

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Children and Families**

**45 CFR Parts 1355, 1356 and 1357**

**RIN 0970-AA97**

**Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews**

**AGENCY:** Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (DHHS).

**ACTION:** Final Rule.

**SUMMARY:** This final rule amends existing regulations concerning Child and Family Services by adding new requirements governing the review of a State's conformity with its State plan under titles IV-B and IV-E of the Social Security Act (the Act), and implements the provisions of the Social Security Act Amendments of 1994 (Pub. L. 103-432), the Multiethnic Placement Act (MEPA) as amended by Pub. L. 104-188, and certain provisions of the Adoption and Safe Families Act (ASFA) of 1997 (Pub. L. 105-89).

In addition, this final rule sets forth regulations that clarify certain eligibility criteria that govern the title IV-E foster care eligibility reviews which the Administration on Children, Youth and Families conducts to ensure a State agency's compliance with statutory requirements under the Act, and makes other technical changes to the race and ethnicity data elements in the Adoption and Foster Care Analysis and Reporting System (AFCARS).

**EFFECTIVE DATE:** March 27, 2000.

**FOR FURTHER INFORMATION CONTACT:**

Kathy McHugh, Director, Policy Division, Children's Bureau, Administration on Children, Youth and Families at (202) 401-5789.

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**I. Background**

Titles IV-B and IV-E of the Social Security Act (the Act) are the primary sources of Federal funds for State child welfare services, foster care and adoption assistance. The Adoption Assistance and Child Welfare Act of 1980 (Pub. L. 96-272), amended title IV-B child welfare services to institute financial incentives for States to provide certain protections for children in foster care under section 427 of the Act. Public Law 96-272 also established Part E of title IV of the Act, "Federal Payments for Foster Care and Adoption Assistance." The foster care component of the Aid to Families with Dependent Children (AFDC) program, which had been an integral part of the AFDC program under title IV-A of the Act, was transferred to the new title IV-E, effective on October 1, 1982.

In August 1993, under the Omnibus Budget Reconciliation Act of 1993, Public Law 103-66, Congress again amended title IV-B, creating two subparts and extending the range of child and family services funded under title IV-B to include family preservation and family support services. The family preservation and support services were designed to strengthen and support families and children in their own homes, as well as children in out-of-home care.

Later, through the Social Security Amendments of 1994, Congress repealed section 427 and amended section 422 of the Act to include, as State plan assurances, the protections formerly required in section 427 of the Act. As a result, ACF is no longer conducting "427" reviews to determine if a State is eligible to receive additional title IV-B, subpart 1 funds. Besides mandating the Secretary to promulgate regulations for reviews of State child and family service programs, the amendments to the Act at section 1123A required the Department to make technical assistance available to the States, and afforded States the opportunity to develop and implement corrective action plans designed to ameliorate areas of nonconformity before Federal funds are withheld due to the nonconformity.

In 1994, Congress passed the Multiethnic Placement Act (MEPA), Public Law 103-382, to address excessive lengths of stay in foster care experienced by children of minority heritage. One factor believed to be

contributing to these excessive lengths of stay in foster care was State agencies' attempts to place children of minority heritage in foster and adoptive homes with parents of similar racial or ethnic backgrounds. The MEPA forbids the delay or denial of a foster or adoptive placement based on the race, color, or national origin of the prospective foster parent, adoptive parent, or child involved. At the same time, Congress added a title IV-B State plan requirement to section 422(b)(9) of the Act, to compel States to make diligent efforts to recruit prospective foster and adoptive parents who reflect the racial and ethnic diversity of the children in the State for whom foster and adoptive homes are needed.

As originally enacted, section 553 of MEPA permitted States to consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parent to meet the needs of a child of such background, as one of several factors in making foster and adoptive placements. In 1996, through section 1808, "Removal of Barriers to Interethnic Adoptions," of the Small Business Job Protection Act (Pub. L. 104-188), Congress repealed section 553 of MEPA, believing that the "permissible consideration" language therein was being used to obfuscate the intent of MEPA. Section 1808 of Public Law 104-188 amended title IV-E by adding a State plan requirement, section 471(a)(18) of the Act, which prohibits the delay or denial of a foster or adoptive placement based on the race, color, or national origin of the prospective foster parent, adoptive parent, or child involved. Section 1808 of Public Law 104-188 also dictates a penalty structure and corrective action planning for any State that violates section 471(a)(18) of the Act.

On November 19, 1997, President Clinton signed the first broad-based child welfare reform legislation since Public Law 96-272 was enacted in 1980. The Adoption and Safe Families Act (ASFA) of 1997, Public Law 105-89, seeks to provide States with the necessary tools and incentives to achieve the original goals of Public Law 96-272: safety; permanency; and child and family well-being. The impetus for the ASFA was a general dissatisfaction with the performance of State child welfare systems in achieving these goals for children and families. The ASFA seeks to strengthen the child welfare system's response to a child's need for safety and permanency at every point along the continuum of care. In part, the law places safety as the paramount concern in the delivery of child welfare

services and decision-making, clarifies when efforts to prevent removal or to reunify a child with his or her family are not required, and requires criminal record checks of prospective foster and adoptive parents. To promote permanency, ASFA shortens the time frames for conducting permanency hearings, creates a new requirement for States to make reasonable efforts to finalize a permanent placement, and establishes time frames for filing petitions to terminate the parental rights for certain children in foster care.

## II. Approach

### A. Consultation With the Field

A Notice of Proposed Rulemaking (NPRM) was published in the **Federal Register** on September 18, 1998 (63 FR 50058–50098) with a 90-day public comment period. We received 176 letters within that period from State and local child welfare agencies, national and local advocacy groups for children, educational institutions, and individual social workers. Other commenters on the NPRM included: Members of Congress, providers of child welfare services, State and local courts, national and State associations representing groups of practitioners, Indian tribes, and local community organizations.

Prior to developing the NPRM, we consulted extensively with the child welfare field. We conducted a series of focus groups related to the child and family services reviews with representatives of State programs and national organizations, as well as with family and child advocates. In addition, State and Federal teams conducted 12 in-depth on-site pilots of the child and family services reviews that shaped our development of the regulation. We also conducted pilots of the title IV–E eligibility reviews in 12 States during the fiscal years 1995 through 1998. Shortly after the enactment of ASFA, we held focus groups in Washington, D.C. and in each of the 10 Federal regions to obtain input from the field on the implementation of the new law.

### B. Analysis and Decision-Making

We received a wide range of written comments on the NPRM, representing a multitude of perspectives on Federal monitoring of State child welfare programs and meeting title IV–E statutory requirements. We received widespread support for an outcomes-focused approach to the child and family services reviews and the inclusion of a program improvement process subsequent to determinations of substantial nonconformity, and have thus retained these features in the final

rule. We also received comments expressing concerns about other provisions of the NPRM.

The major concerns from commenters centered around provisional and two-tiered licensing systems for foster care homes, objectivity and clarity of substantial conformity determinations in the child and family services reviews, the enforcement of the Multiethnic Placement Act (as amended), documentation of reasonable efforts and other judicial determinations, and exemptions and exceptions from the termination of parental rights provisions. We amended and clarified many aspects of the final rule in response to these major issues and to other comments. To guide us in maintaining an appropriate balance in our analysis of the comments and decisionmaking for the final rule we used several principles. Those principles are to:

Focus on Achieving the Goals of Safety, Permanency and Well-being in State Child Welfare Systems

We believe that the Adoption and Safe Families Act of 1997 clearly establishes safety, permanency and well-being as the key goals for State child welfare systems. We were mindful, therefore, to have regulatory provisions that would support these statutory goals. For example, in the NPRM we proposed to prohibit provisional, or less than full licensure of foster care providers for title IV–E purposes. Many commenters opposed this prohibition for various reasons. Some were concerned that since relative caregivers were often granted less than full licensure, disallowing this practice for title IV–E purposes would reduce kinship care and the stability it can provide in a child's life. While we encourage States to consider permanency in kinship care arrangements, the ASFA clearly requires the safety of the child to be the paramount concern that will guide all child welfare services. In addition, the statute on its face requires that a home is fully licensed or approved as meeting the State's licensing standards for the purpose of title IV–E eligibility. Therefore, we decided to retain the proposed prohibition on less than full licensure, in part because the statute as amended by ASFA compels us to ensure that children are in safe placements.

We also chose to strengthen our focus on safety, permanency and well-being in the child and family services reviews in a number of ways. Many commenters were unclear about how we would measure these outcomes, so we have strengthened our process for measuring

and determining substantial conformity with the safety and permanency outcomes in particular, through the statewide assessment. We also heard concerns that one of the safety outcomes was in fact two separate outcomes, so we have divided the first safety outcome accordingly. We believe that these modifications will help clarify our expectations for States to achieve these outcomes.

Another example of strengthening our focus on permanency is in the termination of parental rights provisions. Many commenters believed that certain groups of children in foster care should be exempted from the application of the provision for States to file a petition to terminate parental rights. Consistent with the statutory framework and desire for timely permanency for all children in foster care, we have clarified that no group of children is to be exempted from the TPR provision and State or tribal agencies may make exceptions to the TPR requirements only on a case-by-case basis.

Move Child Welfare Systems Toward Achieving Positive Child and Family Outcomes While Maintaining Accountability

As we noted in the NPRM, we have dramatically changed the focus of State program reviews by examining the results that child and family services programs achieve, rather than the accuracy and completeness of the case file documentation. Most commenters overwhelmingly supported this approach as one that would improve the provision of child welfare services for children and families, and we have thus retained a focus on outcomes in the final rule.

Some of the comments, however, also suggested that the flexibility that is inherent in an outcomes-based approach must be properly balanced with sufficient Federal oversight and State accountability. We agree that flexibility and accountability must be balanced, and have strengthened several provisions in the final rule in this respect. For example, for States who were determined to be out of substantial compliance on a child and family services review, we proposed to allow States two years, with a possible extension to three years, to complete a program improvement plan. Some commenters supported this length of time as sufficiently flexible to address needed areas of improvement, while others believed the program improvement period to be too long. In response, we have clarified that we do not expect States to take the full two

years to complete program improvement in all cases, and note that a State will only be able to extend a program improvement plan to three years in rare circumstances subject to the approval of the Secretary. Finally, we will apply penalties for nonconformity as soon as a State fails to improve on an area of nonconformity within the interval noted in the program improvement plan, rather than at the conclusion of the entire plan. We believe that these changes to the final rule properly focus the State on achieving outcomes while maintaining flexibility and accountability.

We also believe it necessary to ensure State accountability in the areas of documentation of reasonable efforts and contrary to the welfare determinations and requirements related to enforcement of section 471(a)(18) of the Act. Some commenters were concerned that the documentation requirements and enforcement of section 471(a)(18) of the Act were too inflexible. However, we believe that State accountability and Federal oversight in these critical areas of child and family protections and anti-discrimination consistent with the statute, will lead to better outcomes for children and families.

#### Use Non-Regulatory Resources to Support Federal Statutory and Regulatory Provisions

As we analyzed the comments, we carefully considered whether Federal regulations were the appropriate vehicle to address certain comments. We believe that we can better respond to some comments in a venue separate from the regulatory process, such as through technical assistance activities or program guidance.

For instance, some commenters requested regulations on title IV-E training or programs under title IV-B of the Act. We have very limited authority to expand the scope of the final rule beyond the issues presented for public comment in the NPRM, but we are now aware of certain issues that we may consider for future clarification. Other commenters asked for specific guidance on working to reunify children with parents who have substance abuse problems, or guidelines for judges on reasonable efforts, while others requested information about "best practices" in concurrent planning. We are committed to providing practice level guidance and will provide technical assistance in a variety of forms rather than in regulation. Other commenters requested Federal funds to subsidize legal guardianships, or train courts and their staff. Under current authority, title IV-E funds cannot be

used for these purposes. However, we can direct States to our resource centers who may have information on seeking non-Federal funding sources for such initiatives.

#### C. Regulation in Context

This final rule incorporates many provisions of recently enacted legislation, including the Adoption and Safe Families Act of 1997, the Multiethnic Placement Act of 1994 as amended, and the Social Security Act Amendments of 1994. We received some comments that criticized us for not focusing on the requirements of ASFA and other amending legislation. We believe that some commenters were unclear that, to a large extent, provisions of ASFA, MEPA, etc. amend the Social Security Act (the Act), and that we refer to the requirements by their citation in the Act, rather than their citations in the amending legislation. We believe that this final rule does address the requirements of the amending legislation in the context of the existing requirements of titles IV-B and IV-E of the Act.

In addition to the guidance provided by this final rule, we encourage administrators to use the appropriate statutes as references in implementing Federal requirements. Also, the final rule amends existing regulations at 45 CFR part 1355 and 45 CFR part 1356. Therefore, we encourage the reader to examine and implement the rules herein in conjunction with existing regulations that have not been amended.

### III. Discussion of Major Changes and Provisions of the Final Rule

Discussed below are some of the major changes and provisions of the final rule. A more thorough response to the individual comments can be found in the section-by-section discussion.

#### A. Definitions

Overall, we received comments that requested greater clarity on several definitions. We frequently encountered comments that noted that the Federal definitions did not encompass the variety of State definitions or practice. Where a definition was not essential to the proper implementation of the program, we chose to be flexible and leave definitions to the State's discretion. In particular, we deleted definitions of a "full hearing" and a "temporary custody hearing" as the comments revealed that they were limiting and not helpful to States. We also received comments that requested additional definitions for terminology used in the statute or in the regulation, e.g., "compelling reasons," "aggravated

circumstances," and "reasonable efforts." In most cases we chose not to regulate additional definitions as we do not wish to be more prescriptive and restrict State flexibility.

The proposed definition of the "date a child is considered to have entered foster care" elicited many comments requesting more clarity and State flexibility. In response, we have revised the definition to mirror the statutory language more closely. The "date a child is considered to have entered foster care" is no longer different for children placed in foster care under voluntary placement agreements, but more consistently applied. We also have clarified that a State can use a date earlier than the outside Federal limit set in the statute to begin the "clock" for satisfying the requirements for holding periodic reviews, permanency hearings, and for the termination of parental rights (TPR).

We received many comments on the definition of a "foster family home" that urged us to allow provisional licensure and a two-tiered system of licensing and approval. Despite these comments, we are prohibiting these practices, consistent with the statute, to ensure that children receiving title IV-E funds are placed safely in licensed homes. In recognition that some time may lapse between the date when a foster family home satisfies all requirements for licensure or approval and the actual date the license is issued, we will allow States to claim title IV-E reimbursement during this period, not to exceed 60 days. To accommodate those States where current State practice is not consistent with the requirements for foster family homes, we will allow a six-month period for States to bring current foster family homes to the appropriate licensing standards.

#### B. Child and Family Services Reviews

We received many comments in response to the proposed child and family services review process that have helped us strengthen it significantly from that proposed in the NPRM. In the NPRM and in the early pilot reviews, we relied heavily on the findings from the on-site reviews to make determinations about substantial conformity. In the final rule, we believe we have balanced our use of statewide quantitative indicators with case-specific qualitative observations in our decision-making about substantial conformity. Among the major changes we have made in the child and family review process are the following: We have strengthened the use of the statewide assessment, selected particular statewide data indicators to use in determining substantial

conformity, more clearly defined the process for reviewing the systemic factors, clarified the criteria for determining substantial conformity, increased the frequency of full reviews for States not in substantial conformity, added a discrepancy resolution process, and added graduated penalties for continuous nonconformity.

Most of the comments we received, particularly from the States, strongly favored the change to the results-and outcome-based review process proposed in the NPRM from the prior emphasis on compliance with procedural requirements. Similarly, we received very strong support for proposing a review process that provides time for States to improve programs and enhance services to children and families rather than one that imposes immediate penalties for nonconformity with certain requirements. A number of comments also indicated concerns about the details of the review process and raised issues about the overall approach that ACF is taking in reinventing the child and family services reviews.

Since we did not include all of the details of the reviews in the proposed rule, we would like to explain the procedures in more detail prior to addressing the major changes we made to the child and family services review.

We will review State programs in two areas: (1) Outcomes for children and families in the areas of safety, permanency, and child and family well-being; and (2) systemic factors that directly impact the State's capacity to deliver services leading to improved outcomes. The outcomes are as follows:

#### Safety Outcomes

1. Children are, first and foremost, protected from abuse and neglect.
2. Children are safely maintained in their homes whenever possible and appropriate.

#### Permanency Outcomes

1. Children have permanency and stability in their living situations.
2. The continuity of family relationships and connections is preserved for children.

#### Child and Family Well-Being Outcomes

1. Families have enhanced capacity to provide for their children's needs.
2. Children receive appropriate services to meet their educational needs.
3. Children receive adequate services to meet their physical and mental health needs. Each outcome is evaluated by using specific performance indicators and two outcomes are evaluated using data indicators as well.

State programs will also be reviewed to determine the extent to which the State agency has implemented State plan requirements that build the capacity to deliver services leading to improved outcomes. We describe such State plan requirements as systemic factors. These systemic factors include: (1) Statewide information systems; (2) case review system; (3) quality assurance system; (4) staff and provider training; (5) service array; (6) agency responsiveness to the community; and (7) foster and adoptive parent licensing, recruitment and retention. Each of the systemic factors subject to review is based on specific State plan requirements. Our review and assessment of the systemic factors will be based on the extent to which the State is in conformity with those State plan requirements.

We also want to clarify how the various components of the review process will inform decisions regarding substantial conformity.

Four sources of information are included in the child and family services reviews in order to make decisions about substantial conformity:

- Statewide AFCARS and NCANDS data on foster care, adoption and child protective services, including the State's performance on statewide data indicators with respect to the national standards for such;
- Narrative information on outcomes and systemic factors;
- Case-specific qualitative information and family interviews on outcomes; and
- Interviews with non-case-specific State and local community representatives on outcomes and systemic factors.

To complete this review effort, several tools will be used, including:

- A field-tested CFSR procedures manual that addresses the steps to be followed in the reviews and supplements information included in the rule;
- A statewide assessment instrument that directs the utilization of statewide foster care, adoption and child protection data to complete a narrative discussion of the outcomes and systemic factors reviewed, and the State's performance in meeting the standards for the statewide data indicators;
- An on-site intensive review instrument;
- Interview protocols for use with State and local stakeholders; and
- A summary of findings and recommendations form that enables the review team to address each outcome and systemic factor reviewed. This

form, when completed, serves as the report of the review findings to the State.

There are five steps in the review process, from the point of initiating the review to assessing penalties where determinations of nonconformity are made:

- Prior to the State beginning work on the statewide assessment, ACF prepares and transmits data profiles of the State's foster care and child protective service populations, using AFCARS and NCANDS data submitted by the State. Some examples of the data included in the profiles include the length of stay in foster care, foster care re-entries, and repeat maltreatment rates of children. The data will indicate whether or not the State meets the national standards for those statewide data indicators used to determine substantial conformity.

- The State then completes the statewide assessment. This task requires the State to examine the data relative to the State programs, goals, and objectives, and consider them in light of the outcomes for children and families subject to review. The State also addresses in narrative the systemic issues under review relative to their influence on the State's capacity to deliver effective services. Based on the quantitative and qualitative findings of the statewide assessment, the State and the ACF Regional Office jointly make decisions about the locations of the on-site review activities and the types of cases that will be reviewed on-site.

- The on-site review is conducted by a joint Federal-State team that combines both the outcomes and the systemic factors being reviewed. In reviewing for the outcomes, a sample of cases is reviewed intensively using information from the case record and interviews with family members, the caseworker, and service providers involved with the family. The findings from the sample of cases are combined with the State's performance on selected Statewide data indicators to make determinations about substantial conformity on the outcomes. In reviewing for the systemic factors, interviews are conducted with State and local representatives, *e.g.*, courts, other agencies, foster families, and foster care review boards. The information from these stakeholder interviews is combined with information on the systemic factors in the statewide assessment to make determinations about substantial conformity on the systemic factors.

- The review team recommends a determination regarding substantial conformity, for each of the outcomes and systemic factors reviewed. The basis for the determinations is a

combination of quantitative and qualitative information from the statewide assessment and the on-site review related to each outcome and systemic factor.

- States are immediately informed of any penalties associated with outcome and systemic factors determined not to be in substantial conformity. Program improvement plans are developed to address each area of nonconformity and the State has a limited period of time to successfully complete the program improvement plan before penalties are actually taken.

