

Office of Children and Family Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Prohibition of Discrimination on the Basis of Sexual Orientation, Gender Identity or Expression

I.D. No. CFS-32-13-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Addition of sections 180.5(a)(6), 421.3(d), 423.4(m)(7) and 441.24; amendment of sections 182-1.5(g)(1), 421.16(e) and (h) of Title 18 NYCRR.

Statutory authority: Executive Law, sections 503 and 532-e; Social Services Law, sections 20(3)(d), 462(1), 372-b(3), 372-e(2), 378(5), 409 and 409-a

Subject: Prohibition of discrimination on the basis of sexual orientation, gender identity or expression.

Purpose: Prohibits discrimination on the basis of sexual orientation, gender identity or expression in essential social services.

Text of proposed rule: A new paragraph (6) of subdivision (a) of section 180.5 of title 9 is added to read as follows:

(6) *Staff and volunteers of detention providers shall not engage in or condone discrimination or harassment of youth on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. Detention providers shall promote and maintain a safe environment, take reasonable steps to prevent discrimination and harassment against youth by other youth, promptly investigate incidents of discrimination and harassment by staff, volunteers and youth, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, or other like.*

Paragraph (1) of subdivision (g) of section 182-1.5 of title 9 is amended to read as follows:

(1) Each program shall employ policies and procedures designed to ensure that youth are not subject to unlawful discriminatory treatment in any program decision making process or when being considered for any available service. *Program staff and volunteers shall not engage in or condone discrimination or harassment on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. Each program shall promote and maintain a safe environment, take reasonable steps to prevent discrimination and harassment against youth by other youth, promptly investigate incidents of discrimination and harassment by staff, volunteers, and youth, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, or other means.*

A new paragraph (d) is added to section 421.3 to read as follows:

(d) *prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and, shall 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. For the*

purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, and other means.

Subdivision (e) of section 421.16 of title 18 is repealed, and the subsequent subdivisions are re-lettered.

[(e) Length of marriage. 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.]

Paragraph (2) of subdivision (h) of section 421.16 of title 18 is repealed, paragraph (3) of said subdivision is renumbered paragraph (2) and is amended to read as follows:

(2) [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.

(3) [Exploration of a [sexual] preference[s] to adopt a child of a particular gender [and practices of applicants], where found necessary and appropriate, shall be carried out openly with a clear explanation to the applicant of the basis for, and relevance of, the inquiry.

A new paragraph (7) is added to subdivision (m) of section 423.4 of title 18 to read as follows:

(7) *Staff and volunteers of agencies providing preventive services shall not engage in discrimination or harassment of families receiving preventive services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. Such agencies shall promote and maintain a safe environment, take reasonable steps to prevent discrimination by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, or other means.*

A new section 441.24 is added to part 441 of title 18 to read as follows:

441.24 *Nondiscriminatory treatment.*
(a) *Authorized agency staff and volunteers shall not engage in or condone discrimination or harassment against prospective foster parents, foster parents or foster children on the basis of race, creed, color, national origin, age, sex, religion, sexual orientation, gender identity or expression, marital status, or disability. Authorized agencies shall promote and maintain a safe environment, take reasonable steps to prevent discrimination and harassment against youth by other youth, promptly investigate incidents of discrimination and harassment by staff, volunteers and youth, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. Certified or approved foster parents shall not engage in discrimination or harassment against foster children on the basis of race, creed, color, national origin, age, sex, religion, sexual orientation, gender identity or expression, marital status, or disability, and shall promote and maintain a safe environment.*

(b) *For purposes of this section, the term "gender identity or expression" means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, and other means.*

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington Street, Rensselaer, NY 12210, (518) 473-7793

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority:

Social Services Law § 20(3) authorizes the New York State Office of

Children and Family Services (OCFS) to supervise local social services departments and to establish rules, regulations and policies to carry out these duties. Social Services Law § 462(1) authorizes OCFS to regulate voluntary agencies exercising care or custody of children, and Social Services Law § 378(5) provides the legal basis for regulations governing the issuing and revocation of foster care licenses and certificates and prescribing standards, records, accommodations and equipment for the care of children and minors received under such licenses and certificates. OCFS has the legal authority to regulate preventive services pursuant to Social Services Law §§ 409 and 409-a.

