.<sup>8</sup> In June 2001, the ABA Center on Children and the Law again advised that documentation of compelling reasons should reference specific information about the case.<sup>9</sup>

One example of the procedure to apply the compelling reasons exception can be found in a New York Permanency Review Guidelines Memorandum issued in 1999 by Nicholas Scoppetta, Commissioner of New York City's Administration for Children's Services. The memo dictates that when caseworkers determine whether or not to file a TPR, each child should receive "an ongoing individualized assessment." The compelling reasons must be weighed along with other

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<sup>3</sup> Subsequent to the GAO report, Oregon recruited special staff to review every case and reduced the number of cases meeting the compelling reasons criteria to 750 – 800. Many of these remaining cases with a compelling reason determination were older children who would not consent to a TPR or children subject to Indian Child Welfare Act guidelines.

<sup>4</sup> Iowa Code § 232.111

<sup>5</sup> W Va Code § 49-6-5b

<sup>6</sup> NY CLS Soc Serv § 384-b

<sup>7</sup> Cal Wel & Inst Code § 366.26

<sup>8</sup> Hardin, Mark (1999). *Mandatory Termination of Parental Rights Petitions: "Compelling Reasons" and Other Exceptions Under the Adoption and Safe Families Act*. Washington, DC: American Bar Association

<sup>9</sup> Fiermonte, Cecilia (2001), *ASFA's Compelling Reasons Requirement*, Child Law Practice, Vol. 20, No. 4. American Bar Association: Washington, DC.

known family circumstances, and the decision to use this exception must be reevaluated at the next service plan review and should be reevaluated sooner if there is a significant change in circumstances. In addition, the specific compelling reasons must be clearly documented in the progress notes which should be kept in the case record available for court review. Finally the decision to use the compelling reasons exception must be approved in writing by a staff member who is senior to the case planner by at least two levels.<sup>10</sup> This memo presents scenarios in which some exceptions may be used and provides further instruction to caseworkers regarding each of the exceptions set forth by the legislature.<sup>11</sup>

Another example of applying the compelling reasons exception can be found in a memo issued by the Oregon Office of Permanency for Children (2002), regarding how a decision should be made to file a TPR. In order to apply the compelling reasons exception, the memo indicates that local DHS staff must document the compelling reason(s) in the case plan. The memo also indicates that if at any time the compelling reason(s) ceases to exist, DHS shall review the decision not to file, determine if there is another compelling reason not to file, or determine if filing should occur.<sup>12</sup>

None of the states or localities we contacted,<sup>13</sup> including New York City's child welfare system, or New York City's Family Court system reported routine tracking of data on the use of the compelling reasons exception.<sup>14</sup> The Permanency Planning for Children Department of the National Council of Juvenile and Family Court Judges reported finding no evaluations or tracking of the use of compelling reasons and indicated that they are interested in and looking forward to the findings from the District of Columbia's tracking of the use of compelling reasons.<sup>15</sup>

Oklahoma specifically reported the difficulty of collecting data, which they had intended to do through their statewide automated child welfare information system (SACWIS). In response to CSSP's request for information, Oklahoma reviewed its SACWIS records and found that the screens related to compelling reasons were completed in only two (2) of the 4,638 cases where children have been in care for 15 of the past 22 months. In Oklahoma's information system, the selection of a compelling reason is housed in a screen that is separate from the case plan screen (where Oklahoma caseworkers document the compelling reason in narrative form, as required by federal guidelines). Caseworkers may also prepare a written court report outlining the compelling reason(s).

Representatives of each state contacted said that the compelling reason exception is reviewed at every subsequent permanency hearing to ensure it still applies.

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<sup>10</sup> Nicholas Scopetta (March 12, 1999). Memorandum to Executive Directors – Contract Agencies and ACS Staff regarding ACS Permanency Review Guidelines. New York City Administration for Children's Services.

<sup>11</sup> See Appendix A for guidance provided to NYC caseworkers in Nicholas Scopetta's memo.

<sup>12</sup> Oregon Administrative Rule: 413-110-0200/0252, effective January 1, 2002.