A number of the comments we received reflected a need for more clarity regarding the overall process. As noted earlier, we did not include all the details of the reviews in the proposed rule, but chose to regulate only the basic framework of the process, including the overall approach to the reviews, the standards for substantial conformity, and the State plan requirements subject to review as required in section 1123A of the Act. We chose to address specifics about how the reviews will be conducted, the performance indicators that will be used to measure outcomes, and some aspects of the process for determining substantial conformity in a procedures manual we developed separately from the NPRM. This procedures manual will supplement the regulation with additional detail that State and Federal staff will need to conduct the reviews. The procedures manual will be in final form for the initial reviews to be conducted following publication of this rule.

While we recognize the need to be clear on the details of the review process, we also need to maintain the flexibility to make appropriate changes that support the results-focused approach to Federal reviews of State programs. Although we have field-tested the proposed review process extensively in 12 States to date, we believe that not regulating certain aspects of the review process affords both the Federal government and the States an ongoing opportunity to benefit from lessons learned in future reviews and make improvements to the process where needed.

We have made significant changes to the review protocol in response to the concerns raised through public comment. The most significant concerns relate to:

- The process and specific criteria for determining substantial conformity with State plan requirements;
- The degree of subjectivity involved in determining substantial conformity;
- The small sample size used in the on-site portion of the reviews; and,

- The amount of penalties associated with nonconformity.

The following addresses the major issues noted above that were the subject of the majority of the comments and changes to the regulation:

**Determining Substantial Conformity With State Plan Requirements**

Most of the respondents to the NPRM generally supported a determination of "substantial conformity," rather than requiring a determination of conformity on each specific title IV-B and IV-E State plan requirement. Of particular concern to commenters were:

- The standards used to make determinations of substantial conformity for outcomes;
- The process for resolving discrepancies in the aggregate data from the statewide assessment and the information obtained from the on-site review; and,
- The criteria used to determine substantial conformity for the systemic factors being reviewed.

Standards used to make determinations of substantial conformity for outcomes. The primary concerns regarding this issue include a lack of clarity with respect to how substantial conformity is determined and the standards that States are expected to meet in achieving substantial conformity. Commenters particularly requested that we set a more tangible, objective standard for substantial conformity. In response to these comments, and concerns raised about the sample size for the on-site portion of the review, statewide data indicators that are measured against national standards, in combination with the findings of the on-site review, will be used to determine substantial conformity.

*Statewide data indicators.* The following statewide data indicators will be used in combination with findings of the on-site review to determine substantial conformity with the outcomes.

**Outcome S1:** Children are, first and foremost, protected from abuse and neglect. Data indicators: Repeat maltreatment. Of all children who were victims of substantiated or indicated child abuse and/or neglect during the period under review, what percentage had another substantiated or indicated report within a 12-month period?

Maltreatment of children in foster care. Of all children in foster care in the State during the period under review, what percentage was the subject of substantiated or indicated maltreatment by a foster parent or facility staff?

**Outcome P1:** Children will have permanency and stability in their living situations. Data indicators: Foster care re-entries. Of all children who entered care during the period under review, what percentage re-entered foster care within 12 months of a prior foster care episode?

Length of time to achieve the permanency plan.

Of all children who were reunified with their parents or caretakers at the time of discharge from foster care, what percentage was reunified in less than 12 months from the time of the latest removal from home?

Of all children who exited care to a finalized adoption, what percentage exited care in less than 24 months from the time of the latest removal from home?

Stability of foster care placement. Of all children served who have been in foster care less than 12 months from the time of the latest removal from home, what percentage have had no more than two placement settings?

Length of stay in foster care. For a recent cohort of children entering foster care for the first time in the State, what is the median length of stay in care prior to discharge?

The national standard for each statewide data indicator identified above will be based on the 75th percentile of all State' performance for that data indicator, as reported in AFCARS and NCANDS. We considered using the 90th percentile and the median to establish the national standard and rejected both because these standards, respectively, were deemed either too high or too low. This is illustrated, based on 1998b (April 1–September 30) AFCARS data, and 1997 NCANDS data (available for repeat maltreatment only) in the chart below.

Measure	Median	75th	90th
% of children with repeat maltreatment within a 12-month period .....	11	7	2
% of children re-entering foster care	20	13	6
% of children reunified in less than 12 months from latest removal .....	72	80	88
% of children adopted in less than 24 months from the latest removal .....	16	26	43
% of children in care less than 12 months with no more than 2 placements .....	63	77	85

Measure	Median	75th	90th
Median length of stay in foster care prior to discharge (months) .....	18	12	10

**Note:** Data for maltreatment of children in foster care is not available for the purposes of this illustration, but will be available when we calculate the standard.

We recognize that we have set a high standard. However, we think it is attainable and that our overall approach for moving States to the standard through continuous improvement is sound.

We anticipate that the standard for each data indicator based on AFCARS data will be derived from the 1998b, 1999c (complete Federal fiscal year) and 2000a (October 1–March 31) reporting periods and the standard for each data indicator based on NCANDS data will be derived from the 1997 and 1998 reports. However, if we have more current and complete data available, for example the 1998 and 1999 NCANDS reports, we will use these data submissions to develop the standard. By using multiple reporting periods we will increase the number of States that participate in setting the standard.

As we considered how to develop the national standard, we noticed that States with smaller caseloads were clustered in the upper percentiles with respect to performance on the data indicators. We did not want States with larger caseloads to be disadvantaged, therefore, we explored setting multiple standards based on caseload size. We derived the variable “number of children in foster care per 10,000 children under 18 years old in the general population” and used it to test State performance on certain statewide data indicators. We found no correlation between the variables. In short, caseload size was not useful in explaining the variation in State performance with respect to the national standards, so it was not considered in setting the national standards.

Because this concept of setting a national standard for data and basing substantial conformity, in part, on a State’s ability to meet such a standard is untested, we purposely limited the number of outcomes to which we assigned statewide data indicators. For example, we did not assign data indicators to Safety Outcome #2 or Permanency Outcome #2, although we will consider adding indicators to those outcomes at a later time. We will also consider adding to or revising the data indicators listed above as needed. For example, we will consider adding timeliness of initiating investigations of child maltreatment to the safety

outcomes later if there is a broad enough national data base through NCANDS to support that indicator. In addition, to date, there are no uniform national data indicators collected through AFCARS or NCANDS that can be used to review for the Well-being outcomes.

We expect the statewide data indicators to change over time and, therefore, did not regulate them. We chose to base the first set of statewide data indicators on the outcome measures that were developed in accordance with section 203 of the ASFA for two reasons:

- We received many comments requesting that the section 203 measures and the child and family services reviews be consistent with one another; and,
- The section 203 measures were developed in conjunction with a consultation group and were published in the *Federal Register* for public comment.

We would also like to note that many of the data indicators and performance measures we selected are consistent with and support the work of ACF in meeting the requirements of the Government Performance and Results Act of 1993 (GPRA). Under GPRA, Federal agencies are required to work with the States to establish performance goals and monitor performance results for all Federal programs. We believe that the outcomes and data indicators used in the CFSR support one of ACF’s objectives under GPRA to increase the safety, permanency, and well-being of children and youth.

We have, however, in regulation, retained our authority to add new data indicators, change existing data indicators, and suspend the use of data indicators as appropriate. We took a similar approach to setting the national standards. The standards will not change every year. Rather, we have retained our authority to periodically review and revise the standards if experience with the reviews indicates adjustments are necessary.

*Findings from the on-site portion of the review.* During the on-site portion of the review, a set of performance indicators is used to review the outcome and determine the extent to which the outcome has been achieved. Since the individual circumstances of each child and family are unique, the performance indicators serve most effectively as a guide to help the reviewer gather appropriate information from a variety of sources. Experience has taught us that reviewing only the information that is recorded in a written case record is insufficient for assessing outcome achievement. Therefore, the reviewer explores the performance indicators

through the case record review and through interviews with the individuals relevant to each case. Some components of the indicators are quantitative, such as the number of entries into foster care a child has experienced or the number of reports of maltreatment that have been received on a child. However, there are also indicators that are qualitative in nature that help explain the circumstances behind the numbers, such as reasons for re-entry into foster care or the nature of the reports of maltreatment received on a child. Indicators are rated as an area of strength or an area in need of improvement. For outcomes that have multiple indicators, if all but one of the indicators are rated as a “strength,” the outcome is determined “substantially achieved” in that particular case. We learned from the pilots that the information gathered in the on-site review using instruments structured in this way most often led reviewers to a general consensus regarding the degree of outcome achievement.

*Standard for substantial conformity with the outcomes.* For the outcomes to which statewide data indicators are assigned, a State must meet both the national standard for the statewide data indicators and substantially achieve the outcome in 90 percent (95 percent in reviews subsequent to the initial review) of the cases reviewed on-site to be considered in substantial conformity. We will resolve any discrepancies between the Statewide data and the on-site review findings so that substantial conformity does not rely totally on one or the other information source. This approach permits on-site exploration of the reasons why performance with respect to the statewide data indicators might not be an accurate indicator of statewide performance. Outcomes for which there are no assigned statewide data indicators must be substantially achieved in 90 percent (95 percent in reviews subsequent to the initial review) of the cases reviewed on-site to be considered in substantial conformity.

*Program improvement regarding statewide data indicators.* Any State found not to be in substantial conformity with an outcome must enter into a program improvement plan. When the national standard is not met on any of the statewide data indicators used to determine substantial conformity, States must engage in continuous improvement toward the national standard in the program improvement plan. This means that ACF will negotiate with the State to determine how much progress toward meeting the standard, in terms of absolute percentage points, the State

will make to successfully complete a program improvement plan. We retain final authority to determine how much improvement the State must make. In reviews subsequent to the initial child and family services review, we will consider prior program improvement efforts, including continuous improvement in meeting the national standard, when negotiating the degree of improvement required to successfully complete a program improvement plan.

Resolving discrepancies in the aggregate data from the statewide assessment and the information obtained from the on-site review pertaining to the outcomes. We received a number of comments addressing this issue, particularly concerning how discrepancies between the two sets of information will be resolved. New § 1355.33(d) provides more detailed information on the steps we will take to resolve discrepancies between the aggregate data and the findings of the on-site portion of the review. In order to resolve discrepancies between the statewide assessment and the findings of the on-site portion of the review we will provide the State the option of either of the following:

- The submission of additional information by the State that will explain or resolve the discrepancy, such as additional data or analysis of the existing data, or

- ACF and the State will review additional cases, but only for the indicators with a discrepancy that must be resolved. The total number of cases reviewed may not exceed 150 cases, and will represent a statistically significant sample with a 90 percent (or 95 percent in subsequent reviews) compliance rate, a tolerable sampling error of 5 percent, and a confidence coefficient of 95 percent. The conclusions made from reviewing the additional cases will form the basis for determining substantial conformity.

Criteria used to determine substantial conformity for the systemic factors being reviewed. The concerns related to determining substantial conformity for the systemic factors: (1) Statewide information systems, (2) case review system, (3) quality assurance system, (4) staff and provider training, (5) service array, (6) agency responsiveness to the community, and (7) foster and adoptive parent licensing, recruitment and retention were similar to those for the outcome areas: A lack of clarity on how

substantial conformity is determined and on the standards that States are expected to meet in achieving substantial conformity. In response to these concerns, we have established a process for rating the State's conformity with State plan requirements that is based on information obtained from the statewide assessment and the on-site stakeholder interviews. Information from the statewide assessment and interviews with stakeholders on-site must support a determination of substantial conformity. The review team will rate the State's performance for each systemic factor using a Likert-type scale, with criteria attached to each rating, based on the total information obtained from a variety of stakeholders interviewed on-site.

Except for "information system capacity," all of the systemic factors reviewed have more than one State plan requirement associated with them that are included in the review process. A State's conformity with each systemic factor will be rated on a scale of 1-4, based on the extent to which there are processes in place which meet the State plan requirements associated with that systemic factor. For example:

Not in substantial conformity		Substantial conformity	
1	2	3	4
None of the State plan requirements is in place.	Some or all of the State plan requirements are in place, but more than one of the requirements fails to function at the level described in each requirement*.	All of the State plan requirements are in place, and no more than one of the requirements fails to function as described in each requirement*.	All of the State plan requirements are in place and functioning as described in each requirement.

\* For the systemic factor, "information system capacity," if it is determined that a system is in place but not functioning at the level described in the one State plan requirement reviewed, that factor is rated a "2", rather than a "3".

The statewide assessment requires the State to evaluate each of the State plan requirements. Information from that source is used in part to determine how the State is complying with each State plan requirement. During the on-site review, selected local and statewide stakeholders will be interviewed and asked a series of questions that relate to the State plan requirements. Not every stakeholder interviewed will be able to address each systemic issue thoroughly. Thus, for each systemic factor, the review team must use the total information obtained from all the interviews to evaluate the extent to which the requirements are being met. Both the information from the statewide assessment and the stakeholder interviews must indicate that the State should receive a "3" rating or better for that systemic factor in order for the State to be found in substantial

conformity. To ensure objectivity in the information gathered through stakeholder interviews, we have amended the regulation at § 1355.33(c)(4)(iv) to set minimum requirements with respect to the selection of stakeholders who must be interviewed.

**Subjectivity in Determining Substantial Conformity**

Many respondents to the NPRM indicated that we needed to strengthen the rule to assure increased objectivity in making determinations of substantial conformity. Given the focus of the reviews on qualitative measures and degrees of outcome achievement, concerns raised included reviewers making subjective judgments on outcome achievement, holding States accountable for these judgments, and a

lack of clarity on the standards used to make decisions.

We agree that the need to insure objectivity in the decision-making process is extremely important. In fact, we realized early in the design process of the reviews that proposing a results-focused review, as opposed to the checklist-style reviews of documentation conducted in the past, would raise concerns about the level of objectivity in the reviews. However, to design a review process that focuses on results and outcomes we must evaluate not only what happens to children and families as a result of the State's interventions, but the circumstances and mitigating factors that affect both the interventions and the results. To accomplish this, our review process must utilize both quantitative and qualitative assessments. We also realize that determinations regarding outcome

achievement in the areas of safety, permanency and well-being require judgments based on the specific circumstances of individual children and families, and that we need to standardize the criteria for making those judgments in order to ensure objectivity.

As noted in the NPRM, we included several criteria and procedures in the pilot reviews that were designed to make the reviews as objective as possible and to result in consistency among reviewers and across States in making critical judgments about outcome achievement. Those measures include:

- Using statewide aggregate data and qualitative information from the statewide assessment to understand and interpret the status of outcomes and systemic factors;
- Applying uniform criteria or performance indicators that guide reviewers to an accurate conclusion about the extent to which the outcome is being achieved in each case;
- Training State and Federal reviewers in the use of standardized review instruments and protocols; and,
- Using a quality assurance procedure during the course of the review by requiring local team leaders to review case ratings and debrief daily with reviewers to ensure that criteria are applied consistently.

In piloting the reviews, we also determined that the objectivity and uniformity of the process could be strengthened in several areas. For example, we learned that the Statewide assessment was prepared differently among the pilot States and that the manner of collecting the data for the safety and permanency profiles was not uniform, particularly in States where AFCARS or NCANDS data were unavailable. These factors made it difficult to rely upon information in the statewide assessment.

In regard to case selection, we found that the manner of selecting cases for the on-site review varied among States in ways that made it difficult to assure randomness. Through the pilots and the comments we received on the instruments, we became aware that the protocols used to review cases could be improved to reflect, more objectively, those factors that determine conformity with State plan requirements.

In response to these lessons and others, we have strengthened the provisions for objectivity in the reviews by adding a number of measures to the final rule and the CFSR procedures manual. We are also making substantial changes to the content of the instruments used in the reviews that will assist in making objective

determinations and addressing the relevant areas of State plan conformity.

Most of the comments regarding subjectivity were related to the on-site review. The comments we received concerning subjectivity in the review process arise from genuine concerns that States be held accountable to an objective set of criteria. We also have learned from the pilot reviews that we must be willing to accept the professional judgment of reviewers in determining substantial conformity. Where there are adequate procedures in place to assure consistency and accuracy in decision-making, as we have described above, we believe professional judgments will be objective.

We recognize that it is much more difficult to determine whether or not a child is safe than it is to determine, for example, that a date on a court order meets specified time frames. Reviewing for outcomes requires gathering both qualitative and quantitative information, examining the information within an appropriate context and, ultimately, making a judgment about how well the outcome is or is not being achieved. Caseworkers in the field must make these judgments every day, and children's lives depend upon the accuracy of that process. A review process that only checks for procedural requirements and does not evaluate the quality of the decision-making process and service delivery that we expect of caseworkers is not likely to yield findings that will help States improve those processes where needed.

#### Sample Size for On-Site Reviews

In the NPRM, we proposed to review a sample of 30–50 cases. Most of the comments we received indicated strong concerns that reviewing only 30–50 cases may not be representative of the State's service populations and would not lead to credible judgments of substantial conformity. A number of commenters questioned how such a small sample could be statistically valid and expressed concern over imposing penalties based on a small sample of cases. Some respondents indicated a fear that we would be basing decisions about substantial conformity on "anecdotal" information in the absence of a much larger sample.

Clearly, to many of the commenters, sample size is a major issue, and we wish to explain our rationale for making only modest changes to this feature of the review in the final rule, based on the lessons we learned in the course of piloting the new review process. We want to emphasize that two changes also address these concerns about the

sample size: Adding the statewide data indicators and a process to resolve discrepancies that may include reviewing additional cases.

- We found little discrepancy between the statewide data and the findings from the small sample. We should note that we experienced minimal disagreement among reviewers (State and Federal) and between the statewide data and the findings made on the basis of the small samples in the pilot reviews. The findings of the pilots were similar to those noted in State quality assurance systems, where those systems were in place in pilot States. In most situations, the findings provided State officials with sufficient details about the functioning of their programs to make improvements where needed and to build on existing strengths in their programs.

- We learned that we cannot make accurate decisions in a results-focused review by only reviewing documentation in records. We began by pulling a large sample in the first four pilot States. We conducted a record review in all the cases, similar to prior reviews, except we were attempting to capture both qualitative outcome and quantitative information from the records. In a smaller subsample of the larger sample, we interviewed the relevant parties and focused less on record documentation and more on what was actually occurring in each case. Inevitably, the review team found that the small sample and the strategy of in-depth analysis through interviews was a more reliable source of information on outcomes and conformity with applicable requirements. The information obtained solely from the case records was often incomplete, not current, and left information gaps. Basically, we learned that we cannot apply traditional checklist-type reviews of documentation to determine the quality of decision-making and service delivery.

- We learned that reviewing cases intensely, including all the relevant interviews, requires a large number of staff resources and is an extremely time-consuming process. The process of reviewing case records and conducting multiple interviews in each case reviewed, combined with other review team activities, allows a reviewer time for only two cases, possibly three, in one week. Even with a sample size of 50 cases, the process requires a team of approximately 25 reviewers in order to complete the on-site review in one week. Increasing the sample to 150 cases or more would mean that either a team of 75 reviewers would be needed to review a State in one week, or 25

reviewers would have to remain on-site for three weeks to complete the review. Either option creates unreasonable expectations for States and the Federal government in terms of staff resources and cost and, therefore, does not constitute a cost-effective approach to the reviews.

As originally proposed in the NPRM, the sample would be comprised of both in-home and foster care cases. In-home cases do not provide insight into the State's performance with respect to the permanency outcomes, meaning that not every case in the sample would inform decisions regarding substantial conformity for the permanency outcomes. On the other hand, we need to assure that the sample accurately captures information on in-home service cases in order to examine the safety outcomes based on recent practice and for children who never entered the foster care system.

Therefore, in certain circumstances, the sample size may be increased to assure that all program areas identified in the statewide assessment for further review are adequately represented. In addition, we are requiring, in regulation, that the sample of 30–50 cases include children who entered foster care in the State during the year under review.

