

# *Child Welfare Policy Manual*

## **9. TRIBES/INDIAN TRIBAL ORGANIZATIONS**

### **9.1 TRIBES/INDIAN TRIBAL ORGANIZATIONS, Application of Title IV-B and Title IV-E Procedural Requirements**

**I Q:** When the Bureau of Indian Affairs (BIA) is responsible for a child's foster care costs, it will often contract with a State to provide services to that child. Such child is then included in the State's inventory, information system and case review system. The BIA appoints an administrative panel to conduct six month periodic reviews. Do the administrative review panels appointed by the BIA to conduct periodic (six month) reviews for Indian children in foster care satisfy the requirements of sections 475 (5) and (6) of the Social Security Act (the Act)?

**A:** Yes. Periodic reviews which are administrative reviews (rather than reviews conducted by a court) can take various forms at the State's option. They may be conducted by State agency staff, by a review panel made up of persons outside the agency, or by a panel comprised of both agency staff and the public. Title IV-E does not prohibit the State agency from utilizing a non-agency panel appointed outside the administration of the State agency.

Regardless of who appoints the review panel, the review must be conducted in accordance with section 475(5)(B) and (6) of the Act. It must be open to the participation of the parents of the child and it must include at least one person who is not responsible for the case management of, or delivery of services to, either the child or the parent who are the subject of the review.

*Source: ACYF-CB-PIQ-83-09 (12/14/83)ACYF-CB-PIQ-83-09 (12/14/83)*

*Reference: Social Security Act - sections 422 (b)(8), 471 (a)(16) and 475(5)(B) and (6)*

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- 2 *Q*: Please explain how the termination of parental rights (TPR) requirement applies to Indian tribes and its relationship to Indian Child Welfare Act requirements.
- A*: The Indian Child Welfare Act of 1978 (ICWA), Public Law 95-608, was passed in response to concerns about the large number of Indian children who were being removed from their families and tribes and the failure of States to recognize the culture and tribal relations of Indian people. ICWA, in part, creates procedural protections and imposes substantive standards on the removal, placement, termination of parental rights and consent to adoption of children who are members of or are eligible for membership in an Indian tribe. The addition of the requirement in section 475 (5)(E) of the Social Security Act (the Act) to file a petition for TPR for certain children in no way diminishes the requirements of ICWA for the State to protect the best interests of Indian children. Furthermore, States are required to comply with the ICWA requirements and develop plans that specify how they will comply with ICWA in section 422 (b)(9) of the Act.

The requirement in section 475 (5)(E) of the Act applies to Indian tribal children as it applies to any other child under the placement and care responsibility of a State or tribal agency receiving title IV-B or IV-E funds. While we recognize that termination of parental rights and adoption may not be a part of an Indian tribe's traditional belief system or legal code, there is no statutory authority to provide a general exemption for Indian tribal children from the requirement to file a petition for TPR. If an Indian tribe that receives title IV-B or IV-E funds has placement and care responsibility for an Indian child, the Indian tribe must file a petition for TPR or, if appropriate, document the reason for an exception to the requirement in the case plan, on a case-by-case basis.

*Source:* Preamble to the Final Rule (65 FR 4020) (1/25/00) Preamble to the Final Rule (65 FR 4020) (1/25/00)

*Reference:* Social Security Act - sections 422(b)(9) and 475 (5)(E); 45 CFR 1356.21 (i)

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3 **Q:** May the State or Tribe define compelling reasons for not filing a petition to terminate parental rights (TPR) in State law or Tribal code?

**A:** No. States and Tribes may not develop a standard list of compelling reasons for not filing for TPR that exempts groups of children. Such a practice is contrary to the requirement that determinations regarding compelling reasons be made on a case-by-case basis. States and Tribes may, however, provide case workers examples of such for training purposes.

*Source: Preamble to the Final Rule (65 FR 4020) (1/25/00)Preamble to the Final Rule (65 FR 4020) (1/25/00)*

*Reference: Social Security Act - sections 475 (5)(E); 45 CFR 1356.21 (i)*

4 **Q:** Do Indian Tribes have to operate the title IV-B programs to operate a title IV-E program?