<sup>13</sup> California, Illinois, New York, Oklahoma, Oregon, Virginia.

<sup>14</sup> The New York State database is equipped to track cases in which there is a compelling reason not to file a TPR but does not gather information about the specific compelling reason.

<sup>15</sup> Joey Orduna (2004), Model Courts Manager, Permanency Planning for Children Department, National Council of Juvenile and Family Court Judges, telephone conversation.

Anecdotally, representatives of Illinois, Oklahoma and Virginia reported the exception most commonly used in their state is that of a *child over 12 refusing adoption*.

Oregon reports the most frequently used compelling reason in its state is: *There is a viable alternative to termination of parental rights that would free the child for adoption within a reasonable time.*<sup>16</sup> Since Oregon's Administrative Rules allow birth and pre-adoptive parents with whom the child is placed or prospective adoptive parents recruited for a particular child to participate in mediation/"cooperative planning for post-adoption,"<sup>17</sup> this alternative is frequently used instead of filing a TPR. Additionally, when the exception of a child over age 12 not consenting to an adoption is used, it is often in combination with another exception such as: *The parent and child have a significant bond, but the parent is unable to care for the child because of a disability and other permanent plan is identified; or, the child has a demonstrated inability to be maintained in a family setting as documented by a professional assessment that may include, but is not limited to, a medical, psychiatric or psychological assessment.*<sup>18</sup> While Oregon has an exception for parents who are making progress, this does not prevent the filing of a TPR, but the fact that the parent is making progress may prevent the finding of a TPR at disposition.<sup>19</sup>

California reports the compelling reason most often used is also arguably the most "convoluted": *The child is living with a relative or foster parent who is unable or unwilling to adopt the child because of special circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her relative or foster parent would be detrimental to the well-being of the child.*<sup>20</sup> This exception does not apply to any child who is living with a non-relative and who is either (i) under six years of age or (ii) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together. The representative said the second compelling reason most often used is that of an older child refusing termination or adoption and added that the older child often fits into 'the child living with a relative exception.'<sup>21</sup>

## **VI. RECOMMENDATIONS**

### **A. Criteria for Compelling Reasons Determinations**

Based on a review of cited materials and discussion with state policy and program staff across the country, the Child Welfare Leadership Team has adopted the following as criteria for making a compelling reason determination. In addition to listing the criteria, where relevant, included in italics is the evidence the caseworker will need to consider and provide in support of the exception.

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<sup>16</sup> See Appendix of this document for a full list of compelling reasons suggested by Oregon's legislature

<sup>17</sup> OAR 413-120-0600/0635

<sup>18</sup> OAR 413-110-0200/0252

<sup>19</sup> Kathy Ledasma (2004), Adoption Manager, Oregon Department of Human Services, Office of Safety and Permanency for Children, telephone conversation.

<sup>20</sup> Cal Wel & Inst Code § 366.26

<sup>21</sup> Cathy Gunderson (2004), Permanency Policy Bureau, California Department of Social Services, Child and Youth Permanency Branch, telephone conversation

1. There is a permanency goal of return home, approved by the Court and the child is expected to be reunited with parents within 6 months.  
*The caseworker must document evidence in the case record that the parent is making substantial progress in eliminating problems causing the child's placement or subsequent problems which contributed to the child's continued foster care.*<sup>22</sup>
2. The child is a specified age (suggested age is 14) or older and objects to being adopted.  
*The caseworker must document evidence in the case record that the child has participated in specific counseling to discuss all permanency options and understands all the permanency options.*
3. The child has severe emotional or behavioral problems or a serious medical condition and reunification remains an appropriate goal.  
*This reason needs to be documented in the case record with supported clinical evidence on the child's severe emotional, behavioral or medical issues and the need for placement in residential treatment or other intensive treatment. The record should provide evidence that the parent is actively involved in the child's life and is planning for the child's return home.*
4. The child has a permanency goal other than adoption (i.e., permanency with kin through guardianship and is expected to achieve that goal within 12 months of establishing the goal .  
*The caseworker must document the reasons for this exception in the case plan and the steps to be taken to achieve the alternate permanency goal.*
5. Parents are deceased, or have voluntarily relinquished rights or consented to adoption by a relative or identified caregiver, or have indicated they will do so within 30 days. If relinquishment or consent does not occur within specified time frame, the compelling reasons determination should be eliminated.
6. A petition for adoption has been filed with the Court.  
*In these cases, the District OAG would be required to move to join the adoption proceedings.*
7. The parent is terminally ill, does not want parental rights terminated and has designated the child's present caretaker, with the caretaker's agreement, as the child's permanent caretaker.  
*This decision would need to be documented in the case plan, supported by the Agency and ratified by the Court with a standby guardianship agreement.*