We have also added provisions to the rule for resolving discrepancies between the aggregate data and the findings of the on-site review that address the sample of cases reviewed. We are providing States the option of resolving such discrepancies through the submission of additional information, or by ACF and the State reviewing additional cases that, in combination with the 30–50 cases reviewed on-site, will be a sufficient number to comprise a statistically significant sample. ACF and the State will determine jointly the exact number of additional cases to be reviewed, however, the total number of cases may not exceed 150. We chose a maximum of 150 cases because it exceeds the highest number of cases necessary to review a sample that will be statistically significant with a compliance rate of 90 percent (or 95 percent for subsequent reviews), a tolerable sampling error of 5 percent and a confidence coefficient of 95 percent. In order to assure that the sample of cases reviewed in the on-site review and the additional cases actually comprise one random sample, we will randomly select the oversample of 150 cases for the on-site review, from which a subsample of 30–50 cases will be drawn. If the State chooses a review of additional cases to resolve a discrepancy, those cases will be selected from the same oversample. In this

manner, we believe we will address concerns about the size of the sample, particularly in cases where discrepancies in the findings exist and must be resolved.

We recognize that the sample size does not represent a faultless approach to reviewing State programs, and we fully understand the varying perspectives on this issue. We must emphasize, however, that the quality of information gathered from the overall process, and not the on-site sample in isolation, will benefit children and families by tracking their outcomes and allowing States to focus on program improvements where needed.

#### Penalties Associated With Nonconformity

We have made an important change in the final rule regarding withholding of funds in situations where States remain in nonconformity continuously on the same outcomes or systemic factors, and for States that elect not to engage in a program improvement plan. The final rule provides for graduated penalties in successive reviews if areas of nonconformity remain uncorrected. We have also applied the maximum withholding to those States that do not implement program improvement plans to correct the areas of nonconformity.

The comments we received on the imposition of penalties raised a number of issues that we considered in making this change to the rule. Some comments indicated concerns that the Federal government is not meeting its stewardship responsibilities by not taking a more aggressive approach to penalizing States found not to be in substantial conformity. Other comments indicated that the potential for penalties is substantial and could have a serious effect on the capacity of States to administer their programs. We also were encouraged to use the process for imposing penalties to assure that program improvements are made when and where they are needed.

We wish to note that we have not proposed an "all or nothing" approach to penalizing States. We have been faithful to the statutory mandate that applicable penalties be commensurate with the extent of nonconformity. Further, we have designed a review process that is based on substantial conformity with the requirements, rather than total compliance without exception, to be consistent with the statutory mandate. Penalties are attached to each outcome and systemic factor determined to be in nonconformity. We are providing time-limited opportunities for States to make needed program improvements prior to

withholding of Federal funds for nonconformity. Only when States fail to take advantage of program improvement opportunities or complete a plan successfully will they be faced with an actual loss of Federal funding as a result of the child and family services reviews.

At the same time, we have taken seriously the stewardship responsibilities of the Federal government in enforcing conformity with State plan requirements. These responsibilities are clear and we have not abandoned them. We intend to withhold Federal funds where States are not using those funds to achieve their designated purpose. To clarify that the need to make program improvements will be strongly enforced, we are strengthening sections of the final rule to assure that penalties will be taken in a timely and certain manner.

We do not wish to impose penalties in a manner that will impair a State's ability to provide essential services to children and families. However, we have a responsibility to assure that State plan requirements are met and that children and families are served in ways that will provide for their safety, permanency, and well-being.

#### C. Enforcement of Section 471(a)(18) of the Act

We received a large response to the section of the regulation that enforces the Multiethnic Placement Act, as amended. Several commenters sought practice guidance on how to implement the law. We believe that we have addressed these issues in other forums through policy issuances and HHS-funded technical assistance and guides. Other commenters were concerned that we were not maintaining the partnership approach exemplified in the child and family services reviews. We have made no changes to the regulation in response to these comments, since we find that the statute is definitive in the manner in which we are to implement corrective action and enforce compliance with section 471(a)(18) of the Act.

In response to other comments, we have:

- Clarified that we will consider a State in violation of section 471(a)(18) when it maintains a policy, practice, law or procedure that, on its face, clearly violates section 471(a)(18) of the Act;
- Required States to notify ACF upon a final court finding that the State has violated section 471(a)(18) of the Act;
- Allowed States up to 30 days to develop a corrective action plan to respond to a violation of section 471(a)(18) of the Act resulting from a

State's statute, regulation, policy, procedure or practice, and six months in which to complete the plan;

- Clarified which title IV-E funds will be reduced in the event of a violation of section 471(a)(18) of the Act; and
- Added a definition of the term "entity."

#### *D. Reasonable Efforts and Contrary to the Welfare Determinations and Documentation*

Many commenters believed that the requirements for reasonable efforts and contrary to the welfare determinations as proposed were inconsistent with current State practice. In some instances we agree that the regulation was unnecessarily restrictive, and have made the following changes to preserve State flexibility while keeping within the statute and maintaining the integrity of the program:

- Removed the distinction between emergency and non-emergency removals in the sections of the rule on contrary to the welfare and reasonable efforts to prevent removal. This change is in response to concerns that the distinction was artificial.
- Allowed States up to 60 days to obtain a judicial determination with regard to reasonable efforts to prevent removal of a child from home. This responds to concerns that our proposed policy restricted the timing for obtaining such a determination to a specific date rather than within a specified time frame.
- Consolidated the requirements regarding reasonable efforts to reunify the child with the family and efforts to make and finalize alternate permanent placements into a single requirement to be more consistent with actual State practice. Within 12 months of the date the child is considered to have entered foster care, the State is to obtain a judicial determination that the State agency made reasonable efforts with respect to the permanency plan that is in effect.

In other areas, we explained why we are maintaining our policy position rather than changing the regulation in response to commenter' concerns. We affirmed that judicial determinations regarding contrary to the welfare and reasonable efforts are inextricably linked to a child's eligibility for title IV-E. The statute makes these judicial determinations eligibility requirements which we cannot change despite the many opposing comments. We also retained the requirement for the State to make a contrary to the welfare determination in the first court order sanctioning the removal of the child

from the home, because it is a longstanding critical protection for children and families. Finally, we are not relaxing the documentation requirements or allowing *nunc pro tunc* orders because we wish to preserve the certainty that these determinations are made in accord with the statute.

#### *E. Case Plans and Case Review Requirements*

To clarify our existing policy with regard to the timing of the case plan, we have amended the regulation to allow States up to 60 days from a child's removal from the home to develop the case plan. We also made a significant policy shift in the requirements for subsequent permanency hearings. We are now requiring subsequent permanency hearings for all children, including children placed in a permanent foster home or a preadoptive home. We believe that the ASFA compels us to ensure, through the protection of a permanency hearing, that permanency will be achieved for these children.

We received a significant number of requests to limit the TPR provision to only certain groups of the foster care population. We are unable to make this change in the regulation, as no statutory authority exists for doing so, and the clear intent of ASFA was to speed critical decision-making for all children in foster care. We clarify in the final rule that the exceptions to the requirement to file a petition for TPR must be done on a case-by-case basis and added additional examples of a compelling reason. We also clarify that States must begin the process of finding and approving an adoptive family for a child when the State files a petition for TPR.

#### *F. Title IV-E Reviews*

We made several changes to strengthen and clarify the title IV-E reviews. The title IV-E reviews are designed to review the eligibility of children in foster care and providers receiving title IV-E funds. Those changes to the final rule include:

- Clarifying that when using an alternate sampling methodology when AFCARS data are unavailable, we will review a six-month period that coincides with the AFCARS reporting period;
- Allowing all State' initial primary reviews to be held at a 15 percent threshold of ineligible cases regardless of whether or not the review occurs within the first three years of the final rule;
- Providing, on a case-by-case basis, an extension of a program improvement plan when a legislative change is

necessary for the State to achieve substantial compliance; and

- Increasing the initial amount of time to develop a program improvement plan from 60 days to 90 days for States found not to be in substantial conformity as a result of a title IV-E foster care eligibility review.

#### *G. Special Populations*

Several issues of note recurred as themes throughout the comments and the regulation. One was the application of the rules to certain populations, such as Indian tribal children, adjudicated delinquent children, and unaccompanied refugee minors. We clarify how in particular the provisions of the final rule apply to these populations of children, but also emphasize that overall the statute must apply to these children as they would any other child in foster care. We have no statutory authority to exempt any group from provisions such as the safety requirements or termination of parental rights requirements. Furthermore, we strongly believe that, while these requirements must apply to all children, the statute affords the State agency the flexibility to engage in appropriate individual case planning.

For Indian tribes, numerous other issues were raised with regard to how title IV-E requirements and, more specifically, the recent amendments made by the Adoption and Safe Families Act apply to Indian tribes as sovereign nations. While we are committed to the government-to-government relationship between the Federal government and Indian tribes, the foster care program under title IV-E is statutorily targeted to State agencies, and Indian tribes cannot receive title IV-E funds directly. Indian tribes can gain access to title IV-E funds on behalf of title IV-E eligible children if they enter into agreements with State agencies. Accordingly, Indian tribes must operate within the parameters of a particular State plan and the specifics of the agreement. Some commenters also requested that we explain how the requirements of the Indian Child Welfare Act work in the context of the ASFA. Although we can affirm that States must comply with ICWA and that nothing in this regulation supersedes ICWA requirements, we cannot expound on ICWA requirements since they fall outside of our statutory authority.

#### IV. Section-by-Section Discussion of Comments

##### Part 1355—General

###### Section 1355.20 Definitions

This section amends 45 CFR 1355.20 to revise the definitions of foster care and foster family home and to define new terms used throughout the regulation.

*Child care institution. Comment:* Some commenters requested that we provide more specific guidance or parameters to determine whether a facility is a “child care institution” and offered a variety of suggestions and recommendations. For example, one commenter asked that we confirm whether the definition of “child care institution” precludes group child care programs from taking steps to assure safety for foster children, including locking facility doors at night and taking other reasonable measures to prevent foster children from leaving the facility without consent.

*Response:* We understand the desire for more expansive guidance for determining whether a facility is appropriate for title IV–E eligible children. We strongly believe that any such guidance should be developed with input from the field. We have begun this consultation process by inviting comments on a notice published in the **Federal Register** on December 7, 1998 (63 FR 67484). That notice specifically requested comments on defining appropriate child care facilities in which children adjudicated delinquent may be placed. Taking into account the comments received on the **Federal Register** notice, we are considering our options for setting forth more expansive guidance for identifying child care institutions that are appropriate for title IV–E eligible children.

*Comment:* One commenter suggested that language such as “or tribal licensing authorities” be inserted after “State” to clarify the definition of “child care institutions” on Indian reservations.

*Response:* We concur with the commenter and have revised the definition in the final rule to reflect the tribal licensing authority.

*Comment:* One commenter noted that many “child care institutions” care for more than 25 children.

*Response:* The limit of 25 children, by statute, specifically applies to public child care institutions and not private facilities. Therefore, no changes to the final rule are warranted.

*Date a child is considered to have entered foster care.*

*Comment:* We received a great number of comments and suggestions regarding how to define the date a child is considered to have entered foster care in accordance with section 475(5)(F) of the Act (the date the State is to use in calculating when to hold periodic reviews in accordance with section 475(5)(B) of the Act, permanency hearings in accordance with section 475(5)(C) of the Act, and for complying with the termination of parental rights (TPR) provision under section 475(5)(E) of the Act). Some commenters wanted us to define the term by using the date on which the child actually enters foster care and the agency assumes responsibility for the placement and care of the child. Others suggested that we define the term based on a variety of other points in time, such as: The date of a judicial determination that it was contrary to the child’s welfare to remain at home; the date of the full hearing; the date of the initial shelter care hearing; the date of removal; or, the date a petition for removal is filed. Many commenters observed that, by linking the date the child is considered to have entered foster care to a finding of abuse or neglect and the agency receiving responsibility for placement and care of the child, we incorrectly implied that the aforementioned decisions occur at the same hearing when, in fact, these judicial decisions are often made at separate hearings.

*Response:* The time frames for considering when a child has entered foster care, *i.e.*, the earlier of a judicial finding of abuse or neglect or 60 days from the date the child is removed from the home, are statutory. However, nothing precludes a State from using a point in time that is earlier than that required by statute or regulation, such as the date the child is physically removed from the home. We have changed the regulation to reflect this option. Clearly, if a State uses the date a child is physically removed from the home, the requirements for holding periodic reviews, permanency hearings, and complying with the TPR provision within the time frames prescribed would be satisfied.

We also have removed to the reference to the agency’s responsibility for the placement and care of the child so that the definition more closely follows the statutory language and is consistent with actual practice.

*Comment:* One commenter suggested that the time a child spends in shelter care not be factored into calculating the timing for holding periodic reviews, permanency hearings, and for complying with the TPR provision.

*Response:* Under long-standing Departmental policy, shelter care is considered a form of foster care (see the definition of “foster care” at 45 CFR 1355.20). Shelter care is one of many possible settings in which children in foster care are placed. Therefore, time spent in shelter care counts in determining when to hold periodic reviews, permanency hearings, and for complying with the TPR provision. We have made no changes to the final rule in response to this comment.

*Comment:* One commenter requested that we delete the word “physically” from the regulatory definition of the date a child is considered to have entered foster care to adhere strictly to the statutory language which provides no qualification of the term “removal.”

*Response:* While we have deleted the word “physically” from the definition, we have retained the policy on physical removals because it is consistent with the intent of ASFA regarding expedited permanency. Linking the definition of the date a child is considered to have entered foster care to a physical removal ensures that children do not languish in care awaiting a judicial order that says that the child is removed from the home.

We have, however, created an exception. Under § 1356.21(k), we permit constructive removals (*i.e.*, paper removals) to equalize the situation in relative and nonrelative foster family homes. If a child is constructively removed from the home, the date he or she is considered to have entered foster care, absent a finding of abuse or neglect, is the date that is 60 days from the date of the constructive removal. We have amended the regulatory text by cross-referencing § 1356.21(k), which sets the parameters for the acceptable forms of removals.

*Comment:* One commenter was concerned about what appeared to be an inconsistency between the date a child is considered to have entered foster care and the timing for developing case plans. The outside limit for considering a child to have entered foster care is 60 days from the date of removal, while § 1356.21(g)(2) requires case plans to be developed within 60 days of the State agency “ \* \* \* assuming responsibility for providing services including placing the child \* \* \* ”

*Response:* We understand the confusion and have amended the regulatory language at § 1356.21(g)(2) to state clearly that case plans must be developed within 60 days of the date the child is removed from the home.

*Comment:* We received several comments opposing the manner in which we applied this definition to

voluntary placement agreements. In the NPRM, we set the date a child is considered to have entered foster care for a child placed via a voluntary placement agreement as the date the voluntary placement agreement is signed by all relevant parties. Many commenters wanted to be able to use the date the child actually is placed in foster care since the child may not enter foster care the same day the agreement is signed. Some commenters believed we lacked a statutory basis for not applying section 475(5)(F) of the Act to all children, irrespective of how they enter foster care.

*Response:* We concur that it is more appropriate to adopt a consistent application of section 475(5)(F) of the Act for all children. We have amended the definition of the date a child is considered to have entered foster care so that it makes no distinction for children who enter foster care via a voluntary placement agreement. Therefore, children placed in foster care via a voluntary placement agreement will be considered to have entered foster care no later than 60 days after the child is removed from the home.

We want to take this opportunity, however, to note that the purpose of the 60-day limit at section 475(5)(F) of the Act is to ensure that periodic reviews, permanency hearings, and application of the TPR provision are not delayed as a result of contested involuntary removals. The danger of such a delay often does not exist when children are removed from their homes pursuant to a voluntary placement agreement. When children are removed from home via a voluntary placement agreement, we encourage States to use the date the child is placed in foster care (rather than 60 days later) as the date for calculating when to hold periodic reviews, permanency hearings, and for complying with the TPR provision.

*Comment:* A few commenters requested guidance on how to apply the definition to children who are voluntarily relinquished by their parents for adoption.

*Response:* The date a child is considered to have entered foster care according to the statute is the earlier of a judicial finding of abuse or neglect or 60 days from the date the child was removed from the home. Typically, there is no finding of abuse or neglect in a voluntary relinquishment, so the date of entry into foster care would be no later than 60 days from the date the child was removed from the home.

*Comment:* One commenter requested that we specifically clarify, in regulation, that the date the child is considered to have entered foster care

does not affect the date Federal financial participation (FFP) may be claimed for foster care maintenance payments. One commenter observed that there is a connection between maintaining eligibility for title IV-E funding and the date a child is considered to have entered foster care.

*Response:* Both commenters are correct. Establishing initial eligibility for title IV-E funding and initial claiming for FFP have no relationship to the date the child is considered to have entered foster care defined at section 475(5)(F) of the Act. The purpose of that provision is to set the "clock" for determining when to satisfy the requirements for holding periodic reviews, permanency hearings, and the TPR provision. A child's initial eligibility for title IV-E funding is not related to this time frame. We have amended the regulation at § 1355.20 accordingly.

The date a child is considered to have entered foster care is, however, related to maintaining a child's eligibility for title IV-E funding. Under § 1356.21(b)(2), we require the State to use the date the child is considered to have entered foster care in determining when to obtain a judicial determination that it made reasonable efforts to finalize a permanency plan. We intentionally linked the timing for obtaining this judicial determination to the date the child is considered to have entered foster care so that such determinations could occur at the permanency hearing, the logical time for making such determinations.

*Comment:* Several commenters requested guidance for applying the statutory definition of the date a child is considered to have entered foster care to children who are adjudicated delinquent, particularly for those children who enter foster care subsequent to placement in a detention facility.

*Response:* In general, a date that is no later than 60 days from the date the child was physically removed from his or her home should be used in calculating when to satisfy the requirements for holding periodic reviews, permanency hearings, and for complying with the TPR provision, because judicial determinations regarding abuse or neglect are not typically made for children who are adjudicated delinquent. For children who enter foster care subsequent to placement in a detention facility, States should follow existing policy as stated in ACYF-PA-87-02 in calculating when to develop case plans, hold periodic reviews and permanency hearings, and comply with the TPR provision.

ACYF-PA-87-02 requires States to satisfy the requirements for developing case plans, holding periodic reviews and permanency hearings (the requirements at section 427 of the Act at the time ACYF-PA-87-02 was written) for all children supervised by or under the responsibility of another public agency with which the title IV-B/IV-E agency has an agreement under title IV-E, and on whose behalf the State makes title IV-E foster care maintenance payments. Since the State cannot claim Federal financial participation under title IV-E for children in detention facilities, the "clock" for calculating when to comply with the requirements for developing case plans, holding periodic reviews and permanency hearings, and the TPR provision begins when the child is placed in foster care.

Although the ASFA was passed long after ACYF-PA-87-02 was issued, we think that the existing policy is an appropriate interpretation of section 475(5)(F) with respect to adjudicated delinquents who enter foster care subsequent to placement in a detention facility.

*Comment:* A few commenters suggested that we adjust the date a child is considered to have entered foster care for Indian children to accommodate the time involved in tribal identification and notification required by the Indian Child Welfare Act.

*Response:* We are sensitive to the fact that tribal identification and notification may take time and limit the amount of time the tribe or State has in making reasonable efforts to finalize a permanency plan prior to the permanency hearing. However, we have no authority to set a different "date of entry into foster care" for a particular group of the foster care population. Nothing precludes the agency and court at the permanency hearing from taking into consideration the amount of time it took the State to comply with tribal identification and notification requirements when determining appropriate permanency plans for Indian children.

*Comment:* Several commenters did not want the definition of the date a child is considered to have entered foster care to apply to the six-month periodic reviews. The commenters are concerned that, if the definition were so applied, children could potentially be in foster care for eight months before a review is held.

*Response:* We chose to apply section 475(5)(F) of the Act to the six-month periodic reviews, permanency hearings, and the TPR provision, for two reasons. First, nothing prohibits the State from holding six-month periodic reviews

based on the date the child is physically removed from the home. Second, setting different "clocks" for calculating when to hold periodic reviews and permanency hearings, and for complying with the TPR provision would add administrative burdens on States.

For example, we believe that we would encumber State systems by requiring a State to hold six-month periodic reviews based on the date the child is removed from the home while holding permanency hearings based on section 475(5)(F) of the Act. In that situation, the State would be obliged to hold two periodic reviews prior to the permanency hearing, the second of which would have to be held two months before the permanency hearing if the date of entry into foster care were 60 days from the date the child is removed from the home. Therefore, we have not made any changes to the final rule as a result of this comment.

*Foster care.* No comments were received on this definition and therefore no changes are being made to the language proposed in the NPRM.

*Foster care maintenance payments.* *Comment:* One commenter questioned our ability to revise the definition of foster care maintenance payments to include travel for visits with workers, which is currently covered as a title IV-E administrative expense. Another commenter recommended that a revision to the definition be made to include the travel costs for a parent to visit his/her child(ren) as an allowable title IV-E foster care maintenance payment cost.