**A:** Yes, but only a title IV-B subpart 1 program. Section 471(a)(2) of the Social Security Act requires the same agency administering title IV-B, subpart 1 to operate the title IV-E program. To give this language effect, the title IV-E agency must operate a title IV-B, subpart 1 program. There is no similar requirement in title IV-E related to the title IV-B, subpart 2 program.

*Source: 12/19/0812/19/08*

*Reference: Social Security Act section 471(a)(2)*

### **9.2 TRIBES/INDIAN TRIBAL ORGANIZATIONS, Application of Title IV-E Eligibility Requirements**

1 **Q:** A placement is made by an Indian Tribe, can title IV-E payments be made only if the Tribe is certified by the State as a child placing agency?

**A:** No. Under title IV-E, Federal financial participation (FFP) is available for the costs of foster care maintenance for a child who meets the eligibility criteria in section 472 (a). For reimbursement under title IV-E, there is no further specification in the statute with regard to certification of a child placing agency which would preclude placement by an Indian Tribal organization or Indian Tribal court.

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*Source: ACYF-PIQ-87-01 (3/25/87)ACYF-PIQ-87-01 (3/25/87)*

*Reference: Social Security Act - section 472 (a)*

2 **Q:** Must foster family homes approved through the tribal process meet the same standard as homes licensed by the State?

**A:** The definition of "foster family home" at 45 CFR 1355.20 gives tribal licensing or approval authorities the jurisdiction to license or approve homes that are on or near Indian reservations. This is consistent with ICWA at section 1931(b) which states that for purposes of qualifying for funds under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe is equivalent to licensing or approval by a State. The authority to license or approve includes the authority to set standards.

*Source: ACYF-CB-PIQ-87-01 (3/25/87); Preamble to the Final Rule (65 FR 4020) (1/25/00)ACYF-CB-PIQ-87-01 (3/25/87); Preamble to the Final Rule (65 FR 4020) (1/25/00)*

*Reference: The Indian Child Welfare Act of 1978; 45 CFR 1355.20*

3 **Q:** In establishing title IV-E eligibility for adoption assistance, is termination of parental rights the only mechanism for demonstrating that a child cannot or should not be returned home?

**A:** One of the criteria for establishing that a child has special needs is a determination by the State that the child cannot or should not be returned to the home of his or her parents. Previous guidance stated that this means that the State must have reached that decision based on evidence by an order from a court of competent jurisdiction terminating parental rights, the existence of a petition for a termination of parental rights (TPR), or a signed relinquishment by the parents. It has been brought to our attention that there are situations in which adoptions are legal without a TPR. Specifically, in some Tribes adoption is legal without a TPR or a relinquishment from the biological parent(s), and there is at least one State that allows relatives who have cared for a related child for a period of time to adopt without first obtaining a TPR.

After consideration, we believe that our earlier policy is an unduly narrow interpretation of the statute. Consequently, if a child can be adopted in accordance with State or Tribal law without

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a TPR or relinquishment, the requirement of section 473 (c)(1) of the Act will be satisfied, so long as the State or Tribe has documented the valid reason why the child cannot or should not be returned to the home of his or her parents.

*Source: ACYF-CB-PA-01-01 (1/23/01)ACYF-CB-PA-01-01 (1/23/01)*

*Reference: Social Security Act - section 473 (c)*

**4 Q:** By what authority are Tribes restricted to licensing homes that are on or near Indian reservations?

**A:** Section 1931 of the Indian Child Welfare Act (ICWA) authorizes Indian tribes and tribal organizations to establish and operate child and family services programs "on or near reservations," including a system for licensing or otherwise regulating Indian foster and adoptive homes. We use this language at section 1355.20 of the regulations to remain consistent with the ICWA.