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<sup>22</sup> For children with a parent in prison and expected release date within a short specified period of time (i.e. 6 months), this reason might be used once in each case.

8. The child is an unaccompanied refugee minor as defined in 45 Code of Federal Regulations 400.11.
9. There are no or insufficient legal grounds for filing a TPR because required reasonable efforts have not been made.  
*This determination could not be made without legal and supervisory review and documentation of the finding in the case record. In addition, this finding should require a case plan revision with specific actions to make reasonable efforts, and frequent (every three to six months) review of progress.*
10. There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights.

**B. Process for Compelling Reasons Determination**

Equally as important as clarity on the criteria that can be used to make a compelling reason determination is the process that is used by the social worker and OAG counsel to make and document a decision and the process for ongoing review of that decision by the agency and the Court. The following process is recommended.

1. Social workers should be required to document in the case record specific, and detailed reasons, based on the facts of the case, as to why they are not seeking to terminate parental rights.
2. Based on the SACWIS data problem reported by Oklahoma, we suggest that CFSA add a “compelling reasons” screen within the case plan screens in FACES so that caseworkers may easily document (i.e., a checkbox) the criteria used to determine a compelling reason. Specific evidence to support this decision should be documented in the case record. Data from this screen should be used for tracking.
3. The social worker’s supervisor, manager and OAG attorney must review and approve the documented reason for not seeking to terminate parental rights for each case. This approval should be documented on the case record.
4. The Family Court Magistrate/Judge should review the determination at each permanency hearing.
5. CFSA must implement a periodic internal review process of the compelling reason decision in each case. It is proposed that this review occur every six months, or sooner if there are changes in case circumstances. These reviews should be documented in the case record.
6. The Court’s Permanency Hearing Order should be modified to list each of the agreed upon criteria so that the decision and the basis for it can be reviewed by

the Court and is clearly understood by all Parties. Criteria should be included in the order until it is revised

7. If there is disagreement between the agency and the Court, the agency should present their determination and justification at subsequent permanency hearings and must include in the court report results of internal review decisions.
8. CFSA should systematically track and review data on compelling reasons as part of permanency tracking. Tracking should be done by workers, units, and private agencies and include how often exceptions are requested, granted and the reasons given for such exceptions.

## **APPENDIX**

### **A. Policy Excerpts**

#### **New York City**

*Excerpt from New York City's Administration for Children Services Memorandum from Commissioner Nicholas Scoppetta to Executive Directors of contract agencies and ACS Staff. Permanency Review Guidelines, March 12, 1999.*

#### **VII. Compelling Reasons Not To File for TPR**

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

1. The child has a permanency goal other than adoption;
2. The child is 14 years or older and will not consent to an adoption;
3. There are insufficient grounds for filing a TPR petition;
4. The child is the subject of a pending Article 10 disposition;
5. The child was placed into foster care pursuant to Article 3 (JD's) or Article 7 (PINS) of the Family Court Act.

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

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

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

#### **A. The Child Has A Permanency Goal Other Than Adoption**

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

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

1. The child has been placed in a foster home with an approved relative and that relative will provide the best available care for the child. The relative strongly prefers that parental rights not be terminated but is committed to providing a nonadoptive but permanent and legally secure home for the child through legal guardianship or legal custody. Before this factor may be invoked, the relative and the birth parents must receive meaningful counseling about the potential benefits of adoption (along the lines suggested in 92 LCM-27), the option of a voluntary surrender (as described in 18 NYCRR 431.9(c)(1)) and, if appropriate, the availability of an

adoption which allows for continued contact between the child and other members of his or her birth family.