*Response:* The first commenter's observation is correct. Including the phrase "agency workers \* \* \*" in the definition goes beyond the statute and was an error on our part. The statute clearly allows reasonable travel by the child for visitation with family. We have revised the definition in the final rule, deleting the words "agency workers," to conform to the statute. ACYF-PIQ-97-01 addresses the second commenter's request to expand foster care maintenance payments to include travel by the parent(s). Such costs are service related and may be charged to title IV-B, title XX or the State. No change has been made to expand foster care maintenance payments to include other travel.

*Comment:* We received several requests to expand the definition of foster care maintenance payments to cover a variety of items. For example, one commenter recommended that a State be able to claim child care when the foster parent is attending a school meeting or medical and mental health

staffings for another foster child in his/her care.

*Response:* The definition of foster care maintenance payments cited in the NPRM mirrors the statutory language at section 475(4) of the Act. We do not have the authority to extend the definition beyond the statute.

Furthermore, ACYF-PIQ-97-01 explains that child care provided to a foster child when a foster parent is attending activities that go beyond the scope of "ordinary parental duties" are reimbursable under title IV-E. The PIQ provides a thorough discussion on the child care costs that can be included in the title IV-E foster care maintenance payment.

*Comment:* One commenter asked if the State could seek foster care maintenance payments for appropriate child care costs if the State has a two-tiered licensing system, "licensed" for center-based and "regulated" for home-based child care.

*Response:* A State's use of specific terminology or type of child care licensing system has no bearing on whether the costs of child care can be included in title IV-E foster care maintenance payments. As long as the child care facility or individual (in the case of home-based child care) is licensed, or otherwise officially authorized or approved by the State as meeting the requirements for a child care facility, the State may claim the costs of allowable child care as part of a foster care maintenance payment.

*Comment:* Two commenters requested that the language in the preamble to the NPRM which stated that payments for child care could be a separate payment to the child care provider or included in the basic maintenance payment be inserted in the regulatory text of the final rule.

*Response:* We agree and have amended the regulation accordingly.

*Foster family home.* *Comment:* We received many comments on the definition of "foster family home" and related concerns regarding title IV-E eligibility and reimbursement. Several commenters noted that in some States, the terms "approved" and "licensed" are interchangeable, while in other States there are separate standards for each of these categories. States sometimes establish separate standards, i.e., approval and provisional licensure, as opposed to full licensure, for relative caretakers. Some commenters suggested that we allow States to claim title IV-E for eligible children placed with relative caretakers who meet the State standards for approval or provisional licensure, rather than the State's higher standards for full licensure. Some

commenters noted that relative placements encourage continuity in a child's life, allowing the child to maintain a sense of identity and minimize separation and attachment issues. One commenter expressed a belief that the statutory language of "licensed or approved" implies that different standards are acceptable. Another commenter suggested that to require that approval and licensure be held to the same standard is an extremely problematic higher standard than has been required in the past.

*Response:* We have given considerable thought to these comments and have tried to balance the integrity of the requirement, the safety of the child and existing State licensing practices. We did not change the requirements: (1) That approved foster family homes must meet the same standards as licensed foster family homes; or (2) that relatives must meet the same licensing/approval standards as nonrelative foster family homes for the reasons below.

Section 471(a)(10) of the Act requires that a State's title IV-E plan provide for the establishment or designation of a State authority that is responsible for establishing and maintaining standards for foster family homes and child care institutions. This section also requires that the title IV-E State plan provide for the application of these standards to "any" foster family home or child care institution receiving either title IV-B or title IV-E funds. Further, the statutory definition of "foster family home" in section 472(c) of the Act states that a foster family home is a home " \* \* \* which is licensed by the State in which it is situated or has been approved (by the State licensing authority) as meeting the standards established for such licensing." Clearly, the statute did not intend that there be separate standards for licensing and approval.

The plain language of the statute requires that, to be considered a foster family home for the purpose of title IV-E eligibility, the home must be either licensed or approved as meeting State licensing standards. It also is clear from the language in section 471(a)(10) of the Act that the State licensing standards must be applied to "any" foster family home that receives funding under titles IV-E or IV-B. The licensing provisions of the Act make no exceptions for different categories of foster care providers, including relative caretakers.

In past title IV-E foster care eligibility reviews, we have verified the existence of a license without differentiating among the types, and we understand State concerns in this regard. We also agree that placements that meet the

child's need for attachment and continuity should be encouraged. We further recognize that, consistent with section 471(a)(19) of the Act, States must consider giving preference to a relative caregiver, provided that the relative caregiver meets all relevant State child protection standards. However, given the emphasis in ASFA on child safety, and the plain language of the statute with respect to the licensing requirements, we believe that it is incumbent upon us, as part of our oversight responsibilities, to fully implement the licensing and safety requirements specified in the statute by requiring that foster care homes, whether relative or nonrelative, be fully licensed by the State.

*Comment:* In some States, relative caretakers must meet the standards for full licensure, but the State allows for a waiver of certain provisions for these specific caretakers. One commenter asked if the language requiring that "approved" and "licensed" homes meet the same standard would restrict the use of these waivers to approve relative foster family homes. Other commenters requested that we continue our current policy of allowing certain requirements to be waived for relatives.

*Response:* Waivers are not addressed in the regulatory text. However, as we have explained in ACYF-PIQ-85-11, special situations may arise with relative caretakers in individual cases where there are grounds for waiving certain requirements, such as square footage of the relative's home. The safety standards, however, cannot be waived in any circumstance. ACYF-PIQ-85-11 has not been withdrawn and, therefore, continues to reflect current policy. To the extent that waivers are allowed, they must be granted on a case-by-case basis, based on the home of the relative and the needs of the child. The State may not exclude relative homes, as a group, from any requirements.

*Comment:* Several commenters requested that we reconsider our position on requiring that a foster family home be fully licensed before the State is eligible to claim for title IV-E. We were advised that in some States, a provisional license is issued so that a child may be placed in a foster home while the State is awaiting criminal background checks or waiting for the prospective foster parents to complete required training. In other States, a provisional license is issued to all new foster homes during a probationary period, even though the home meets the requirements for a full license or approval.

*Response:* We considered the commenter's suggestions, but we believe that the statute requires a foster family home to meet all of the State requirements for full licensure or approval to be eligible for title IV-E purposes. Accordingly, if a State issues an interim license (provisional, emergency, etc.) pending satisfaction of all licensing standards (e.g., while the State is awaiting the results of a criminal records check or the completion of training), then the State may not claim title IV-E funds on behalf of a child in that home.

Since there seems to be some confusion over the nomenclature used in the draft regulation, we have revised the regulatory language in § 1355.20 to remove the reference to provisional licensure and to articulate that before a State may claim title IV-E funds, it must find that the home meets the State's licensing standards.

*Comment:* Several commenters offered varying suggestions on the concept of allowing retroactive payments. Generally, the commenters suggested that we allow States to claim title IV-E reimbursement back to the date of placement once the home becomes fully licensed.

*Response:* The statute predicates foster family home eligibility on licensure or approval of the home. Allowing retroactive payments to the child's date of placement would be inconsistent with this requirement. In addition, we do not wish to provide financial incentives for States to place children in homes before the safety of the children in those homes can be assured.

However, we recognize that some time may elapse between the date that satisfaction of the requirements is received and documented and the date on which the license is actually issued. We have concluded that 60 days is an ample period of time to allow between the time the State receives all the information on a home and the date on which the full license is issued. Therefore, we are permitting States to claim title IV-E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.

*Comment:* One commenter requested that we allow States a six-month period to grandfather in homes that are currently operating under a provisional license, so long as the safety of the child is preserved.

*Response:* We will allow States a grace period to bring homes currently operating with less than a full license or

approval to full licensure/approval status. Accordingly, if a State is currently claiming title IV-E foster care for a foster family home that does not meet fully the State licensing standards, the State has no more than six months from the effective date of this final rule to grant a full license or approval for these homes. After that date, a State may not claim title IV-E funds for any child in a home that does not meet the State's full licensing or approval standards.

*Comment:* One commenter suggested that provisional and emergency licensure be defined, and a distinction be drawn between these two types of licenses.

*Response:* The terms provisional licensure and emergency licensure are not used in the regulation. Thus, we see no reason to impose a definition of these terms on States.

*Comment:* One commenter recommended that the definition of "foster family home" begin with a statement indicating that this definition is for purposes of title IV-E foster care so that it is not wrongly applied to exclude non-licensed placements from the section 422 requirements.

*Response:* We concur with the commenter and have revised the regulation to clarify that the definition relates to title IV-E eligibility only. It should be noted that section 471(a)(10) of the Act more broadly requires that a State's title IV-E plan provide that a State's established licensing standards apply to "any" foster family home or child care institution receiving either title IV-B or IV-E funds. This is a State plan conformance issue, however, and not a title IV-E eligibility issue.

*Comment:* A commenter opposed inclusion of group homes, agency operated boarding homes and other institutional settings in the definition of "foster family home." The commenter noted that Congress clearly has indicated a desire to avoid a child's placement in such settings unless it is necessitated by repeated extreme disruptions of the preferred family settings. It was suggested that the definition include only homes of individuals or families licensed or approved by the State licensing or approval authorities that provide 24-hour out-of-home care for children.

*Response:* Group homes, agency operated boarding homes and other facilities have been included in the definition of "foster family home" since the title IV-E regulations were issued in 1983. The purpose of including these facilities has been to assure that all foster care placements meet the minimum safety requirements by being licensed or approved under State law or

rules. We believe this is a safety issue for children and not a statement of placement preference; therefore, we have retained the language in the final rule.

*Comment:* We received some comments concerning the licensing of homes by tribal authorities. A few commenters suggested that tribes should have the authority to license tribal homes irrespective of where they are located, and that the language in the definition of "foster family home" implies that tribes only have the authority to license homes that are on or near reservations. A couple of commenters suggested that not to allow tribes this authority would be a violation of tribal sovereignty and jurisdiction. One commenter suggested that this is an overreaching of the Federal government rather than a safety issue. It was suggested that HHS strike "or with respect to foster family homes on or near Indian reservations" from the definition.

*Response:* The authority of Indian tribes to license homes that are "on or near Indian reservations" has been part of the title IV-E regulations since May 23, 1983. This provision is consistent with the Indian Child Welfare Act (ICWA) of 1978. Section 1931 of 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 are maintaining the language to remain consistent with the ICWA.

*Comment:* One commenter asked whether the definition of "foster family home" should be interpreted to mean that homes approved through the tribal process must meet the same standard as homes licensed by the State.

*Response:* The definition of "foster family home" should not be interpreted in that manner. The definition of "foster family home" 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.

*Comment:* One commenter was concerned about the requirement that approved and licensed homes must meet the same standard. The commenter noted that States sometimes use waivers

to approve Indian foster homes which may not meet certain criteria, such as square footage requirements, in order to comply with the ICWA placement preferences. The commenter recommended that we include language to assure that this type of waiver continues to be permissible.

*Response:* Our current policy, set forth in ACYF-PIQ-85-11, recognizes that there may be exceptional circumstances that arise with a specific relative caretaker where there are grounds for waiving a licensing requirement, such as square footage, in order to place a child. The policy set forth in that issuance applies also to licensing or approving tribal relative foster homes, either by a State or tribal licensing authority. This waiver authority does not extend to all foster homes, but only to relative homes in certain circumstances delineated in ACYF-PIQ-85-11, as determined by the licensing authority on a case-by-case basis. We did not address the issue of waivers in the NPRM or final rule, but clarify here that the existing policy stands.

*Full hearing. Comment:* Several commenters objected to a definition for "full hearing" because it did not coincide with some States' terminology. Many commenters requested clarification, while others recommended changes in the definition that would accommodate the specific terms and proceedings used in their States.

*Response:* We defined a full hearing in an attempt to establish a universal term for the hearing at which the State agency is assigned responsibility for placement and care of a child who is removed from home. Given the multiple requests for clarification and the conflicting nature of the recommendations, it is likely that any definition for "full hearing" would be problematic given the variety of State-specific practices. Therefore, we have deleted this definition from the final rule.

*Full review.* No comments were received on this definition and therefore no changes are being made to the language proposed in the NPRM.

*Legal guardianship. Comment:* A few commenters supported the definition of legal guardianship as written in the proposed rule. However, some commenters requested clarification that the term "custody," as used in the definition, refers only to physical custody of the child rather than legal custody. The commenters asserted that some States retain legal custody of the child in guardianship situations.

*Response:* The definition in the final rule is taken directly from the statute

which makes no distinction between physical and legal custody. We believe that the definition is intended to include all legal guardianship arrangements that are permanent.

*Comment:* A commenter wanted to know how the Federal definition for legal guardianship will be applied to States that do not have the same definition in their State statutes.

*Response:* There is no Federal requirement for States to have the statutory definition of legal guardianship in State law. The statute requires States to evaluate certain permanency goals, including legal guardianship, for children during the development of the case plan and the course of a permanency hearing. We believe that the definition was developed to clarify that States should consider legal guardianships that are permanent and self-sustaining as a permanency option for children in foster care.

*Comment:* There were several comments on funding legal guardianships. We received a suggestion that title IV-E funding be made available for subsidized legal guardianship. Another commenter asked for clarification on financial and medical assistance available for children placed in legal guardianship and how to access funding for legal guardianship. A third commenter requested that we clarify that a State is not precluded from providing financial assistance in legal guardianships.

*Response:* While legal guardianship arrangements may be appropriate permanency plans, we have no statutory authority to make title IV-E funding available for subsidized legal guardianships. However, some States are using title IV-E funds to subsidize legal guardianships under the terms of a title IV-E demonstration waiver approved by the Secretary. The statute does not preclude States from subsidizing legal guardianships with State funds.

*Comment:* A commenter requested that we make a greater distinction between legal guardianships and other living arrangements such as permanent foster care placements and parent-child relationships. The commenter believed that children placed in legal guardianships often are not subject to ongoing judicial review, and that in contrast to parent-child relationships, a child is not entitled to inherit from a guardian, and vice versa.

*Response:* The term legal guardianship should be used in reference to the requirements on reasonable efforts to finalize a permanency plan, case plans,

permanency hearings, and TPR. In that context, States determine whether a legal guardianship is the most appropriate permanency option for a child. We do not believe it is appropriate for us to regulate the definition of a legal guardianship further.

*Comment:* One commenter requested guidance on the use of legal guardianship as a permanency option. The commenter requested that we share lessons learned from the title IV-E demonstration waiver States.

*Response:* Information on the findings from the States with demonstration waivers will be disseminated when available. This information will be better provided through our resource centers and technical assistance activities rather than through regulation.

National Child Abuse and Neglect Data System (NCANDS). No comments were received on this definition and therefore no changes are being made to the language proposed in the NPRM.

*Partial Review.* The Department is responsible for State compliance with all aspects of the title IV-B and IV-E plan requirements and not only the elements covered by the child and family service reviews. Accordingly, we have revised the definition of "partial review," to clarify its application to title IV-E and title IV-B compliance issues that are outside the scope of the child and family services review. This partial review may cover whatever the Secretary considers necessary to make a determination regarding State plan compliance. An example of an area which is not subject to the full child and family services review but subject to a partial review is compliance with AFCARS. The procedures and standards for AFCARS compliance are set forth in 45 CFR 1355.40.

*Permanency Hearing. Comment:* One commenter disagreed with the requirement that permanency hearings be held within 12 months of the date a child is considered to have entered foster care. The commenter felt that it did not give families sufficient time to make their homes ready for the child to return.

*Response:* The requirement to conduct permanency hearings no later than 12 months from when a child enters foster care is statutory. One of the main purposes of ASFA was to encourage States and parents to achieve permanency for children in a more timely manner.

*Comment:* One commenter did not think that permanency hearings should be conducted by any entity other than a court.

*Response:* The option for administrative bodies, appointed or approved by the court, to conduct permanency hearings is expressly permitted at section 475(5)(C) of the Act.

*Comment:* Several commenters were opposed to the requirement that any body that conducts permanency hearings may not be part of or under the supervision or direction of the State agency. One commenter asked if this requirement extended to other public agencies with which the State agency has an agreement.

*Response:* Critical decisions that have a significant effect on the lives of children and their families are made at permanency hearings. The purpose of requiring courts to oversee permanency hearings is to ensure that these hearings are conducted by an impartial body, which includes any body appointed or approved by the court to provide this oversight in its stead. An administrative body that is part of the State agency or under its direction or supervision would not meet the test of impartiality.

The requirement does extend to other public agencies with which the State agency has an agreement. In accordance with ACYF-PIQ-85-2, title IV-E requirements extend to any other public agency with which the State agency enters an agreement for the performance of title IV-E administrative functions, including responsibility for placement and care of the child.

*Comment:* One commenter requested that the definition of "permanency hearing" be revised to indicate specifically that a tribal agency is permitted to appear before a tribal court and that the tribal court has the authority to make all the necessary rulings with respect to permanency hearings.

*Response:* The statutory and regulatory language both clearly indicate that permanency hearings may be held before a tribal court. The references to State courts in the permanency hearing requirements in section 475(5)(C) of the Act and in the definition of permanency hearing at § 1355.20 should be understood to include tribal courts.

*Comment:* A few commenters requested additional guidance regarding whether reunification efforts can be extended beyond the permanency hearing or if an alternate permanency plan must be set at the permanency hearing if the child and family cannot be reunited at that time.

*Response:* A major purpose of ASFA is to promote timely permanency planning. We recognize, however, that there are situations when reunification

cannot occur within 12 months but it is not appropriate to abandon it as the permanency plan at the permanency hearing. It is acceptable to extend reunification efforts past the permanency hearing if the parent(s) has been diligently working toward reunification and the State and court expect that reunification can occur within a time frame that is consistent with the child's developmental needs.

*Comment:* One commenter wanted to know if the permanency hearing was similar to a dispositional hearing or an administrative review. This commenter also wanted to know if the hearing could still be held within 18 months of a child entering foster care.

*Response:* The ASFA changed the name of the former "dispositional hearing" to "permanency hearing" and the timing was changed from 18 months to 12 months (see p. 50072 of the NPRM). No statutory flexibility exists with respect to the time line in the ASFA for conducting permanency hearings.

*Comment:* One commenter asked that we clarify whether the permanency goal of placement with a fit and willing relative was optional because the commenter's State had eliminated it as a permanency goal. A few commenters asked that we specifically identify placement in "another planned permanent living arrangement" as the appropriate permanency option for all unaccompanied refugee minors. These commenters requested that, in establishing placement in "another planned permanent living arrangement" as the appropriate permanency option for unaccompanied refugee minors, this group of the foster care population be exempted from the requirement to provide a compelling reason for not setting reunification, adoption, legal guardianship or placement with a fit and willing relative as the permanency plan.

*Response:* We do not believe it is appropriate for ACF or States to exclude any permanency options from consideration or to identify one permanency goal as the appropriate permanency goal for an entire group of the foster care population. Permanency planning is based on the best interests, individual needs, and circumstances of the child. The requirement to document, to the court, a compelling reason for setting a permanency plan other than reunification, adoption, legal guardianship, or placement with a fit and willing relative is statutory and cannot be waived for any group of the foster care population.

*Comment:* We had several commenters request that we include

placement in a permanent foster family home and emancipation in the list of permanency goals at section 475(5)(C) of the Act that are exempt from the compelling reason requirement in that section. Some commenters also asked us to include long term foster care and emancipation as other planned permanent living arrangements.

*Response:* Section 475(5)(C) of the Act specifies that the only permanency options the State may set without a compelling reason to do so include reunification, adoption, legal guardianship, or placement with a fit and willing relative. Therefore, "another planned permanent living arrangement" would be any permanent living arrangement that is not enumerated in statute.

*Comment:* One commenter suggested that we amend the section of the definition that describes the decisions to be made at a permanency hearing. The commenter suggested that the term "should" be replaced with "will" in the definition. The commenter thinks the term "will" is consistent with ASFA's intent to ensure permanency while "should" is noncommittal.

*Response:* We agree and have amended the language accordingly.

*Comment:* One commenter was opposed to the prohibition of paper reviews, *ex parte* hearings, and agreed orders as satisfying the requirements of a permanency hearing.

*Response:* Section 475(5)(C) of the Act requires the State to ensure "\* \* \* procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents \* \* \*." In our view, paper reviews, *ex parte* hearings, and agreed orders fail to provide these important safeguards. No change was made to the regulation based on this comment.