*Source: Preamble to the Final Rule (65 FR 4020) (1/25/00)Preamble to the Final Rule (65 FR 4020) (1/25/00)*

*Reference: The Indian Child Welfare Act of 1978; 45 CFR 1355.20*

**5 Q:** May a State establish and implement a policy that limits foster care maintenance payments and child welfare services for Indian children to only those who are title IV-E eligible?

**A:** No. Not in the use of Federal funds. A State may not establish and implement policy that treats one group of children differently from another on the basis of ethnicity or race or that categorically excludes Indian children from benefits in the administration of any Federally assisted program. Such a policy is discriminatory and is in conflict with the provisions of title VI of the Civil Rights Act.

States and Tribes receiving title IV-B child welfare services funds have the flexibility and discretion to allocate these and other resources within the context of a total child welfare services plan. A child welfare services plan, however, may not be designed or implemented in such a way as to discriminate against any group based on race, age, or ethnicity, either directly or through geographic or other proximate exclusions.

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*Source: ACYF-CB-PIQ-88-02 (1/27/88)ACYF-CB-PIQ-88-02 (1/27/88)*

*Reference: Social Security Act - sections 422, 428 and 472; 25 CFR 20.3*

**6 Q:** If the child will not receive title IV-E foster care maintenance or adoption assistance payments, must a prospective foster parent or adoptive parent who will be licensed or approved by an Indian tribe meet the requirements of 471(a)(20) of the Social Security Act (the Act)?

**A:** No. The requirement at section 471(a)(20) of the Act is applicable to the State's title IV-E plan, with some additional conditions for claiming title IV-E payments and therefore does not extend to Indian tribal licenses or approvals if the child will not receive title IV-E foster care maintenance or adoption assistance payments.

*Source: April 13, 2007April 13, 2007*

*Reference: Social Security Act - sections 471(a)(20)*

**7 Q:** Section 471(a)(20)(A)(i) and (ii) of the Social Security Act (the Act) prohibit a State from claiming title IV-E foster care maintenance payments or adoption assistance payments when prospective foster or adoptive parents have been convicted of certain crimes. Are there any exemptions or exceptions permitted from this requirement, such as the State or Indian tribe under a title IV-E agreement with the State considers the prospective parent rehabilitated or the placement is in the best interests of the child?

**A:** No, there are no exceptions to the requirements at section 471(a)(20)(A)(i) and (ii) of the Act, once the provision is effective in the State. The State, or an Indian tribe under a title IV-E agreement (pursuant to section 472(a)(2)(B)(ii) of the Act) has the discretion to place the child in a home where prospective parents have been convicted of such crimes. However, the State or Tribe may not claim title IV-E foster care maintenance or adoption assistance payments in such cases.

*Source: April 13, 2007April 13, 2007*

*Reference: Social Security Act - sections 471(a)(20)(A) and 472(a)(2)(B)(ii)*

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8 **Q:** Is an Indian tribe that has a title IV-E agreement under section 472(a)(2)(B)(ii) of the Social Security Act (the Act) permitted an exemption or exception to the background check provisions of section 471(a)(20) of the Act?

**A:** No. An Indian tribe with a section 472(a)(2)(B)(ii) agreement must meet the requirements of section 471(a)(20) of the Act for any prospective foster or adoptive parent who will provide care for a child who will receive title IV-E foster care maintenance payments or title IV-E adoption assistance payments.

*Source: April 13, 2007*

*Reference: Social Security Act sections 471(a)(20)(A) and 472(a)(2)(B)(ii)*

### **9.3 TRIBES/INDIAN TRIBAL ORGANIZATIONS, Responsibilities of the Bureau of Indian Affairs**

1 **Q:** Is it the State title IV-B/IV-E agency or the Bureau of Indian Affairs (BIA) that has responsibility for providing foster care and child welfare services to Indian children residing on or near an Indian reservation?