Social Services Law § 372-b(3) authorizes OCFS to promulgate regulations to maintain enlightened adoption policies and establish standards and criteria for adoption practices, and Social Services Law § 372-e(2) authorizes OCFS to establish standards and procedures for evaluating persons who have applied for adoption of a child.

Executive Law § 532-e provides authority for OCFS to approve and regulate programs for runaway and homeless youth, and Executive Law § 503 provides authority for the regulation of secure and non-secure detention.

2. Legislative objectives:

These proposed regulations serve the legislative objective of promoting the safety, permanency, and well-being of families who receive preventive services, and children in foster care, detention and run away and homeless youth programs. The amendments also promote fairness and equality in the child welfare adoption program by eliminating archaic regulatory language that implies the sexual orientation of gay, lesbian and bisexual prospective adoptive parents – but not of heterosexual prospective adoptive parents -- is relevant to evaluating their appropriateness as adoptive parents.

The proposed regulation would better promote the safety and well-being of such families and children by prohibiting discrimination and harassment on the basis of sexual orientation and gender identity and expression.

3. Needs and benefits:

The proposed regulatory amendments require program staff and volunteers to refrain from engaging in discrimination or harassment on the basis of sexual orientation, or gender identity or expression. They further require that program staff and volunteers take reasonable steps to prevent discrimination against youth by other youth, investigate incidents of discrimination and harassment promptly, and take all reasonable and appropriate corrective or disciplinary action when such incidents occur. The proposed amendments also eliminate archaic regulatory language, which implies that the sexual orientation of gay, lesbian and bisexual prospective adoptive parents – but not that of heterosexual prospective adoptive parents -- is relevant to evaluating their appropriateness as adoptive parents.

The proposed regulation is needed to allow OCFS to fully implement LGBTQ best practices in child welfare, detention and run away and homeless youth programs.

4. Costs:

There are no costs associated with the proposed regulation. While training on LGBTQ best practices will support implementation of the proposed regulatory amendments, the proposed regulatory amendments do not impose training requirements. Further, OCFS has provided, and anticipates that it will continue to provide, training to local departments of social services, voluntary agencies, and others on this topic. Additionally, many advocacy and educational organizations provide LGBTQ training for child welfare, juvenile justice and related programs at no cost.

5. Local government mandates:

This proposal prohibits counties and local departments of social services (LDSSs) that operate detention facilities, foster care programs, or provide preventive services from discriminating against program participants and service recipients on the basis of sexual orientation or gender identity or expression, and requires that they investigate acts of discrimination or harassment by staff and volunteers and take appropriate and reasonable corrective action in response thereto. The majority of detention and foster care programs are provided by voluntary agencies and the majority of preventive services are provided by not-for-profit entities. Counties and LDSSs are already prohibited from discriminating in the provision of social services on the other bases addressed by the regulations, and OCFS believes that most counties and LDSSs already prohibit discrimination on the basis of sexual orientation and gender identity and expression in the provision of these services.

The proposal also imposes a mandate on local departments of social services who contract with agencies for the provision of preventive services to include such anti-discrimination requirements in these contracts. OCFS does not anticipate that this requirement will limit the pool of available preventive service providers or affect the cost of these contracts.

6. Paperwork:

The proposed regulation requires no additional paperwork.

7. Duplication:

The proposed regulation does not duplicate other state or federal requirements.

8. Alternatives:

The regulatory amendment is necessary to promote and maintain a safe environment for lesbian, gay, bisexual, transgender and questioning youth, families and prospective adoptive parents. OCFS has issued guidelines within existing regulatory authority, but these regulatory amendments are necessary to promote best practices with this population.

9. Federal standards:

While federal statutes and regulations do not prohibit discrimination against youth in care or families receiving the enumerated services on the basis of sexual orientation, or gender identity or expression, the proposed regulations are not inconsistent with federal standards.

10. Compliance schedule:

The proposed regulation will take effect upon enactment. OCFS anticipates that it will issue policy directives to affected entities providing implementation guidance.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed regulation prohibits discrimination or harassment on numerous grounds, including sexual orientation, gender identity, and gender expression, by detention facilities, foster care homes and facilities, runaway and homeless programs, and preventive services providers. Detention facilities are operated by counties or by not-for-profit entities. In most cases preventive services are provided by not-for-profit entities, which may be small businesses; they also may be provided by local departments of social services (LDSSs). Foster care facilities are operated by voluntary authorized agencies, which may be small businesses.