*Comment:* One commenter was opposed to the use of the term "compelling reason" for setting another planned permanent living arrangement as the permanency plan. The commenter feels the term suggests a legal burden of proof that is not appropriate for establishing permanency plans.

*Response:* The term "compelling reason" is taken directly from the statutory language. Moreover, the term was adopted because far too many children are given the permanency goal of long-term foster care, which is not a permanent living situation for a child. The requirement is in place to encourage States to move children from

foster care into the most appropriate permanent situation available.

*Comment:* We received several comments regarding the preamble language to paragraph 1356.21(g) in the NPRM which states that States should exhaust all efforts to place a child in a permanent home outside the foster care system before placing the child in a permanent foster care setting. The commenters feel this language has created a standard above the "compelling reason" requirement prescribed in statute.

*Response:* We want to clarify that the language should not be interpreted to set a standard above what is set in statute. It was intended to encourage States to seriously consider placement options outside of foster care before settling on a permanent foster care placement as the permanency plan.

*Statewide Assessment* (formerly State self-assessment). No comments were received on this definition, so we made no changes to the definition itself. We did, however, change the name from "State self-assessment" to "statewide assessment." The term "statewide assessment" more accurately reflects the comprehensive nature of the assessment conducted during the first phase of a child and family services review.

*Temporary custody proceeding.*

*Comment:* Several commenters objected to a definition for a temporary custody proceeding. Some commenters expressed confusion while others asserted that the definition, especially in combination with the definition for a "full hearing," did not accurately reflect the variety of State proceedings where placement and care responsibility is granted to the State agency.

*Response:* In the proposed rule we defined "temporary custody proceeding" as the first judicial proceeding held at or shortly after the emergency removal of a child from the home. We intended to clarify when the State court must make certain reasonable efforts and contrary to the welfare judicial determinations. However, we concur that a Federal definition for a temporary custody proceeding is not helpful in clarifying when the court must make certain title IV-E eligibility determinations, and we have deleted the definition.

#### **Sections 1355.31–1355.37 The Child and Family Services Reviews**

##### *Section 1355.31 Elements of the Child and Family Services Review System*

This section describes the scope of the child and family services reviews as including programs administered by

States under titles IV-B and IV-E of the Act.

All of the relevant comments on this section are addressed in the following sections.

##### *Section 1355.32 Timetable for the Reviews*

This section specifies the review timetable for the initial and the subsequent reviews as required by section 1123A of the Act, and sets forth rules for reinstatement of reviews based on information that a State is not in substantial conformity.

##### *Section 1355.32(a) Initial Reviews*

This section sets forth the timetable for the initial child and family services reviews.

*Comment:* We received many comments concerning the time that it will take for States to become familiar with the new review process. Most of the commenters indicated that it will take significant time for States to prepare for the reviews and requested that ACF add to this section a requirement that we provide an advance six-month, or longer, notification to States prior to initiating the review process. Similarly, most of these commenters indicated that the six-month period proposed between publication of the final rule and initiation of the new review schedule is necessary and some comments suggested that a longer time frame to begin reviews is desirable. A small number of comments dissented on this provision.

*Response:* We acknowledge that advance notice and preparation are required for the child and family services reviews. The exact period of preparation may vary by State and may change as the States and ACF become more familiar with the process. Taking into consideration that Federal staff will also require a period of time to prepare adequately for each review, we do not anticipate lack of advance notice becoming an issue. Therefore, we do not intend to regulate the notification period. We have, however, extended the time for completing the initial reviews to up to 4 years following the effective date of the final rule.

*Comment:* We received comments requesting coordination among the components of the child and family services reviews with other Federal planning and review functions, *i.e.*, coordinating the statewide assessment with the CFSP and coordinating the reviews with the title IV-E reviews.

*Response:* We have designed the child and family services reviews to build on and coordinate with the process in place

for title IV–B State planning as set forth in 45 CFR part 1357. The timing of the statewide assessments will, in part, be determined by the timing of the actual reviews which will vary from State to State, and coordination with the timing of the annual progress and services reports (APSRs) may not be possible.

We considered combining the child and family services and the title IV–E reviews but believe that conducting the two reviews at the same time would pose a serious burden on States, given the intensity of the review processes and the level of State effort required for each. We will coordinate the actual timing of the two different reviews such that States will not be over-burdened.

*Section 1355.32(b) Reviews Following the Initial Review*

This section sets forth the timetables for subsequent child and family services reviews.

*Comment:* We received a range of comments on the proposed frequency of the reviews. Although a number of comments supported the proposed schedule, some commenters suggested that reviewing at five-year intervals for States determined to be in substantial conformity is insufficient to assure the safety and permanency of children. Others suggested that the interim statewide assessments should not be required at three-year intervals if the State is in substantial conformity, but should either be eliminated or occur less frequently.

*Response:* We proposed a five-year review cycle for States found in substantial conformity and do not think that it compromises our ability to ensure children's safety and permanency for the following reasons:

• A full or partial child and family services review can be reinstated whenever information from any source indicates that the State is not in substantial conformity;

• The standard for achieving substantial conformity is high;

• States in substantial conformity are required to complete a statewide assessment at the three-year point between full reviews;

• The title IV–B five-year Child and Family Services plan, and the related annual updates, provide significant insight into the functioning of the State child welfare program and a mechanism for identifying potential conformance issues with respect to safety and permanency.

Because we believe that other types of reviews and information gathering provide insight into State performance between on-site reviews, we have not changed the requirement to review

States every five years if they are determined to be in substantial conformity. Likewise, we have not eliminated or changed the requirement for the statewide assessment to be completed every three years because we believe that the use of information from that source is an important mechanism for helping States maintain successful performance.

In order to address the comments about assuring the safety and permanency of children between reviews, we have changed the requirement for States determined not to be in substantial conformity to be reviewed at two-year intervals, rather than three-year intervals.

*Section 1355.32(c) Reinstatement of Reviews Based on Information That a State Is Not in Substantial Conformity*

This section sets forth the requirements for a reinstatement of a full or partial review and describes the types of information that may require a review.

*Comment:* We received many comments suggesting that the regulation should denote that ACF and the State negotiate a specific time frame for the receipt of additional information as part of the detailed inquiry to determine if more frequent reviews should be reinstated, and that only after that time has been exceeded should we be authorized to proceed with an additional review.

*Response:* The time frame and circumstances of the request for information will vary depending upon the nature of the information required to determine if more frequent reviews should be reinstated. We have a responsibility to assure compliance with State plan requirements and it may be necessary to require information of a particular nature within a specific time frame. Thus, we will not provide for a negotiated time frame.

*Comment:* We received many comments indicating concern about the sources of information that could trigger reinstatement of reviews based on information that a State is not in substantial conformity. Specifically, objections were raised regarding inclusion of information from public and private organizations and from the disposition of class action lawsuits. The main concern was the accuracy of information from these and other sources.

*Response:* Section 1123A(b)(1)(C) of the Act gives the Secretary the authority to reinstate more frequent reviews based on information indicating that the State may not be in conformity with the State plan. The statute is silent with respect

to the source of the information that would trigger an unplanned review. Therefore, we deleted the list of potential sources of information that could trigger an investigation and, instead, reiterated the statutory language.

We do recognize that the specific sources mentioned in the NPRM, and others not mentioned, may not always provide accurate information about the State's compliance with State plan requirements. The provision for ACF to conduct detailed inquiries prior to initiating more frequent reviews is designed to address this issue by ascertaining the validity of the information. A decision whether or not to reinstate reviews to determine substantial conformity will only be made after the validity of the information is determined.

*Comment:* We received questions concerning the process for reinstating reviews based on information that a State may not be in substantial conformity. Specifically, questions were raised about the content and format of the more frequent reviews.

*Response:* The reinstatement of reviews could take the form of a full or partial review, both of which are defined in § 1355.20. We prefer not to specify an exact format for each reinstated review in the rule, since the nature of the concerns triggering the review and the intensity of reviews needed will vary. We have, however, clarified in the regulation that any inquiry conducted by ACF does not replace a full review as scheduled according to § 1355.32(b).

*Section 1355.32(d) Partial Reviews Based on Noncompliance With State Plan Requirements That are Outside the Scope of a Child and Family Services Review*

This new section was added to set parameters for addressing noncompliance with title IV–B and IV–E State plan requirements that are outside the scope of a child and family services review.

*Comment:* A few commenters questioned our proposal to review for only certain State plan requirements in the child and family services reviews, rather than all State plan requirements.

*Response:* We have selected those requirements for the child and family services review that are most directly related to the achievement of successful outcomes in the areas of safety, permanence and child and family well-being. However, the State remains responsible for complying with all State plan requirements for titles IV–B and IV–E, even if each requirement is not

subject to review in the child and family services review. Therefore, we have added § 1355.32(d) to clarify that we will use a partial review to determine conformity with State plan requirements outside the scope of the child and family services reviews. Because defining the variety of State plan compliance issues in advance is not possible, we will approach each circumstance on a case-by-case basis. Consistent with section 1123A, the necessary elements of the program improvement plan and, if necessary, the amount of the withholding, will be commensurate with the extent of the State's non-conformity.

### *Section 1355.33 Procedures for the Review*

This section sets forth the review process and outlines general procedures for the statewide assessment and the on-site review.

*Comment:* Overall, we received many comments from the States favoring the use of the statewide assessment process and applauding the partnership between State and Federal reviewers who comprise the proposed review teams. Many comments indicated support for the joint planning of the on-site review and the proposal that it be guided by information in the statewide assessment. Others wrote in support of the increased focus on outcomes from prior reviews and the comprehensive nature of the reviews in covering the range of child and family services.

*Response:* None needed.

*Comment:* We received comments regarding the review's reliance on existing data sources, specifically AFCARS. Some comments supported the use of existing data sources for the reviews, while some suggested that these data may not be reliable or capable of addressing safety and permanency adequately.

*Response:* We understand the concerns regarding the AFCARS data and acknowledge that the data in the earliest AFCARS submissions had weaknesses with respect to quality. The quality of the data has increased with every submission and we see this trend continuing as a result of three factors:

(1) *Penalties.* Since October 1994, States have been required to participate in AFCARS and, beginning in Federal fiscal year 1998, penalties were imposed on States not in compliance with AFCARS submission requirements. The number of States submitting penalty-free data has increased significantly since penalties have been imposed.

(2) *State self-analysis prior to submission.* Two types of software are available to afford States the

opportunity to ensure the quality of their data prior to submitting it to ACF. The first performs more than 800 checks on various relationships among AFCARS data elements to ensure the accuracy of the data. The second is the same software ACF uses to assess data quality and is the basis for imposing penalties.

(3) *Incentives.* Two sources provide incentives for improving AFCARS data. First, the ASFA established the Adoption Incentive Program, section 473A of the Act, under which States receive a bonus for increasing the numbers of children adopted out of the public child welfare system. While the statute provides flexibility with respect to data sources used for establishing initial baselines, AFCARS data must be used in calculating bonuses for the number of adoptions over the baseline. Second, under section 479A of the Act, the Department is required to develop a set of outcome measures based, to the maximum extent possible, on AFCARS data. State performance will be rated based on these outcome measures.

AFCARS is the statutorily-mandated information collection system for the Federal child welfare programs. Thus, it is the appropriate data source for use in Federal reviews.

### *Section 1355.33(a) The Full Child and Family Services Reviews*

This section states that the review will be a two-phase process and describes the composition of the review team.

*Comment:* We received a number of comments about the composition of the review team, including requests for specific representatives on the team, such as representatives of citizen review panels. Some commenters raised concerns that the training and backgrounds of review team members reflect strength in child welfare practice. One respondent suggested that representatives of the Department's Office for Civil Rights (OCR) in particular receive training in the processes and issues covered by the child and family services reviews.

*Response:* We recognize the necessity of having reviewers who are knowledgeable about child and family services and this is an important matter for internal ACF consideration. However, the existing regulations that implement title IV-B of the Act specify the types of representatives with whom the State should consult in its planning processes, and we anticipate that States will utilize many of these same individuals or types of representatives in staffing the child and family services review teams. We will also provide

guidance to States for the selection of team members and train both Federal and State members of the review teams on the review procedures as the reviews are conducted. For those reasons, we did not regulate the specific State or Federal representatives who will participate on the review team.

### *Section 1355.33(b) Statewide Assessment*

This section describes the first phase of the full review, the statewide assessment.

*Comment:* There were a wide variety of concerns about objectivity in the review process, most of which were directed toward the sample of cases to be reviewed on-site and the role of the statewide assessment.

*Response:* We are making revisions to the following sections of the rule to increase the objectivity of the reviews and support accurate determinations of substantial conformity:

- In § 1355.33(b)(1), we require that the statewide assessment address each systemic factor under review, including the statewide information system, case review system, quality assurance system, staff training, service array, agency responsiveness to the community, and foster and adoptive parent licensing, recruitment and retention.

- In § 1355.33(b)(2), we require that the State, using data from AFCARS, NCANDS, or, for the initial review, another source approved by ACF, assess the outcome areas of safety, permanency, and well-being of children and families served by the State agency, including a discussion of the State's performance in meeting the national standard established for the statewide data indicators.

- In § 1355.33(b)(5), we require that the completed statewide assessment include a list of all the persons external to the State agency who had input into the preparation of the statewide assessment in order to assure that the required participation and consultation in § 1355.33(a)(2)(ii) and (iv) actually occurred.

- In § 1355.33(b)(6), we require that the State submit the statewide assessment to ACF within 4 months of our transmission of the information for the statewide assessment to the State. We anticipate that we will need 60 days to review the statewide assessment and notify the State of any potential areas that might be an issue during the on-site review. It will also afford the State an opportunity to gather additional information in advance of the review to clarify any concerns raised; and,

• In § 1355.33(c)(5), we regulate the size of the on-site sample of cases to be reviewed and require that the cases be selected randomly from AFCARS and NCANDS, or, for the initial review, another approved source. This will promote consistency and help to eliminate bias in the sample.

*Comment:* We received a few comments that expressed concern about the use of the statewide assessment in county-administered States.

Commenters noted that particular items in the statewide assessment have the potential for variance among counties.

*Response:* We recognize the issues raised by reviewing programs in county-administered versus State-administered systems. Following the pilot reviews, however, we concluded that we could not design a separate review process to measure State compliance for county-administered system. States, not counties, are ultimately responsible and held accountable for compliance with State plan requirements. The statewide assessment is designed to be completed by the State, not by individual counties, and responses should reflect official State policies and the most typical State practice, while noting where outstanding exceptions exist.

#### *Section 1355.33(c) On-site Review*

This section describes the second phase of the full review, the on-site review.

*Comment:* We received some comments about the geographic areas to be covered by the on-site review as stated in paragraph (c)(1) through (3). In particular, some concern was expressed that including the State's largest metropolitan area would lessen the representativeness of the sample and would target the area of the State with the most resources. Another comment requested that the review also include rural areas of the State.

*Response:* Urban areas often provide a disproportionate number of families who have contact with the child welfare system. In order to serve its stated purpose of improving outcomes for children and families, the proposed review process must include this population of children and families. For example, the reviews could not accurately claim to represent statewide issues in Illinois without reviewing Chicago, in New York without reviewing New York City, or in California without reviewing Los Angeles. It is also important to represent the range of other environments in the State including rural and suburban areas with their unique family and resource issues. However, since the reviews will only permit on-site activities in a

limited number of locations, we prefer not to regulate geographic sites other than the largest metropolitan area. Beyond that, we have provided for the statewide assessment to guide the State and Regional ACF Offices in determining the most appropriate review sites given each State's unique characteristics, issues and population.

*Comment:* We received comments requesting that specific representatives be interviewed as part of the on-site review process as described in paragraph (c)(4). Most often, the commenters suggested a requirement that parents and adoptive parents be included, as well as the courts or administrative body that conducts administrative reviews in the States. One respondent also noted that special consideration should be given to the circumstances under which children and families should or should not be interviewed and the weight that should be given their responses.

*Response:* Parents and adoptive parents will be routinely interviewed on cases selected for the on-site review. While the rule does not specify the community stakeholders who will be interviewed in addition to the case-specific representatives, a number of representatives with both statewide and local perspectives on the systemic functioning of the child and family services delivery system will be interviewed. Representatives from the courts or other administrative review bodies will be included, as well as children's guardians ad litem and other individuals representing the child's best interests. We are producing, separate from the rule, a procedures manual for use in conducting the reviews that lists the community representatives to be interviewed. The procedures manual and the training provided by ACF to the reviewers will also address the circumstances under which children and families should or should not be interviewed.

*Comment:* Some commenters requested that we require case information obtained by reviewers to be kept confidential.

*Response:* All case-specific information disclosed during a child and family services review is confidential. Both titles IV-B and IV-E have restrictive disclosure provisions (found at section 471(a)(8) of the Act and 45 CFR 205.50). One of the purposes for which a State is authorized to disclose such information, however, is for an audit or similar activity conducted by the Department in connection with the State plan. Further, Federal regulations at 45 CFR 205.50 require that recipients of information

concerning children and families receiving assistance and/or services from the title IV-B/IV-E agency be held to the same standards of confidentiality as the agency. The confidentiality standards for case-specific information are addressed in the procedures manual for use in conducting the child and family services review. In addition, the confidentiality of case records routinely will be reinforced during reviewer training prior to each review.

States have complete flexibility in establishing procedures to ensure that confidentiality requirements are met. During the pilot reviews, some States chose to require the reviewers who were not State or Federal employees to sign confidentiality agreements prior to reviewing confidential information.

*Comment:* We received a number of comments requesting that we not use the term "social worker" unless it is a specific reference to professionally trained social workers, *i.e.*, persons with B.S.W. or M.S.W. degrees.

*Response:* Recognizing that not all caseworkers in public agencies have academic degrees in social work, we are changing the term "social worker" in the rule to "caseworker."

#### *Section 1355.33(d) Resolution of Discrepancies Between the Statewide Assessment and the On-site Review*

This new section was added to describe the steps we will take in resolving discrepancies between the aggregate data and the findings of the on-site review.

ACF will provide States with the option of submitting additional information to resolve the discrepancy, or for ACF and the State to review additional cases, using only those indicators in which the discrepancy occurred. ACF and the State will determine an additional number of cases to be reviewed, not to exceed a total of 150 cases. As described in section 1355.33(c)(6), the additional cases, in combination with the 30–50 cases reviewed on-site, will comprise a statistically significant sample with a 90 percent (or 95 percent for subsequent reviews) compliance rate, a tolerable error rate of 5 percent, and a confidence coefficient of 95 percent. We will pull the additional cases from an oversample of cases for the on-site review, so that both sets of cases will comprise one sample. Only those indicators in which the discrepancy occurred will be subject to review.

#### *Section 1355.33(e) Partial Review (1355.33(d) in the NPRM)*

This section describes the partial review process.

We redesignated § 1355.33(d) as § 1355.33(e) and made a technical edit to clarify that the partial review requirements in this section relate to the partial child and family services reviews. We have also clarified that a partial review does not substitute for the regularly scheduled full reviews.

*Section 1355.33(f) Notification (1355.33(e) in the NPRM)*

This section describes the manner in which ACF will notify States of whether the State is operating in substantial conformity.

*Comment:* Some comments requested that the regulation require more detail to be included in the ACF notification letter to States, informing them if they are operating, or not operating, in substantial conformity.

*Response:* In the interest of providing the States with timely feedback on the child and family services reviews, we have designed a review process that is less dependent upon lengthy reports than in the past. The review team will provide the State with verbal information on the findings of the review throughout the on-site review and subsequent exit conference. The written description of the findings will begin with the evaluation of the statewide assessment and will be updated as a result of the on-site review. The notification to the State following the on-site review is a confirmation of those findings and will provide specific information to allow a State to know where it is operating in or out of conformity.

*Section 1355.34 Criteria for Determining Substantial Conformity*

This section pertains to the criteria that must be satisfied to find a State in substantial conformity, including a discussion of outcomes, level of achievement of outcomes, and criteria related to a State agency's capacity to deliver services leading to improved outcomes for children and families.

*Section 1355.34(a) Criteria To Be Satisfied*

This section describes the elements on which a State's substantial conformance with title IV-B and title IV-E State plan requirements will be based.

*Comment:* Some respondents requested that decisions regarding substantial conformity not be reliant on the resolution of discrepancies between aggregate data from the statewide assessment and the findings of the on-site review.