**A:** The BIA takes the position that its legislation and regulations make it the payor of last resort for Indian child welfare services, and that it will only provide assistance when it is not available from other sources (see 25 CFR 20.3). Therefore, the BIA does not become involved in paying for Indian child welfare services or foster care payments until the State and the Tribes have determined that assistance or services are not otherwise available. The availability of payments and services, however, must not be based on any discriminating practice which treats Indian children differently from other children.

*Source: ACYF-CB-PIQ-88-02 (1/27/88)*

*Reference: Social Security Act - sections 421, 422, 428 and 472; 25 CFR 20.3*

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## **9.4 TRIBES/INDIAN TRIBAL ORGANIZATIONS, Title IV-E Agreements**

**1 Q:** Which agency (State or Tribal) has responsibility for providing foster care payments and child welfare services to Indian children?

**A:** While the Federal government provides funds through legislatively mandated programs for certain child welfare needs, it does not assume direct responsibility for the needs of individual children in each State. Rather, this responsibility is reserved for the States.

Federal programs which assist States in meeting this responsibility include the title IV-E foster care maintenance payments program and the title IV-B child welfare services program.

The title IV-E program is a State administered program to pay the costs of foster care for AFDC eligible children removed from their homes, for whom the State or the Tribe has responsibility for placement and care. It is an entitlement program for individual children and must be available to all eligible residents of a State, including Indian children living on or off reservations.

The title IV-B child welfare services program provides Federal funds in the form of formula grants to States and Tribes consistent with the purposes in section 421 of the Act.

Some federally recognized Tribes providing child welfare services are eligible to receive title IV-B grants directly from the Federal government. Since these are grants to States and Tribes, and are not entitlements for individual children, the States and participating Tribes have the authority to allocate the use of these funds and to set priorities for their use.

Many States and Tribes have developed State-Tribal agreements which formalize the sharing of responsibility for providing foster care maintenance and child welfare services, using title IV-E and title IV-B funds, as well as Social Services Block Grant funds and State funds.

Where neither the State nor the Tribe has resources sufficient to cover all the needs of all Indian children, the BIA, as payor of last resort, may pay for these services.

*Source: ACYF-CB-PIQ-88-02 (1/27/88)ACYF-CB-PIQ-88-02 (1/27/88)*

*Reference: Social Security Act - sections 421, 422, 428 and 472; 25 CFR 20.3*

**2 Q:** Must a State decline to enter into a title IV-E agreement with a Tribe that does not meet all of



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the title IV-B section 422 "protection" or assurances?

- A:** No. It would not be necessary to decline entering into such Tribal-State agreements because of the Tribe's inability to meet certain title IV-E requirements.

We assume that by Tribal-State intergovernmental title IV-E agreements you are referring to an agreement for the placement and care of children eligible under section 472 (a) of the Social Security Act (the Act).

The terms of a title IV-E agreement, in accordance with section 472 (a)(2)(B) of the Act, would be negotiated between the State and the Tribe. The agreement should specify the respective responsibilities of each in relation to carrying out the title IV-E requirements. The agreement should also include provisions for assuring that the section 422 protections are afforded to each child in foster care under the Tribes responsibility for placement and care for whom title IV-E foster care maintenance payments are being made by the State. The State and Tribe would determine the responsibilities of each in meeting the section 422 requirements.

However, the State has ultimate responsibility for assuring that the title IV-E requirements are met for title IV-E eligible children.

*Source:* ACYF-CB-PIQ-85-05 (4/12/85)ACYF-CB-PIQ-85-05 (4/12/85)

*Reference:* Social Security Act - section 472 (a)

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3 **Q:** In order for the State to meet the title IV-B section 422 requirements, must Tribal children assisted under intergovernmental agreements be included in the State's inventory, information system and case review system?

**A:** In order for a State to meet the section 422 requirements, children under the Tribe's responsibility, but for whom the State is making title IV-E payments, must be included in the State's inventory and information system. The State must also assure that a case review system and a preventive and reunification services program are in operation and applicable to these Native American children.

The title IV-E agreement may designate whether the State or the Tribe will implement the case review system and provide the services specified above, since the State (making the title IV-E foster care maintenance payments) and the Tribe (having the responsibility for placement and care) have a shared responsibility for assuring title IV-E children receive these protections.