2. The parent(s) have made substantial progress in eliminating the problems causing the child's continued placement in foster care and there is a strong likelihood that the child will be able to return home safely within the next six (6) months. For example, if a parent is attending a substance abuse treatment program, a compelling reason might be a favorable prognosis for completing treatment based on clear evidence of substantial progress in the areas of abstinence and parenting. Unless justified by extenuating circumstances, this factor should not be invoked more than once.

3. A parent's death is imminent and the parent does not wish to surrender the child for adoption. The parent has designated, or is in the process of designating, an appropriate permanent caretaker for the child.

4. The parent is incarcerated but is scheduled to be released within the next 6 months and there is a strong likelihood that the child will be able to return home safely within a reasonable time period after the parent is released. Unless justified by extenuating circumstances, this factor should not be invoked more than once.

5. As the result of a current assessment, the agency has determined that a family setting will not meet the child's needs because of the child's severe emotional, behavioral or psychiatric problems. The agency must demonstrate that it has put in place services to address the problems that prevent the child from functioning in a family setting.

6. The child has a permanent disability which can be managed only with intensive assistance in a specialized setting (such as a residential group care setting, therapeutic foster board home, or medical foster boarding home) and

(a) the child's birth parent or other family member continues to be meaningfully involved in planning for the child, or

(b) the child's birth parent or other family members are no longer involved in planning for the child but no adoptive resource has yet been identified. In that case, the agency must make diligent efforts on all levels, including local, state and national adoption exchanges, to find a prospective adoptive family for the child.

7. The parent(s) has agreed either to surrender his or her parental rights or has agreed to consent to an appropriate legal guardianship arrangement for the child. In the event of an agreement to surrender, the birth parent's application for approval of a judicial surrender must be filed within 60 days of the permanency review case conference. If the plan is legal guardianship, judicial proceedings to effectuate the guardianship must be initiated within 60 days of the permanency review case conference. In either case, if the relevant documents are not filed in court within 60 days, or if the matters is dismissed or withdrawn, a referral for termination of parental rights must be made.

8. It is understood that every family's circumstances are unique and that not all situations can be anticipated. Therefore, we foresee that other serious, extenuating circumstances may exist that mandate the conclusion that it would be clearly detrimental to the best interests of the child to file a petition to terminate parental rights. Such extenuating circumstances must be clearly documented in the case file.

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

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

**C. Insufficient Grounds To File TPR Petition**

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

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

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

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

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

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

**VIII. Necessary Services Not Provided**

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

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

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

The case plan developed at the service plan review conference must carefully document why the necessary services were not provided, (e.g. failure to refer, outside institutional resistance, unavailability of service, lack of treatment slots), and must include a plan to immediately put the necessary services in

place. **The determination that necessary services were not provided, as well as the plan for immediately putting those services in place, must be approved by a staff member at least two (2) levels above the case planner.**

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

## **Oregon**

*Excerpt from Oregon Administrative Rule: 413-110-0200/0252, effective January 1, 2002. Department of Human Services Children, Adults and Families*

Compelling reasons may include but are not limited to:

1. A court or Citizen's Review Board has made a finding that DHS has made no reasonable efforts to make it possible for the child to safely return home;
2. A court or DHS has determined that:
  - (i) The parent has made significant progress and continues to make efforts regarding the case plan, and reunification is likely within a reasonable time;
  - (ii) DHS is working with the non-offending parent to establish a permanent placement;
  - (iii) There is a viable alternative to TPR that would free the child for adoption within a reasonable time;
  - (iv) If the child is an Indian child under the Indian Child Welfare Act. The child's tribe is opposed to adoption and has another permanency plan for the child (in accordance with ICWA).
3. DHS has determined that adoption is not an appropriate plan for the child for reasons that may include:
  - (i) A child age 12 years old or older or a child less than 12 years old who is capable of making this decision will not consent to adoption and another plan is identified;
  - (ii) The parent and the child have a significant bond but the parent is unable to care for the child due to a disability and another permanent plan has been identified;
  - (iii) The child has an inability to be maintained in a family setting as documented by a medical/psychiatric/psychological assessment.