*Response:* It was always our intention to resolve discrepancies between

aggregate data from the statewide assessment and the findings of the on-site review. Now that substantial conformity is based on statewide data indicators, as well as the findings of the on-site review, we believe that if significant discrepancies occur among the sources of information used to determine substantial conformity, they must be reconciled so an accurate determination can be made. To clarify our procedures to resolve these discrepancies, we are adding a new § 1355.33(d) that gives States the option of either submitting additional information to resolve discrepancies between the statewide data indicators, or the State and ACF reviewing additional cases for the indicators where the discrepancy exists.

*Section 1355.34(b) Criteria Related to Outcomes*

This section sets forth the criteria related to outcomes that will be evaluated to determine a State's substantial conformance.

*Comment:* We received many comments supporting the proposed approach of limiting the reviews to those State plan requirements that relate specifically to outcomes and the delivery of improved services. Some comments questioned the authority of HHS to select only certain State plan requirements for review in the child and family services reviews.

*Response:* The child and family service reviews focus on the most prominent aspects of the programs under review, specifically child safety, permanency for children in foster care, and well-being of all the children served by the programs. This focus in no way alters the requirements imposed on States to operate their programs in conformity with all applicable State plan requirements.

Therefore, in response to this comment, a new paragraph (d) under § 1355.32, "Partial reviews based on noncompliance with State plan requirements that are outside the scope of a child and family services review" has been added to clarify parameters for addressing issues regarding compliance with title IV-B and title IV-E State plan requirements that are outside the scope of these reviews. If needed, we will conduct partial reviews to resolve such issues regarding compliance. Partial reviews of this nature will not necessarily follow the prescribed format of the child and family services review. Rather, such partial reviews will address whatever the Secretary deems necessary in order to make a determination concerning State plan compliance.

If a State is determined to be out of compliance with a State plan requirement under either title IV-E or title IV-B, there will be an opportunity for program improvement, consistent with section 1123A of the Act, before funds are withheld.

*Comment:* A significant number of comments noted that Safety Outcome #1 is actually two separate outcomes.

*Response:* We agree and have revised § 1355.34(b)(1)(i)(A) and (B). We separated Safety Outcome #1 into its two component parts and will use them as the two safety outcomes, replacing the current Safety Outcome #2 (The risk of harm to children will be minimized.). The two safety outcomes now read as follows:

Outcome S1: Children are, first and foremost, protected from abuse and neglect.

Outcome S2: Children are safely maintained in their homes whenever possible and appropriate.

In this manner, we will address safety as a State's primary concern while measuring compliance with the statutory requirement to maintain children safely in their own homes when possible.

*Comment:* One commenter questioned whether safely maintaining children in their own homes is, in fact, a safety outcome. The commenter suggested that it would be more appropriately assessed as a permanency outcome.

*Response:* Although this outcome addresses decisions about whether to remove children and place them in foster care or maintain them in their own homes, it is, in fact, a safety outcome. ASFA is clear that the child's health and safety must be the primary concern in decisions to remove or to reunify. In reviewing the circumstances of those children who remain in their own homes, we intend to review for their safety and well-being, and not for the foster care provisions under the permanency outcomes that are not applicable to them. We will evaluate the permanency outcomes only for those children who have been removed from their homes and placed in foster care, since foster care is intended to be a temporary setting.

*Comment:* We received numerous comments questioning the applicability of certain performance indicators to their related outcomes. One example cited was Well-Being Outcome #1, Families have enhanced capacity to provide for their children's needs. Commenters raised concerns that the performance indicators associated with it are measures of process and do not equate with enhanced capacity for parents.

*Response:* For each outcome to be reviewed, we selected indicators that, if met, are both within the scope of the State agency's range of responsibilities and are likely to promote outcome achievement. Each of the on-site indicators includes a subset of questions and issues that permits reviewers to explore the indicator below the surface level. We believe that this type of exploration during the on-site review is necessary to evaluate the quality of work and the successful achievement of outcomes for children and families. It is unlikely that individual performance indicators, in isolation, can be used to evaluate the outcomes accurately. In combination, however, the set of performance indicators associated with each outcome will provide a balanced perspective on the outcome.

*Comment:* A number of comments were received indicating concern that Well-Being Outcome #2, Children receive appropriate services to meet their educational needs, is not an outcome that can necessarily be achieved by the child welfare system. Other comments were received questioning if this outcome, as it is stated, meets the definition of an outcome.

*Response:* The outcome delineated in § 1355.34(b)(1)(iii)(B), addresses the responsibilities of public child welfare agencies in regard to the educational needs of children in their care and custody. Certain aspects of the educational status of children are not within the control of the public child welfare agency. We are reluctant to describe the outcome in more definitive terms and hold the State accountable for educational outcomes that must be addressed primarily through the State's educational agencies. Rather, we have proposed to review those responsibilities that the State child welfare agency legitimately has in this area: Considering and addressing educational needs for children in case planning; obtaining and considering educational records for children in its care; and, where appropriate, advocating for children's educational needs with the education authorities in the State.

*Comment:* A few commenters raised concerns that length of stay in foster care and number of adoptions from the public child welfare system were not included as outcomes for the child and family services reviews.

*Response:* We agree that it is critical to track the length of a child's stay in foster care and the number of adoptions from the public child welfare system. We have included length of stay as a statewide data indicator and we are

addressing numbers of adoptions by looking at the length of time between a child's entry into foster care and a finalized adoption. In this manner, we capture not only the number of adoptions but also assess State performance in expediting this permanency goal.

*Comment:* Commenters noted that some of the outcomes and indicators may not be appropriate for all types of cases in the system, particularly the well-being outcomes as they relate to families who are receiving child protective services.

*Response:* We recognize that not all of the outcomes and indicators will be applicable to every type of case reviewed. In most areas, we have allowed for nonapplicability to be noted on the review instrument. However, we also believe that the well-being outcomes very often do apply to children and families who are served in their own homes, in addition to children placed in out-of-home care. For example, the well-being outcomes address issues such as: A family's ability to meet a child's needs; educational achievements of children; and children's physical and mental health needs. We believe that these are concerns that should be addressed by child welfare systems regardless of whether the child is in out-of-home-care or not.

*Comment:* We received many comments urging consistency between the outcomes used in the child and family services reviews, and those outcomes that will be included in the annual report to Congress on State performance.

*Response:* We agree with the commenters that it is critical that we coordinate the annual report on State performance in child welfare, required by Section 203 of the ASFA, with the child and family services reviews and have taken the necessary steps to do so. Specific statewide data indicators, drawn from the outcome measures included in the annual report, in addition to the findings of the on-site review, will be used as the basis for determinations of substantial conformity on one outcome measure of safety and one of permanency. As we gain experience in using statewide data indicators for making determinations of substantial conformity, such data indicators may change. However, we have committed in regulation, to the extent practical and feasible, to keeping the data indicators used in the child and family services review consistent with the measures developed pursuant to section 203 of the ASFA.

#### *Section 1355.34(c) Criteria Related to State Agency Capacity to Deliver Services Leading to Improved Outcomes for Children and Families*

This section describes criteria for seven core systemic factors that will be evaluated to determine the State agency's capacity to deliver services that improve outcomes for children and families.

*Comment:* A number of comments suggested a need for greater detail in the regulation on how determinations of substantial conformity will be made for the systemic factors being reviewed.

*Response:* A detailed description of the changes to the process for making determinations of substantial conformity can be found under the "Discussion of Major Changes and Provisions of the Final Rule" section. We amended § 1355.34(c) so that determining substantial conformity with the systemic factors includes a process by which the review team rates the State's conformity with State plan requirements, based on information obtained from the statewide assessment and the on-site review. Information from BOTH the statewide assessment and the on-site portion of the review must support a determination of substantial conformity. State performance will now be rated for each systemic factor, using a Likert-type scale, e.g., 1-4 with criteria attached to each rating, based on the total information obtained from a variety of stakeholders interviewed on-site.

*Comment:* We received several comments suggesting that States found to be in substantial conformity on the outcomes should not be reviewed for conformity with the systemic factors, stating that these are process measures. Other comments requested deleting some of the systemic requirements.

*Response:* The purpose of the child and family services reviews is to determine compliance with State plan requirements as well as the outcomes for children. Some requirements are related directly to outcomes in the areas of safety, permanency, and well-being, while others are related to systemic factors that States are accountable for implementing in return for receipt of Federal funds. We do not believe that a process limited to procedural requirements can assure improved outcomes for children and families. We do believe, however, that the presence of specific systemic factors is essential to assuring that States have the capacity to deliver services in a manner that is most likely to help children and families achieve desirable outcomes. We cannot forego the responsibility to

review systemic factors, and abandoning that responsibility would weaken the potential of the child and family service review process to help States identify areas where needed improvements can lead to better outcomes.

*Comment:* We received a number of comments requesting that the child and family services reviews include the full range of training activities permitted under title IV-E, including pre-employment training of State staff and long-term training that permits staff to obtain social work degrees.

*Response:* We have proposed to review staff and provider training according to State plan requirements in those areas, as stated in the NPRM. Although pre-employment and long-term staff training are allowable title IV-E training costs, there are no State plan requirements for these activities that would be subject to the child and family services review.

*Comment:* Several commenters expressed concern that the child and family services review does not include the ASFA requirements.

*Response:* The child and family services review does examine a State's compliance with several requirements of the ASFA. However, the rule does not specifically cite the ASFA in identifying those State plan requirements under review. The ASFA is not cited because it primarily amends the Social Security Act, which is the authorizing legislation for the Federal child welfare programs.

*Comment:* We received a comment that the NPRM fails to recognize two distinct case review systems in Public Law 96-272 and ASFA and does not acknowledge the value of the periodic case review system in place since 1980. The comment noted that periodic review should be recognized as necessary to insure safety and permanency.

*Response:* This comment seems to confuse the State's periodic administrative or judicial review of individual cases with the Federal review of State plan requirements. The purpose of the child and family service review, in part, is to test whether a State has appropriately implemented the case review system required by Public Law 96-272 and strengthened by ASFA. We concur with the commenter that periodic reviews and other requirements of the case review system are critical protections for children and help to promote timely permanency.

*Comment:* We received some comments questioning the applicability of the review of State plan requirements to the tribes and the Indian Child Welfare Act (ICWA), and whether a State's compliance with ICWA will be

part of the review. Some commenters raised questions about how particular State plan requirements will be considered for tribes that receive their title IV-B allocations directly.

*Response:* In both the statewide assessment and the on-site review instruments, we have included items that address how States are meeting ICWA requirements. Further, in the pilot reviews, we found that the review process helped us successfully assess whether or not the interaction between the State and tribes satisfied title IV-B and title IV-E requirements for tribal children. However, the child and family services reviews are not intended to review for ICWA compliance, per se, but to review for the effectiveness of the broad child and family service system relative to State plan requirements. Further, the reviews are based on the entire child and family service system as indicated by the use of AFCARS and NCANDS data as an integral part of the process, and assessing penalties for nonconformity on a pool of funds that includes both titles IV-B and IV-E. For these reasons, we did not tailor the CFR specifically to examine ICWA requirements.

Similarly, because the child and family service reviews are designed to review the entire system of child and family services, which includes both titles IV-B and IV-E, this review process is not designed for tribes that receive title IV-B funding only. Furthermore, section 1123A of the Act directed the Department to develop a review system for State compliance with the State plans under titles IV-B and IV-E of the Act. Therefore, tribes that receive title IV-B allocations will not be reviewed under the child and family services review process.

#### *Section 1355.34(d) Availability of Review Instruments*

This section states that copies of the review instruments will be made available to the State.

*Comment:* We received several comments in response to our request for suggestions on the most effective method for keeping States updated on the content of the review instruments. One of the recommendations was to provide States with a copy of the instrument that will be used for the review at least six months before the review is conducted.

*Response:* We appreciate the State's need to have as much advance exposure as possible to the most current review instruments. We anticipate revising the instruments as appropriate, based on lessons learned from ongoing reviews and from State's feedback to us. Given

that we expect the statewide assessment process to take approximately six months, we easily anticipate having review instruments available to the State well before the on-site portion of the review is conducted. In addition, we plan to post the instruments on the ACF website (<http://www.acf.dhhs.gov/programs/cb/>) in order to make the most current version of the instruments available at all times.

#### *Section 1355.35 Program Improvement Plans*

This section pertains to the development of program improvement plans for States determined not to be in substantial conformity with State plan requirements, including the time frames for submission and implementation of the plans.

##### *Section 1355.35(a) Mandatory Program Improvement Plan*

This section describes elements of a program improvement plan for those States found not to be operating in substantial conformity.

*Comment:* We received comments concerning Federal technical assistance to States upon a finding of nonconformity, ranging from a need to develop the capacity for technical assistance prior to initiating reviews to suggesting that the need for technical assistance is not a valid reason for delaying penalties or the frequency of reviews.

*Response:* Section 1123A of the Act requires that States be afforded opportunities to correct areas of nonconformity with the use of technical assistance prior to having penalties withheld. While we have not regulated this aspect of the review process, we are committed to developing effective sources and means for providing technical assistance to States.

*Comment:* We received many comments concerning possible conflicts between program improvement plans and requirements for State consent decrees. Concerns were raised that program improvement plans not be required to include any action steps or goals that are inconsistent with a State's consent decree. Some respondents also requested that the provisions of a State's consent decree not automatically be required to be included in a program improvement plan.

*Response:* ACF is responsible for reviewing compliance with State plan requirements, and we must assure that the program improvement plan addresses applicable requirements. We did not include any provisions in the NPRM that would require States to include the provisions of consent

decrees into program improvement plans. We cannot assure that the provisions of a State's consent decree do not conflict with Federal requirements. It is the State's responsibility to ensure that no such conflict exists. We are willing to work with States to minimize such conflict within our statutory and regulatory mandates.

*Comment:* We received a small number of comments suggesting that States determined not to be in substantial conformity should be penalized for ASFA violations immediately, rather than suspending the penalties pending implementation of a program improvement plan. The same comments suggested that the term "program improvement plan" deviates from the "corrective action" language of the statute and undermines the enforcement role of HHS.

*Response:* Section 1123A(b) of the Act requires that States be afforded the opportunity to correct areas of noncompliance prior to withholding Federal funds. ASFA primarily amends sections of the Social Security Act to which section 1123A applies. Moreover, ASFA did not supercede section 1123A, nor did it amend section 1123A to require immediate penalties for failure to comply with the ASFA requirements.

The use of the term "program improvement plan" in no way deviates from statutory requirements since the result is still that the State must correct any identified areas of nonconformity with State plan requirements. The term "program improvement plan" underscores the intent of the reviews to serve as a means of assisting States to help families and children experience improved outcomes as a result of the services provided by the State and funded by the State and Federal governments. Failure to successfully complete a program improvement plan will result in penalties.

#### *Section 1355.35(b) Voluntary Program Improvement Plan*

This section sets forth the condition, under which States found to be operating in substantial conformity may voluntarily develop and implement a program improvement plan.

There were no comments on this section and no changes have been made to this section.

#### *Section 1355.35(c) Approval of Program Improvement Plans*

This section sets forth the approval process for the program improvement plan.

*Comment:* With a few exceptions, most of the comments we received on the time frames for submitting and re-

submitting program improvement plans following reviews encouraged us to lengthen the time frames.

*Response:* We recognize that the development and revision of program improvement plans requires considerable effort. Given the complexity of the issues that will be addressed in many program improvement plans, we are extending the length of time for the initial submission of the program improvement plan by the State to ACF from 60 days to 90 days. We are retaining the 30-day time frame for re-submitting plans that are not initially approved by ACF. Given the potential consequences for children and families of delaying efforts to correct areas of need, we do not believe we can further lengthen the time frames to develop the plans.

#### *Section 1355.35(d) Duration of Program Improvement Plans*

This section sets forth the time frame for successful completion of provisions in a State's program improvement plan.

*Comment:* We received a number of comments in favor of the two-year maximum time frame for implementing program improvement plans, with the opportunity for a one-year extension in certain circumstances. Some comments, however, indicated the time period was too long and should be shortened.

*Response:* We have retained this feature in the final rule. However, not all program improvement plans will require two years to implement and the specific time frame for each State's plan will be negotiated and agreed upon between the State and ACF. We are aware though, from the complex issues being litigated or settled by a number of States on behalf of their child welfare systems, that some improvements will require extensive periods of time to implement. Systemic changes that lead to identifiable improvements in the outcomes for children and families cannot always be achieved by simply modifying a policy, creating new tracking procedures or implementing new standards. However, in consideration of the comments on this issue and those pertaining to § 1355.36 that we strengthen the certainty of a penalty when a State fails to make program improvements, we are making the following changes in the rule for the time allotted to implement program improvement plans:

- ACF will require time frames for a program improvement plan to be consistent with the seriousness and complexity of the remedies required for any areas determined not in substantial conformity.

- We are requiring in paragraph (d)(2) that particularly egregious areas of nonconformity impacting the safety of children in the State's responsibility receive priority in both the content and time frames of the program improvement plans and must be satisfactorily addressed in less than two years.

- We are adding a requirement to paragraph (d)(3) that the Secretary approve any extensions of deadlines in the program improvement plans and any requests to extend the program improvement plan by a third year. The circumstances under which requests for extensions would be approved are expected to be very rare and will require compelling documentation. Requests for extensions must be received by ACF at least 60 days prior to the affected completion date.

- Finally, in paragraph (d)(4) we are requiring that monitoring of the implementation of the State's program improvement plans include quarterly status reports by the States to ACF, unless the State and ACF agree to less frequent reports. These reports will inform ACF of the State's progress in implementing the plan.

#### *Section 1355.35(e) Evaluating Program Improvement Plans.*

This section describes the joint process the State agency and ACF will use to evaluate the program improvement plan. This section also describes the frequency of evaluating progress and the terms for renegotiating a program improvement plan.

No comments were received on this section. Changes were made to this section only to the extent necessary to keep it consistent with the changes made to the other sections of § 1355.35.

#### *Section 1355.35(f) Integration of Program Improvement Plans With CFSP Planning.*

This section requires that elements of the program improvement plan be incorporated into the goals and objectives of the State's CFSP and annual reviews and progress reports related to the CFSP.

No comments were received on this section and no changes have been made to the final rule.

#### *Section 1355.36 Withholding Federal Funds Due to Failure To Achieve Substantial Conformity or Failure to Successfully Complete a Program Improvement Plan*

This section sets forth the penalties associated with a State's failure to operate a program in substantial conformity; implements the statutory

requirement to specify the methods for withholding Federal funds for substantial nonconformity; and describes the amount of Federal funds that are subject to a penalty. The suspension of withholding during the course of a State's program improvement plan, and termination of the penalty upon successful completion of the plan are also discussed.

*Section 1355.36(a) For the Purposes of This Section*

This section defines "title IV-B funds" and "title IV-E funds" for the purpose of this section.

*Comment:* We received comments that the regulation, rather than the preamble, should state that the title IV-E administrative costs to which withholding applies does not include funds allocated for training.

*Response:* In the proposed rule, we specified that the administrative costs of the foster care maintenance payments program are included in the pool of funds from which penalties will be assessed. In the final rule, rather than listing those title IV-E components that are excluded from the penalty pool, we have amended the regulatory language to more specifically identify the administrative costs of the foster care maintenance payments program as the source of title IV-E funds for the penalty pool.

*Section 1355.36(b) Determination of the Amount of Federal Funds To Be Withheld*

This section describes the manner in which ACF will determine the amount of the State title IV-B and IV-E funds to be withheld if the State is not operating in substantial conformity.

*Comment:* We received many comments in favor of the proposal that funds not be withheld from a State if the determination of nonconformity was caused by the State's correct use of formal written statements of Federal law or policy provided by HHS, but a few comments objected to this provision.

*Response:* This is a statutory requirement under section 1123A of the Act. Therefore, we have not made changes to the final rule.

*Comment:* We received comments regarding the proposed requirement that, upon finding that a State is not in substantial conformity, funds be withheld for the year under review and for each succeeding year until the State's failure to comply is ended either through the successful completion of a program improvement plan or until a subsequent full review determines the State is operating in substantial conformity. The commenter requested

assurance that withholding is not unnecessarily extended because of HHS' lack of capacity to assess the completion of the plan or to conduct another review.