*Source: ACYF-CB-PIQ-85-05 (4/12/85)ACYF-CB-PIQ-85-05 (4/12/85)*

*Reference: Social Security Act - section 472 (a)(2)*

4 **Q:** May payments be made under title IV-E of the Social Security Act (the Act) with respect to children in Indian foster homes only if the children are under the responsibility of the State title IV-E/IV-B agency or a State-certified child placing agency?

**A:** No. Section 472(a) of the Social Security Act (the Act) outlines the eligibility requirements for a child to receive assistance and the conditions under which a State may make foster care maintenance payments under title IV-E and receive Federal financial participation (FFP).

In accordance with section 472(a)(2)(B), a State shall make foster care maintenance payments under title IV-E if, among other conditions, the child's placement and care are the responsibility of the State agency administering the title IV-E State plan or any other public agency (including an Indian Tribe) with whom the State agency has made an agreement which is in effect. There is no provision in the statute that authorizes title IV-E payments where custody or responsibility for placement and care of the child has been given to a private agency.

Therefore, if the State and the Indian Tribe negotiate and enter into an agreement which

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recognizes that the Tribe has been given custody or responsibility for placement and care of certain title IV-E eligible children and which confirms the Tribe's responsibility to comply with the requirements under title IV-E in relation to these children, the State may claim FFP under title IV-E for the costs of foster care maintenance payments for them.

*Source: ACYF-CB-PIQ-87-01 (3/25/87)ACYF-CB-PIQ-87-01 (3/25/87)*

*Reference: Social Security Act - section 472 (a)*

5 **Q:** Can Indian tribes identify, in tribal code, those aggravated circumstances in which reasonable efforts are not required in accordance with section 471 (a)(15)(D)(i) of the Social Security Act?

**A:** When entering into a title IV-E agreement with a State, the tribe must adhere to the list of aggravated circumstances defined in State law. The statute at section 471 (a)(15)(D)(i) specifically requires that the aggravated circumstances in which reasonable efforts are not required be defined in State law. Moreover, other public agencies and tribes that enter into agreements with the State agency are not operating or developing their own title IV-E program separate and apart from that operated under the State plan. Rather, the agency or tribe is agreeing to operate the title IV-E program established under the State plan for a specific population of children in foster care. Therefore, the other public agency or tribe is bound by any State statute related to the operation of the title IV-E program. We expect the State child welfare agency to engage the tribes, and any other agency with which it has title IV-E agreements, in developing its list of aggravated circumstances.

*Source: Preamble to the Final Rule (65 FR 4020) (1/25/00)Preamble to the Final Rule (65 FR 4020) (1/25/00)*

*Reference: Social Security Act - section 471 (a)(15)(D); 45 CFR 1356.21 (b)(3)*

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6 *Q:* May an Indian tribe elect not to conduct or require criminal records checks on foster or adoptive parents if it obtains an approved resolution from the governing body of the Indian tribe?

*A:* No. Tribes may only receive title IV-E funds pursuant to a title IV-E agreement with a State. A tribe that enters into such an agreement must comport with section 471 (a)(20) of the Social Security Act and 45 CFR 1356.30 in accordance with the State plan in order to receive title IV-E funding on behalf of children placed in the homes it licenses. The statute expressly gives the State the authority to opt out of section 471 (a)(20) through State legislation or a letter from the Governor to the Secretary. Agreements between the State child welfare agency and other public agencies or tribes permit those entities to have placement and care responsibility for a particular group of the foster care population under the approved State plan. Such agreements do not permit other public agencies or tribes to develop a distinct title IV-E program separate from that operated under the approved State plan.

*Source:* Preamble to the Final Rule (65 FR 4020) (1/25/00)Preamble to the Final Rule (65 FR 4020) (1/25/00)

*Reference:* Social Security Act - section 471 (a)(20); 45 CFR 1356.30