## **B. Statutes Reviewed**

California: Cal Wel & Inst Code § 366.26  
Colorado: C.R.S. 19-3-702  
Iowa: Iowa Code § 232.111  
Montana: MCA § 41-3-604  
New York: NY CLS Soc Serv § 384-b  
North Dakota: N.D. Cent. Code, § 27-20-20.1  
Oklahoma: O.S. § 7003-4.7  
Oregon: ORS § 419B.498  
Pennsylvania: 42 Pa. C.S. §6351(f)(9)(i)(ii)(iii)  
Rhode Island: R.I. Gen. Laws § 40-11-12.1  
South Carolina: S.C. Code Ann. § 20-7-766  
West Virginia: W. Va. Code § 49-6-5b

## **C. Policies Reviewed**

California: Health and Human Services, Department of Social Services, All County Letter No. 00-77, November 17, 2000.

Illinois: Department of Children and Families Policy Guide 99.09, Adoption and Safe Families Act, August 19, 1999.

New York City: Administration for Children's Services, Memorandum from Nicholas Scoppetta, Commissioner: ACS Permanency Review Guidelines, March 12, 1999.

Oregon: Department of Human Services, Children, Adults and Families, Office of Permanency for Children, Number I-F.3.2.1, effective January 1, 2002.

Virginia: Virginia Department of Social Services, April 2004.

Wisconsin: Department of Health and Family Services, Division of Children and Family Services. Memo Series CFS 98-12, October 6, 1998.

## **D. Contacts**

American Bar Association

California: Ombudsman's Office; Department of Social Services, Permanency Policy Bureau, Karen Gunderson, (916) 651-7395.

Illinois: Communications Office; Office of the Attorney General, Greg Seifert, (217) 785-2558.

National Child Welfare Resource Center

National Clearinghouse on Child Abuse and Neglect

National Council of Juvenile and Family Court Judges, Permanency Planning for Children Department, Joey Orduna, Model Courts Manager, 775-784-7040.

National Resource Center for Family-Centered Practice and Permanency Planning

New York City: Administration for Children’s Services, Division of Foster and Care and Adoption, Alexandra Lowe, Special Counsel to the Deputy Commissioner for Foster Care and Preventive Services, (212) 341-0959; Family Court Special Projects Coordinator, Barbara DeMayo, (646) 386-5197

New York State: Office of Children and Family Services, Information Technology, Lilian Denton (518) 474-6947.

Oklahoma: Commission on Children and Youth, (405) 606-4900; Department of Human Services Children and Family Services, Amy White, Permanency Planning and Policy Program Administrator, (918) 588-1736.

Oregon: Department of Human Services, Office of Safety and Permanency for Children, Kathy Ledasma, Adoption Manager, (503) 945-5677. (Ms. Ledasma is also President of the Association of State Adoption Program Managers.)

Virginia: Department of Social Services, Permanency Division, Terese Wolf, (804) 726-7522; Foster Care and Adoption Policy Specialist, Northern region, Joanne Simmons, (540) 347-6250.

## **E. Articles**

Fiermonte, Cecilia (2001). *ASFA’s Compelling Reasons Requirement*. Child Law Practice, Vol. 20, No. 4. Washington, DC: American Bar Association.

“Recent Legislation Helps States Focus on Finding Permanent Homes for Children but Long-Standing Barriers Remain” (GAO-02-585, Washington, D.C.: June 28, 2002.)

Hardin, Mark (1999). *Mandatory Termination of Parental Rights Petitions: “Compelling Reasons” and Other Exceptions Under the Adoption and Safe Families Act*. Washington, DC: American Bar Association.