*Response:* The rule specifies the time frames for conducting reviews and for the duration of program improvement plans. Adherence to those time frames should limit delays in determining the status of the State's substantial conformity. We do not believe any change to the regulation is necessary.

*Comment:* We received many comments pertaining to the amount of the penalties. The comments ranged from the suggestion that the proposed penalties are too low to the idea that they are too high. Some respondents expressed concern about the cumulative effects of penalties for a variety of Federal reviews of child welfare programs and systems, and urged us to consider a consolidated penalty proposal based on a performance-based incentive system for child welfare or a reinvestment policy for nonconformity. Comments on the pool of funds from which penalties will be taken ranged from requests to specifically limit the pool to increasing it to include additional funds.

*Response:* We have given serious consideration to the comments on the amount of the penalties and the pool from which they are to be taken and believe that a change is warranted. We wish to promote practice improvements through the review process, and do not wish to use the penalty process to prevent States from making the needed improvements. However, we must make clear that the failure to correct areas of nonconformity identified in the reviews will result in substantial financial penalties. Therefore, we have added sections 1355.36(b)(7) and (b)(8) to provide a graduated penalty for continuous nonconformity.

To strengthen our commitment to program improvement through the review process, we have added these sections to the final rule that will increase the penalty for outcomes and systemic factors that remain in continuous nonconformity on successive reviews. States that continue to remain out of substantial conformity on successive reviews can now be penalized up to two percent per outcome or systemic factor at the second full review in which the nonconformity continues, and up to three percent per outcome or systemic factor at the third and subsequent full reviews in which the nonconformity continues. We believe the possibility of increased withholding of funds will encourage States to engage in active program

improvement planning and make efforts to resolve areas of nonconformity as early as possible.

We believe that this revised penalty structure is in accordance with the Social Security Act Amendments of 1994 (Pub. L. 103-342), since we are making the amount of the penalty commensurate with the level of nonconformity and providing States an opportunity to engage in corrective action prior to withholding funds. We tried to establish penalties in amounts that create significant motivators for States to improve programs while not denying services to needy children that are critical to their safety, permanency, and well-being. We believe the approach contained in these final rules balances the issues in a manner that promotes the overall goal of program improvement in States.

The State's entire title IV-B allocation is included in the pool from which penalties will be taken because we are reviewing for all the programs funded by title IV-B in the State. A portion of the title IV-E administrative funds is included in the pool from which penalties will be taken, since a smaller percentage of title IV-E requirements are reviewed in the child and family services reviews.

In addressing the comments that advocated for funding reinvestment, the statute specifically mandates withholding Federal funds as penalties for nonconformity, rather than reinvesting. Also, the statutes for various programs carry penalty provisions that HHS cannot waive in favor of a consolidated, performance-based incentive system in child welfare.

We recognize the commenter's concerns that States found to be the most egregious in their non-conformity, based on the child and family services reviews, may also be determined out of conformity in other reviews, e.g., title IV-E eligibility reviews and other reviews that cover related issues and requirements. Such States could be exposed to multiple penalties in a fiscal year. We strongly encourage States in those situations to take full advantage of the opportunities for technical assistance and program improvement planning in order to increase the effectiveness of their programs and improve the outcomes of children and families served by the programs.

*Section 1355.36(c) Suspension of Withholding*

This section describes the circumstances under which ACF will suspend the withholding of funds for those States found not to be operating in substantial conformance.

We did not receive comments on this particular section and have made no changes to the regulation.

*Section 1355.36(d) Terminating the Withholding of Funds*

This section describes the circumstances under which ACF will terminate the withholding of State funds related to nonconformity.

We did not receive comments on this particular section and have made no changes to the regulation.

*Section 1355.36(e) Withholding of Funds*

This section describes the circumstances under which ACF will withhold funds for those States determined not to be in substantial conformity.

*Comment:* A number of commenters suggested that we emphasize that penalties will be enforced.

*Response:* As we consider the amount of the penalty and the provisions for withholding funds due to nonconformity, we think that this is an area where stronger provisions are needed. We want to convey in the rule our sense of urgency about the need to implement needed improvements in child and family services and to make the application of penalties consistent with that sense of urgency. As a result, we have amended the regulatory language at § 1355.36(e)(2) so that proposed penalties associated with a particular outcome or systemic area will be imposed when the State fails to come into substantial conformity or fails to make the necessary progress with respect to the statewide data indicators by the date specified in the PIP, rather than waiting for the completion of the entire PIP. Some problems may only require six months to fix, for example, while others may require the full two years. In this manner, if the State is required to complete an action step in six months, fails to do so, and the Secretary does not approve an extension, an immediate penalty will be assessed for that area of nonconformity. We also added a provision at § 1355.36(e)(4) that applies the maximum withholding of funds of 42 percent of the pool to States that elect not to engage in program improvement planning or to otherwise correct areas determined not to be in substantial conformity.

*Comment:* There were several alternatives suggested regarding the basis for computing interest on penalties and the time frame during which interest will accrue.

*Response:* The Department has established regulations with respect to

interest on withheld funds to which we are bound.

*Section 1355.37 Opportunity for Public Inspection of Review Reports and Materials*

This section provides that States must make certain sources of information related to the child and family services reviews available for public inspection.

*Comment:* We received several comments requesting that States be given flexibility in the methods of making the review reports and materials available for public inspection. Some commenters suggested we take a more prescriptive approach with respect to this issue.

*Response:* Given the variance across State systems, we think it is important to permit States flexibility in satisfying this requirement. While the suggestions we received regarding ways States should publicize information related to the child and family services review were excellent, they would be more appropriately deployed through technical assistance efforts with States rather than requiring them through regulation.

*Comment:* We received comments requesting that ACF provide official public notice of reviews in advance of the reviews.

*Response:* We are considering options for implementing this suggestion. However, we do not believe it is an appropriate issue for regulation.

*Section 1355.38 Enforcement of Section 471(a)(18) of the Act Regarding the Removal of Barriers to Interethnic Adoption*

This section implements the enforcement of section 471(a)(18) of the Act which specifically prohibits the denial of the opportunity to any person to become an adoptive or a foster parent, or the delay or denial of the placement of a child in an adoptive or foster family home on the basis of the race, color, or national origin of the child or of the adoptive or foster parent. In addition to the specific comments on § 1355.38, we received a number of general comments and requests related to the statutory language itself at section 471(a)(18) of the Act.

Many commenters requested that the final rule include a section on what constitutes a delay or denial of a child's adoptive or foster care placement and when race, color, or national origin can be used in child placement decisions. Several commenters also requested that the final rule include a discussion of good social work practice and define "best interest of the child" as it relates to section 471(a)(18) of the Act. A large

number of commenters also requested that the final rule include language that stated that compliance with section 471(a)(19) (which allows the State to give preference to a relative over a non-related caregiver) and section 422(b)(9) (which requires the State to make diligent efforts to recruit potential foster and adoptive families that reflect the ethnic and racial diversity of children needing an adoptive or foster home) would not be considered a violation of section 471(a)(18) of the Act.

Also, many commenters believed the tone of the section to be adversarial and requested that the section be revised to mirror the partnership approach used in the child and family services review. A few commenters believed the enforcement of section 471(a)(18) of the Act is too heavily focused on the rights of adults rather than the needs of the child. Additionally, a few commenters were concerned that vigorous enforcement of section 471(a)(18) of the Act may have a negative effect on the quality of services available to children.

In contrast to these comments, one commenter voiced concern that § 1355.38 did not adequately enforce section 471(a)(18) of the Act. The commenter believed that additional enforcement mechanisms and administrative authority should be included in the final rule.

The regulatory language in § 1355.38 closely follows the statutory language and represents our commitment to diligently enforce these provisions of law. We have made only limited revisions to this portion of the regulation in response to comments, as we believe that enforcement of section 471(a)(18) of the Act is clearly defined by the statute. We would like to note that the statutory language guiding this section is very different from that underpinning the child and family services reviews, and it is this distinction that accounts for the difference in the approaches taken.

The request for guidance on what constitutes a delay or denial of a child's adoptive or foster care placement and when race, color, or national origin can be used in child placement decisions; a discussion section on good social work practice; and the inclusion of a definition of "best interest of the child" as it relates to section 471(a)(18) of the Act all represent practice level issues. Practice level issues are more appropriately addressed through technical assistance rather than regulation. Also, the determination of delay or denial in foster care or adoption is based on the facts of the specific case. Thus, we did not include

any additional guidance in the final rule.

We also did not include qualifying statements regarding relative preference and/or diligent recruitment in the final rule. The activities regulated in this final rule are procedural directives for implementation of financial sanctions. Thus, we do not intend to cite all the activities which may or may not violate section 471(a)(18) of the Act. Given the number of comments received, we are providing the following discussion on relative preference and diligent recruitment as they relate to section 471(a)(18) of the Act:

- Section 471(a)(19) of the Act allows the State to give preference to an adult relative over a nonrelated caregiver, when placing a child for adoption or in foster care provided that the relative caregiver meets all relevant child protection standards. Relative preference recognizes the importance of maintaining biological relationships. Prioritizing biological ties is not a form of race preference; rather it is an acknowledgment of the significance of these ties. Relatives come under the same scrutiny as nonrelatives and must meet the same Federal title IV-E requirements to become foster and/or adoptive parents. In all circumstances, the best interests of the child must determine a placement decision. A State's appropriate use of the relative placement preference does not constitute a violation of section 471(a)(18) of the Act.

- Section 422(b)(9) of the Act requires the State to make diligent efforts to recruit potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State needing an adoptive or foster home. Diligent recruitment activities are necessary to ensure that all qualified members of a community, who may be excluded from or reluctant to request services, have the opportunity to become a foster or adoptive parent. Diligent recruitment can provide a broad pool of placement resources for those children waiting for foster or adoptive homes. A State's general diligent recruitment activities do not constitute a violation of section 471(a)(18) of the Act. General diligent recruitment activities should not discriminate on the basis of race, color or national origin by excluding families who are not targeted for services and denying them the opportunity to be a part of the pool of available families for children of different backgrounds.

- The purpose of the Multiethnic Placement Act of 1994 (MEPA) was threefold: (1) To decrease the length of time a child waits to be adopted; (2) to

prevent discrimination in foster care and adoption; and (3) to promote the recruitment of ethnic and minority families that reflect the children in the public child welfare system. We do not interpret any of these purposes to be mutually exclusive. In the Removal of Barriers to Interethnic Adoption (IEP) provisions, which amended MEPA, Congress further clarified that race, color, or national origin should not be routinely considered in foster care and adoption placements. The IEP also contained enforcement provisions. The IEP did not change the recruitment provision contained at section 422(b)(9) of the Act.

We recommend that the State or entity review Federal policy guidance already issued on the MEPA, as amended by IEP (found at <http://www.acf.dhhs.gov/programs/cb/>). Additionally, both the Office of Civil Rights (OCR) and ACF Regional Offices stand ready to provide guidance to any State with a specific policy question.

Rather than attempting to identify the multiple situations which may lead to a violation of section 471(a)(18) of the Act, we have found that providing technical assistance to specific State questions is most useful. Technical assistance is available through the ACF and OCR regional offices, as well as through the federally funded national resource centers. Periodically the Department will review the issues raised to determine the need for additional guidance.

Specific questions and comments are addressed in the following paragraphs.

Section 1355.38(a) Determination That a Violation Has Occurred in the Absence of a Court Finding

This section sets forth the requirements for determining a violation of section 471(a)(18) of the Act during the course of a child and family services review, the filing of a complaint, or some other mechanism.

*Comment:* One commenter requested clarification of the term "entity in the State" as used in section 471(a)(18) of the Act, specifically if it includes private agencies. Another commenter inquired about the application of section 471(a)(18) of the Act to court findings and if ACF has the authority to sanction the court as an "entity."

*Response:* We have added a definition for "entity" in § 1355.20 in response to this comment. According to the statute any entity in a State that receives title IV-E funds must comply with section 471(a)(18) of the Act. We define the term "entity" to include private agencies. A State court is not an "entity," for purposes of this provision, to the extent that it issues decisions or

opinions, or performs other judicial functions. If, on the other hand, an administrative arm of a State court carries out title IV-E administrative functions pursuant to a contract with the State agency, then it is an "entity" for these narrow purposes. If the private agency, an administrative arm of the court, or any other entity is found not to be in compliance with section 471(a)(18) of the Act, ACF has the authority to collect all of the title IV-E funds received by the entity for the quarter the violation occurred.

*Comment:* Several commenters requested that the final rule contain the "HHS criteria" that ACF will use to determine if a violation of section 471(a)(18) of the Act has occurred.

*Response:* HHS has not developed any specific "criteria" for determining if a violation of section 471(a)(18) of the Act has occurred. HHS will determine on a case-by-case basis whether the State has delayed or denied a child's adoptive or foster care placement or denied a person the opportunity to become an adoptive or foster parent based on race, color, or national origin. It is impossible to define every situation and circumstance that would result in a civil rights violation. Thus, the regional office will review the specific facts of each case to determine if a State or entity is in violation of section 471(a)(18) or if a policy or practice is consistent with previously issued guidance. No change has been made to the final rule as a result of this comment.

*Comment:* One commenter requested that the final rule provide guidance on how a complaint from a prospective foster or adoptive parent who is not selected for a specific placement and is of a different race, color, or national origin of the child to be placed, will be handled (*i.e.*, the roles of all parties involved, if the State will have an opportunity to respond to the allegation, etc.).

*Response:* We have not defined specific procedures for the determination of a violation, or the procedures for handling allegations of a violation in regulation, as we expect that these determinations will be made on a case-by-case basis and rely on the specific facts of each situation.

*Comment:* Many commenters requested that the final rule detail the contents of the notification letter that ACF will provide to the State found to be in violation of section 471(a)(18) of the Act and suggested that the letter include specific information on the roles and responsibilities of HHS and the State.

*Response:* We intend to draw on this suggestion, and others like it, in

preparing the internal agency procedures that will be used to investigate and respond to a violation of section 471(a)(18) of the Act. However, we believe this level of specificity is inappropriate for regulation. No change has been made to the final rule.

*Comment:* Several commenters objected to the phrase “\* \* \* if applied, would likely result in a violation against a person \* \* \*” in paragraph (a)(2)(iii). The commenters stated that this ambiguous phrase may result in a violation being based on a hypothetical situation.

*Response:* We concur with the commenters that the phrase “\* \* \* would likely result \* \* \*” may appear ambiguous. We have reworded paragraph (a)(2)(iii) to clarify that a violation will be based on policies, procedures, practices, regulations, and laws that on their face violate the law.

#### *Section 1355.38(b) Corrective Action and Penalties for Violations With Respect to a Person or Based on a Court Finding*

This section sets forth the requirements for corrective action and penalties for a violation of section 471(a)(18) of the Act with respect to a person or based on a court finding.

*Comment:* One commenter requested that we define the term “court finding,” to clarify what court is being referred to in this section as it relates to the assessment of penalties for a violation of section 471(a)(18) of the Act.

*Response:* While we do not intend to define the term “court finding,” we would like to clarify that any Federal or State court’s finding of a violation of section 471(a)(18) of the Act may result in the assessment of a penalty by ACF. Under the statute, an individual who believes that he or she has been aggrieved by a section 471(a)(18) violation, may bring action in the United States District Court. The final rule will not be this specific because the District Court finding can be appealed to a higher court; thus a court other than the United States District Court may ultimately determine that a 471(a)(18) violation has taken place.

*Comment:* Several commenters opposed the immediate assessment of the penalty for a violation with respect to a person, suggesting that there should be an opportunity for corrective action beforehand.

*Response:* We believe that the statute is clear at 474(d)(1) that there is to be an immediate penalty, without corrective action beforehand, where there is a violation with respect to a person. This is consistent with the Department’s commitment to aggressive

enforcement of section 471(a)(18) of the Act. Thus, no change has been made to the final rule as a result of these comments.

*Comment:* Several commenters opposed the immediate assessment of a penalty for a violation based on a court finding, suggesting that ACF/OCR investigations be the sole basis for assessing a penalty.

*Response:* Section 474(d)(3) of the Act affords an individual who is aggrieved by a violation of section 471(a)(18) of the Act the right to file a lawsuit against the State or entity. In accordance with the statute, a violation with respect to an individual requires an immediate penalty if the court finds that the State has violated section 471(a)(18) of the Act. Thus, we do not intend to investigate a case where the court has already rendered a finding. If a State, an entity, or an individual is dissatisfied with the court’s finding, the appropriate action of recourse is to appeal through the judicial system. No change has been made to the final rule as a result of these comments.

*Comment:* Several commenters expressed concern about dual penalties (from both the Court and ACF) that States may incur based on a court finding of a violation of section 471(a)(18) of the Act.

*Response:* We do not believe that dual penalties will result from the situation as described. The statute allows for an individual aggrieved by a violation of section 471(a)(18) of the Act the right to bring action and seek relief from the State. If the court finds that the individual has been aggrieved by the State, it is possible that monetary compensation may be awarded to the individual as relief for the State’s action. This monetary award is not a penalty. Penalties by ACF are required by the statute when the State violates the law. No change has been made to the final rule as a result of these comments.

*Comment:* A few commenters recommended that the final rule require the State to notify ACF of a court’s finding that the State is in violation of section 471(a)(18) of the Act, since ACF will not be a party to the proceedings.

*Response:* We agree with the commenter’s recommendation and have revised the final rule to require a State found by a court to be in violation of section 471(a)(18) to notify ACF. A new paragraph, § 1355.38(b)(4), requires the State to notify the appropriate ACF regional office of the violation within 30 days from date of entry of the final judgement once all appeals have been exhausted, declined, or the appeal period has expired.

#### *Section 1355.38(c) Corrective Action for Violations Resulting From a State’s Statute, Regulation, Policy, Procedure, or Practice*

This section sets forth the requirements for corrective action when a State’s statute, regulation, policy, procedure, or practice is found to be in violation of section 471(a)(18) of the Act.

*Comment:* We received several comments relating to the time period provided for corrective action. One commenter stated that six months for corrective action is too short, while another commenter stated that six months is excessively long.

*Response:* The statute specifies at 474(d)(1) of the Act, that the time period to implement a corrective action plan for section 471(a)(18) of the Act must not exceed six months. We have made a change to the regulation to require a State to complete a corrective action plan within six months. All corrective action plans will not require six months to complete. ACF has the authority to establish a shorter time frame for the completion of the corrective action plan consistent with the seriousness, complexity, and the remedy required by the violation.

*Comment:* Another commenter recommended that the time limit for ACF to approve or disapprove a State’s corrective action plan be defined in the final rule to avoid a State’s being penalized due to delayed action by ACF.

*Response:* ACF recognizes the need for approving corrective action plans in a timely manner but did not include the commenter’s recommendation in the final rule. To respond to the commenter’s concern we have revised § 1355.38(c)(1). The State will have 30 days after receipt of written notification of noncompliance with section 471(a)(18) of the Act, to develop a corrective action plan and submit it to ACF for approval. Once the corrective action plan is approved by ACF, the State will have six months to complete the corrective action and come into compliance before a penalty is applied. The calculation for the six months will begin after ACF has approved the plan.

A State’s completion of a corrective action plan within the specified time will not, in itself, prevent the assessment of a penalty. The completed corrective action plan must result in the State coming into compliance with section 471(a)(18) of the Act to avoid incurring a penalty. We have revised the final rule to clarify this point at § 1355.38(c)(1) and also at (g)(1)–(4).

Additionally, we have revised § 1355.38(c)(3) to provide the State with

an additional 30 days to revise and resubmit the corrective action plan in the event the State's corrective action plan is not approved by ACF. If the State fails to resubmit the corrective action plan within the 30 days, a penalty will be assessed.

*Comment:* One commenter was concerned that §§ 1355.38(c)(1) and (g)(3) were inconsistent. The commenter believed paragraph (c)(1) provides a State with six months before assessing a penalty while paragraph (g)(3) imposes a reduction beginning with the quarter that the State received notification.

*Response:* Paragraphs (c)(1) and (g)(3) are not inconsistent. Paragraph (c)(1) provides the State with six months to complete corrective action before a penalty is assessed. Paragraph (g)(3) defines the starting point for assessing the penalty in the event a State declines to participate in corrective action or fails to successfully complete the corrective action plan within six months.

*Comment:* One commenter disagreed with the use of the word "implement," in original paragraph (c)(4), to mean "begin" and stated that "implement" means to "complete."