2. Compliance requirements:

The proposed regulation requires counties, LDSSs, and authorized agencies to refrain from engaging in discrimination or harassment on the basis of sexual orientation, or gender identity or expression, take reasonable steps to prevent discrimination against youth by other youth, investigate incidents of discrimination and harassment by staff, volunteers and youth promptly, and take all reasonable and appropriate corrective or disciplinary action when such incidents occur.

3. Professional services:

OCFS anticipates that it will provide technical guidance and training on best practices associated with these regulations.

4. Compliance costs:

This proposal has no economic impact on small businesses and local government. Although training on LGBTQ best practices will support implementation of the proposed regulatory amendments, training requirements are not imposed. Further, OCFS has provided and anticipates that it will continue to provide training to LDSSs, voluntary agencies, and others on this topic. Additionally, many advocacy and educational organizations provide LGBTQ training for child welfare, juvenile justice and related programs at no cost.

5. Economic and technological feasibility:

The proposal is economically and technically feasible. There is no economic impact, and authorized agencies, counties and LDSSs may use whatever procedures are already in place for preventing and correcting prohibited behavior to comply. As noted, there are many sources of training to implement best practices available at no cost.

6. Minimizing adverse impact:

The proposal has no adverse impact.

7. Small business and local government participation:

During development of the informational letter on non-discrimination against LGBTQ youth in the child welfare system, OCFS conferred with representatives of authorized agencies, run away and homeless youth programs, and LDSSs. All of these entities were supportive of the development of non-discrimination standards.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed regulation affects the City of New York and all of the counties in New York which operate as local departments of social services (LDSSs) and which may provide detention services, as well as authorized agencies and not-for-profit entities that operate foster care detention, or run away and homeless youth programs, or provide preventive services within those counties. Many of these counties and these agencies are located in rural areas.

2. Reporting, recordkeeping and other compliance requirements and professional services:

The proposed regulation imposes no reporting or recordkeeping requirements.

3. Costs:

The proposal imposes no costs. While training on LGBTQ best practices will support implementation of the proposed regulatory amendments, the proposed regulatory amendments do not impose training requirements.

Further, OCFS has provided, and anticipates it will continue to provide, training to local departments of social services, voluntary agencies, and others on this topic. Additionally, many advocacy and educational organizations provide LGBTQ training for child welfare, juvenile justice and related programs at no cost.

4. Minimizing adverse impact:

The proposal has no adverse impact.

5. Rural area participation:

During development of the informational letter on non-discrimination against LGBTQ youth in the child welfare system, OCFS conferred with representatives of authorized agencies, run away and homeless youth programs, and LDSSs, some of which were located in rural areas. All of these entities were supportive of the development of non-discrimination standards.

Job Impact Statement

The proposal prohibits discrimination on the basis of sexual orientation, gender identity and expression. Agencies will likely choose to engage in training to better understand and prevent these forms of discrimination. Such training is currently available at no cost from OCFS and not-for-profit agencies. It is possible that not-for-profit agencies that currently provide LGBTQ non-discrimination training will need to hire additional staff to provide training to the numerous service providers subject to the proposed regulations.

Division of Criminal Justice Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Probation Case Record Management

I.D. No. CJS-32-13-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of Part 348 of Title 9 NYCRR. This rule is proposed pursuant to SAPA § 207(3), 5-Year Review of Existing Rules.

Statutory authority: Executive Law, section 243(1)

Subject: Probation Case Record Management.

Purpose: To establish minimum state standards regarding probation case record management.

Substance of proposed rule (Full text is posted at the following State website: www.criminaljustice.ny.gov): The proposed rule amendments revise Part 348 governing Case Record Management of probation department records governing probation service delivery. Below is a brief summary of the regulatory provisions.

Section 348.1 is the definitional section. It deletes unnecessary language and clarifies that records may be written and/or electronic.

Sections 348.2-348.4 have been renumbered Sections 348.4-348.6 respectively.

New Section 348.2 sets forth the Objective which is to establish minimum state standards regarding probation case record management.

New Section 348.3 governs applicability and provides that Part 348 is applicable to all probation departments in New York State.

Section 348.4 governs content of case records. Clarified is that records may be maintained and an index filing system established in an automated case management system. Other provisions provide more specificity as to minimum information and/or documents which should be in the case record. Additional language emphasizes that appropriate protections shall be instituted to safeguard records, electronic or otherwise prepared, transmitted, and stored.

Section 348.5 sets forth supervision recordkeeping requirements and has been updated to remove obsolete language and replace it with terminology in the new DCJS Supervision rule which took effect June 1, 2013.

Section 348.6 governs accessibility of case records. It has been expanded to clarify additional instances when certain probation case records must be made accessible pursuant to law and other times when probation records may be legally accessible and parameters governing such access. Specific changes reflect recent statutory laws and/or are being incorporated to address confusion. Overall changes in this section should foster greater probation understanding of when record sharing is

mandatory or permissible, terms and conditions with respect to access, lead to greater collaboration where authorized, and maintain safeguards to protect confidentiality and guarantee against inappropriate access. Further, greater flexibility in the area of research, by recognizing bona fide research provided by a private entity, should lead to additional research in the area of probation services which can prove helpful to probation management in terms of assessing their current program services and/or needs and planning future service delivery.

Text of proposed rule and any required statements and analyses may be obtained from: Linda J. Valenti, Assistant Counsel, New York State Division of Criminal Justice Services, A.E. Smith Building, 80 South Swan Street, Room 832, Albany, New York 12210, (518) 457-8413, email: linda.valenti@dcjs.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Review of Existing Rules: There exist various state and federal laws governing confidentiality, access and release of information which are typically contained in probation case records. These proposed regulatory amendments to 9 NYCRR Part 348 conform with existing laws governing confidentiality of certain case record information and provide probation departments with greater flexibility to communicate more effectively and better manage those under their supervision. Public safety and the general welfare of the public will be served by adoption of these regulatory amendments.

These regulatory amendments clarify rule language governing mandatory sharing of probation case record information in an effort to assist practitioners in fulfilling their responsibilities under law. Further, additional rule language clarifies discretionary sharing of probation case record information authorized in existing law and also expands upon probation's ability to share and/or otherwise disclose certain case record information to particular individuals or entities for public safety and/or case management purposes. Additional flexibility in the area of research will foster greater collaboration and assessment between probation and academia to assist them in analysis of probation needs and programmatic changes that will improve service delivery.

Moreover, these regulatory amendments address a need to promote community corrections by affording probation departments the ability to authorize greater probation record access to assist them in carrying out their official duties. The amendments retain necessary language to guard against inappropriate access to records which are otherwise sealed or not accessible under state or federal law. The regulatory changes in this area are consistent with good professional practice, are in the best interest of the state and local government since they address and optimize public and victim safety, promote greater offender accountability, facilitate better communication by probation departments, clarify certain constraints in law and establish appropriate safeguards to guarantee more uniform application.

Additionally, certain regulatory language has been updated to reflect recent statutory or regulatory changes and to avoid confusion. For example, mandatory and discretionary record sharing provisions have been expanded to reflect new statutory provisions governing access and/or disclosure of certain probation records relative to specific entities. Further, supervision recordkeeping requirements have been updated to remove obsolete language and replace it with terminology in the new DCJS Supervision rule which took effect June 1, 2013.

With respect to technology, revised regulatory language clarifies that probation case records may be written and/or electronic and that records may be maintained and an index filing system established in an automated case management system. Additional language emphasizes that appropriate protections shall be instituted to safeguard records, electronic or otherwise prepared, transmitted, and stored.

Regulatory Impact Statement

1. Statutory authority:

Executive Law section 243(1) empowers the Commissioner of the Division of Criminal Justice Services to promulgate rules "which shall regulate methods and procedure in the administration of probation services", including but not limited to "supervision, case work, recordkeeping... and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state."

2. Legislative objectives:

These regulatory amendments are consistent with the legislative intent that the Commissioner adopt regulations in areas relating to critical probation functions. They promote consistent professional standards governing the administration and delivery of probation services in the area of case records management.

There exist various state and federal laws governing confidentiality, access and release of information which are typically contained in probation