*Response:* In light of the addition of up to a 60-day period for the State to develop the corrective action plan, we have revised the definition of "implement" in the final rule to mean "complete." Paragraphs (c)(4) and (5) were deleted and paragraph (c)(1) now reads that a State in violation of section 471(a)(18) of the Act will have six months to complete corrective action and come into compliance once its plan has been approved before a penalty is assessed.

*Comment:* One commenter requested that the State be allowed to make changes to the corrective action plan without incurring additional penalties.

*Response:* As written, the regulation does not preclude the State from making changes to the corrective action plan. The changes made to the corrective action plan must be approved by ACF and completed within the original six-month time frame.

#### *Section 1355.38(d) Contents of a Corrective Action Plan*

This section describes the contents of a corrective action plan.

We did not receive comments related to this section but have revised this section to coincide with changes made in § 1355.38(c). Paragraph (d)(4) defines the completion date for the corrective action and deletes the option to extend the corrective action completion date.

#### *Section 1355.38(e) Evaluation of Corrective Action Plans*

This section describes the evaluative steps that ACF will take to review the implementation of corrective action plans submitted by States who have been found to be in violation of section 471(a)(18) of the Act.

We received no comments related to this section but revised this section to coincide with changes made to § 1355.38(c) and (d). This section now states that ACF will evaluate the corrective action plan within 30 days of the six-month completion date.

#### *Section 1355.38(f) Funds To Be Withheld*

This section defines the term "title IV-E funds" in the context of this section.

*Comment:* One commenter requested clarification on the use of the word "claims."

*Response:* In describing the penalty for a violation of section 471(a)(18) of the Act, the statute at 474(d)(1) uses the phrase, "otherwise payable to the State under this part" in reference to the amount of title IV-E funds to be reduced. We interpret this to mean the Federal share of allowable title IV-E costs paid or advanced to the State and have revised § 1355.38(f) in the final rule to reflect this interpretation. The reader should note that it does not matter whether the costs are reported as a current expenditure or as an adjustment; all title IV-E funds expended during the quarter(s) the State is determined to be in violation of section 471(a)(18) of the Act will be subject to a penalty.

#### *Section 1355.38(g) Reduction of Title IV-E Funds*

This section describes the circumstances under which a State's title IV-E funds will be reduced by ACF due to a violation of section 471(a)(18) of the Act.

*Comment:* Several commenters expressed concern about ACF's authority to continue a penalty into the next fiscal year.

*Response:* The regulation does not provide for a continuation of a penalty into the subsequent fiscal year if a State fails to come into compliance. ACF may and has the authority to initiate a full or partial review in a subsequent fiscal year for those States that are in violation of section 471(a)(18) of the Act and have failed to complete corrective action to come into compliance. Thus, any statute, regulation, policy, procedure or practice that remains uncorrected from a previous fiscal year may result in a

new finding of a violation of noncompliance with section 471(a)(18) of the Act. We will not disregard an uncorrected violation simply because a fiscal year has ended. It is part of the Department's oversight responsibility to ensure that all States are in compliance with section 471(a)(18) of the Act at any given time and any uncorrected violation may be subject to a review at the beginning of a new fiscal year.

*Comment:* One commenter is concerned that the use of fiscal sanctions for every quarter that the State has not completed a corrective action plan is overly harsh.

*Response:* We are unable to modify the penalty structure as it is defined in law. The statute clearly states that penalties are to be applied quarterly when a State is in violation of section 471(a)(18) or has not successfully implemented a corrective action plan; and that the penalty will be applied until the State achieves compliance or until the end of the fiscal year.

*Comment:* Several commenters requested that the final rule permit the suspension of the penalty while the State appeals a court finding of a violation of section 471(a)(18) of the Act.

*Response:* We concur and have included such language in the final rule at paragraph (g)(6). This clarifies that penalties will not be imposed until a final determination regarding a violation is made through the judicial appeal process.

#### *Section 1355.38(h) Determination of the Amount of Reduction of Federal Funds*

This section describes the specific amount a State's title IV-E funds will be reduced by ACF in the event of a section 471(a)(18) violation and provides instructions related to interest liability.

*Comment:* One commenter requested that the final rule clarify that the calculation of the penalty is quarterly.

*Response:* We have revised paragraph (h) to clarify that the penalty is calculated and assessed quarterly.

*Comment:* One commenter believed that five percent is the penalty and not a cap.

*Response:* Five percent is both a penalty and a cap. The statute at section 474(d)(1) of the Act requires that the third or subsequent violation(s) in a fiscal year will result in a five percent reduction of title IV-E funds payable to the State in that quarter. The statute also sets an annual cap whereby no State's fiscal year payment will be reduced by more than 5 percent.

*Comment:* One commenter requested clarification on the State agency's

responsibility for interest if an entity such as a private agency violates section 471(a)(18) of the Act.

*Response:* The State agency or entity that has been found to be in violation is responsible for the interest. No change has been made to the final rule.

#### *Section 1355.39 Administrative and Judicial Review*

This section provides States found not to be in substantial conformity with titles IV–B and IV–E State plan requirements, or in violation of section 471(a)(18) of the Act, with an opportunity to appeal.

*Comment:* One commenter recommended that the final rule provide the State with the right to immediately appeal a determination of substantial nonconformity or require ACF to provide the State with a detailed report of the reasons underlying the finding prior to the development and implementation of a program improvement plan.

*Response:* A final determination regarding State nonconformity is not made until the State has had an opportunity for corrective action. Therefore, it would be premature to provide for an appeal to the DAB prior to that time. However, we will provide written notification, within 30 days following the child and family services review, that the State is, or is not, operating in substantial conformity. While we understand the commenter's desire to have a detailed report of the review findings, specifying the details of the notification letter is not appropriate for regulation. Additionally, we have designed the review process to be less dependent upon a lengthy report. The team will provide the State with verbal information on the findings of the review throughout the on-site review and subsequent exit conference. The notification letter will confirm findings of the onsite review, which builds on information initially reported in the State prepared statewide assessment, and will include sufficient information for a State to know where it is operating in or out of conformity. No change has been made to the final rule.

*Comment:* One commenter recommended that the final rule require ACF to assume the responsibility for any costs related to the development and implementation of the program improvement plan in the event ACF determines that the State is not operating in substantial conformity but a subsequent DAB decision finds that the State is operating in substantial conformity.

*Response:* We do not concur with the commenter's proposal that ACF should

assume full costs for the program improvement plans in the event the DAB overturns an ACF finding of substantial nonconformity. The State may claim FFP for appropriate program improvement plan activities under title IV–E.

*Comment:* One commenter stated that if private agencies are to be sanctioned for a violation as "entities in the State," they should have an opportunity for appeal.

*Response:* We concur with the commenter and have revised the final rule to allow such entities the opportunity to appeal to the DAB.

#### *Section 1355.40 Foster Care and Adoption Data Collection*

We have made a technical amendment to conform with new Federal requirements related to the collection of race and ethnicity data. On October 30, 1997, the Office of Management and Budget (OMB) published a notice in the **Federal Register** (62 FR 58781–58790) announcing its decision to revise Statistical Policy Directive No. 15, *The Race and Ethnic Standards for Federal Statistics and Administrative Reporting*. OMB's Statistical Policy standards provide a common language to promote uniformity and comparability of data on race and ethnicity for the population groups specified in the directive. The Department is required to collect information in accordance with the directive's standards.

The revised standards have five categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. The new standards allow individuals of mixed race to identify with more than one race. Also, OMB revised the two categories for data on ethnicity to: "Hispanic or Latino" and "Not Hispanic or Latino." The AFCARS currently collects information on the race and ethnicity of children in foster care and those who have been adopted, foster parents, and adoptive parents. However, we must change the definitions of the racial classifications, revise ethnicity classifications, and allow multiple-race identification in AFCARS race data elements to comply with the OMB Directive. In ACYF–CB–PI–99–01 (issued January 27, 1999) we informed States of the required changes to the AFCARS collection of race data as a result of a change in OMB policy. States were directed to change race and ethnicity collections for the report period beginning October 1, 1999. Since these changes are already underway in the States and a matter of HHS policy,

we are codifying these changes as technical amendments in this final rule.

#### *Section 1355.40(a) Scope of the Data Collection System*

We removed a reference to the former protections in section 427 of the Act in paragraph (a)(2) and replaced it with the correct citation. Congress repealed section 427 of the Act with Public Law 103–432, effective October 1, 1997. The protections previously included in section 427 of the Act are now included as assurances in section 422(b)(10) of the Act.

#### *Appendix A to Part 1355*

In Appendix A to part 1355, Section I, we included the new race and ethnicity classifications consistent with OMB's Statistical Policy Directive Number 15. All of the foster care race elements (elements II.C.1, IX.C.1 and IX.C.3) are listed in the element chart alphabetically as they are in the directive.

In section II to appendix A, we removed the obsolete reference to the section 427 protections and replaced it with the correct statutory reference. In Section II, II.C.1, we added new race definitions and made an editorial change regarding how a person's race and ethnicity is determined. Consistent with the OMB Directive, we make this change to emphasize that self-identification or self-reporting is the preferred method of gathering information on race or ethnicity except where this is not practical. Obviously, in the case of young children, racial or ethnic self-identification is not practical and is therefore primarily determined by the parent. We recommend that caseworkers ask children (if age appropriate) and adults to identify all the racial categories that apply.

In ACYF–CB–PI–99–01 we provided policy guidance on the use of the category "unable to determine" as it applies to situations where a parent or other adult caretaker is unwilling to identify their race or that of the child. We have included that clarification in this regulation. If a parent or caretaker is unwilling to identify a race, then the State should classify the information as "unable to determine," indicating that the State attempted to gather the information but was unable to do so. This will provide for better data as the State will not overstate the amount of missing data for this element and jeopardize conformity with the missing data standards. Finally, we amend the way that a State must code the data for the race categories to properly identify a single race, multiple race or "unable to determine" response.

We have made changes similar to those above in Section II, II.C.2, which define the Hispanic and Latino ethnicity classifications. In addition, we have deleted the last sentence of the paragraph that required the State to indicate that the child is not of Hispanic ethnicity only when the origin of the child is clear. We believe that this distinction is unnecessary and inconsistent with our approach to other regulatory definitions on race and ethnicity.

In Section II, IX.C, we now cross-reference only the definitions of race and ethnicity classifications used in the section on child demographics (II.C). The existing regulations also cross-reference the definition of "unable to determine," however, this definition as stated is not applicable to adults. For adults, the code "f. unable to determine," must be used only in circumstances where the parent is unwilling to identify his or her race or ethnicity. During AFCARS pilot reviews, we found that States were inappropriately coding missing information as "unable to determine." When data is missing or not known because the State has not asked an individual for information on race or ethnicity, the response must be left blank.

Finally, in Section II, we have deleted paragraph IX.D on coding ethnicity data. This paragraph incorrectly cross-referenced the section on disabilities. We have incorporated the relevant portions of the instruction in paragraph IX.C.

#### *Appendix B to Part 1355*

In appendix B to part 1355, we have made the same amendments to the race and ethnicity adoption data elements as those listed above for the foster care elements.

#### *Appendix D to Part 1355*

In appendix D to part 1355, we amended the race and ethnicity elements in the foster care and adoption record layouts consistent with the OMB directive. We amended the coding notes that precede each record layout table to clarify that the race classifications are now elements where more than one response is allowed.

We also made a technical change to the foster care and adoption record layouts to accommodate the year 2000 century date change. Prior to October 1996, States were required by regulation to report date information in decade format. In response to the year 2000 and the data issues associated with the processing of date information, we issued an information memorandum,

ACYF-IM-CB-96-08 (April 17, 1996), requiring States to report in century date format. We are now making the requisite technical change to the regulation.

#### *Appendix E to Part 1355*

In appendix E to part 1355, we made several technical edits to replace all references to "Hispanic origin" with "Hispanic or Latino ethnicity" in order to be consistent with the OMB directive (see element charts and Section B.2.a.(8)). In section A.2.a.(18) for foster care and section B.2.a.(9) for adoption, we have added an internal consistency validation for race elements. Internal consistency validations evaluate the logical relationship between data elements in a record. We also revised cross-references to the internal consistency checks throughout the Appendix to accommodate the addition.

#### **Part 1356—Requirements Applicable to Title IV-E**

##### *Section 1356.20 State Plan Document and Submission Requirements*

##### *Section 1356.20(e)(4) State Plan Document and Submission Requirements*

This section implements the authority of ACF Regional HUB Directors and Administrators and the Commissioner of ACYF to approve State plans and amendments that govern State programs under section 471 of the Act.

No comments were received on this section and no changes were made in the final rule.

##### *Section 1356.21 Foster Care Maintenance Payments Program Implementation Requirements*

In this section, we clarified existing policies and set forth additional foster care maintenance requirements which have a direct impact on determining the eligibility of children in the title IV-E foster care program.

*Comment:* A few commenters were concerned that § 1356.21 of the regulation was not sensitive to and appeared inconsistent with the Indian Child Welfare Act (ICWA).

*Response:* The purpose of the regulation is to implement the title IV-E foster care program, not the requirements of the ICWA. We want to be clear that nothing in these regulations supersedes the requirements of the Indian Child Welfare Act. States must continue to comply fully with ICWA.

*Comment:* We received a large number of general comments expressing disappointment that following the outcome orientation of the child and family services review that § 1356.21 of

the regulation reverts to a process orientation.

*Response:* We agree, this section of the regulation is process-oriented. The purpose of this section is to regulate title IV-E eligibility criteria and procedural requirements, which are inherently process-oriented.

*Comment:* One commenter suggested we provide language throughout this section that distinguishes title IV-E eligibility criteria from State plan requirements.

*Response:* Title IV-E eligibility criteria are distinguished from State plan requirements in § 1356.21. We have amended § 1356.71(f) and (g) to clearly enumerate the title IV-E eligibility criteria. However, we agree that we may have caused some confusion by addressing a particular State plan requirement in the reasonable efforts section relating to permanency hearings that must be held within 30 days of a judicial determination that reasonable efforts to reunify a child and family are not required. Also, the leading sentences to § 1356.21(h) suggest that the permanency hearing is an eligibility criterion. We have deleted language that could cause any confusion between title IV-E eligibility criteria and State plan requirements.

*Comment:* Some commenters recommended that the regulations include a new section that describes tribal authority and responsibilities in satisfying title IV-E requirements when tribes and States enter into title IV-E agreements. One commenter also requested that the suggested section include a provision that permits the Secretary to waive title IV-E provisions with respect to any title IV-E agreement between an Indian tribe and a State. The commenter believed such a provision would make it easier for State-tribal agreements to be established.

*Response:* The regulations are written from the perspective of the State agency because the statute makes the State child welfare agency ultimately responsible for the proper administration of the title IV-E program. Section 472(a)(2) of the Act permits other public agencies to have responsibility for placement and care of children in foster care under an agreement with the State child welfare agency. The State and the public entity with which it is entering into an agreement, whether it is a tribe, juvenile justice agency, etc., must determine between themselves how roles and responsibilities for meeting title IV-E requirements will be shared. The requirements of the title IV-E program do not, and cannot, change merely because a public entity other than the

State child welfare agency has responsibility for placement and care of certain children in foster care. Tribes and other public entities with which the State agency has entered into agreements do, however, have the latitude to develop their own procedures for satisfying title IV-E requirements as long as the State child welfare agency's ultimate responsibility for compliance is assured. We have not made any changes to the regulation based on these comments.

*Section 1356.21(a) Statutory and Regulatory Requirements of the Federal Foster Care Program*

This section introduces the title IV-E implementation requirements for eligibility of Federal financial participation (FFP) under the title IV-E foster care program.

*Comment:* One commenter observed that §§ 1356.22 and 1356.30 should be included in the references in this paragraph.

*Response:* We concur and have amended the paragraph accordingly.

*Section 1356.21(b) Reasonable Efforts*

This section sets forth the ASFA requirement that the State hold the child's health and safety as its paramount concern when making reasonable efforts.

*Comment:* We received several suggestions to include, in the regulation, the preamble language at page 50073 of the NPRM which describes the threefold purpose of the reasonable efforts requirements. The basis for this suggestion was a concern that the focus of the regulation was on the steps the State agency must take in order to access Federal funds rather than the intent of the statute. The commenters believe the inclusion of this language in the regulation will provide an outcome oriented balance to the process orientation of this section of the regulation.

*Response:* We concur and have amended § 1356.21(b) accordingly.

*Comment:* Many commenters requested that we delete the preamble language at page 50073 of the NPRM that provides examples of questions the courts should consider in determining whether the agency satisfied the reasonable efforts requirements. These commenters are concerned that examples provided in regulation or policy guidance become de facto policy. Conversely, we received many comments not only supporting the list in question, but encouraging us to include it in the text of the regulation and expand it to include more guidance

on reasonable efforts to make and finalize permanent placements.

*Response:* We intend for examples to set parameters for the appropriate use of the flexibility that is inherent in some title IV-E provisions. We believe the examples will be helpful to State child welfare agencies in preparing for hearings at which reasonable efforts determinations are to be made. We do, however, think the list is more appropriate as policy guidance rather than regulatory text and therefore, did not change the regulation to include the examples.

*Comment:* One commenter suggested that we include regulatory language which places the burden of proof in satisfying the reasonable efforts requirements on the State agency.

*Response:* We believe that the very nature of the reasonable efforts determination indicates the burden of proof is on the State agency. Section 472(a)(1) of the Act requires that the court determine whether the State agency made reasonable efforts in accordance with section 471(a)(15) of the Act. We believe that the suggested change is unnecessary, therefore, and have made no changes to the regulation.

*Comment:* We received a few comments suggesting that we have no statutory basis for requiring a judicial determination that the State made reasonable efforts to prevent the child's removal from his/her home, to reunify the child and family, and to make and finalize an alternate permanent placement when the child and family cannot be reunited. We also received several comments supporting the requirement for three separate reasonable efforts determinations but questioning our authority to link title IV-E funding to such determinations.

*Response:* The judicial determinations are based in the statute. Section 472(a)(1) of the Act contains two eligibility criteria. The first pertains to the child's removal from home. Such removal must be based on a voluntary placement agreement or a judicial determination that it was contrary to the child's welfare to remain at home. The second eligibility criterion requires a judicial determination that the State made reasonable efforts of the type described in section 471(a)(15) of the Act. Section 471(a)(15) of the Act requires the State agency to make reasonable efforts to prevent the child's removal from his/her home, to reunify the child and family, and to make and finalize an alternate permanent placement when the child and family cannot be reunited. The requirements for judicial determinations regarding reasonable efforts are title IV-E

eligibility criteria. If the eligibility criteria are not satisfied, the child is not eligible for title IV-E funding.

*Comment:* One commenter suggested we permit a 60-day extension to the time frames prescribed in the regulation for obtaining judicial determinations regarding reasonable efforts to address the problem of continuances.

*Response:* We are sympathetic to the issue of continuances. However, we believe that the need for timely judicial determinations is more appropriately addressed by building capacity through training judges and attorneys rather than extending the time frames for satisfying title IV-E eligibility criteria. Therefore, we have not modified the regulation in response to this comment.

*Comment:* We received a few comments observing that a sentence in the preamble for this section mistakenly read, "Congress provided a list of circumstances in which reasonable efforts are required."

*Response:* Yes, this was a misprint. The sentence should have read, "Congress provided a list of circumstances in which reasonable efforts are **not** required (emphasis added)."

*Section 1356.21(b)(1) Judicial Determination of Reasonable Efforts To Prevent a Child's Removal From the Home*

This section sets forth the statutory requirement of a judicial determination that reasonable efforts were made to prevent removal of a child from his or her home.

*Comment:* Numerous commenters informed us that the distinction we made between emergency and non-emergency removals was not reflective of State practice.

*Response:* We concur that the distinction was not useful. We have removed the distinction and consolidated the requirements for reasonable efforts to prevent removals into a single paragraph, (b)(1). States will now have up to 60 days from the time a child is removed from the home to obtain a judicial determination regarding reasonable efforts to prevent removal.

*Comment:* We received an overwhelming number of comments on the timing prescribed for obtaining judicial determinations that the State made reasonable efforts to prevent removals. The proposed language required such determinations to be made "\* \* \*" at the first full hearing pertaining to the removal of the child or no later than 60 days after a child has been removed from home, whichever is first." Commenters interpreted this

language to preclude such determinations from being made at an earlier time, thus delaying title IV–E eligibility.

*Response:* We did not intend to prohibit these determinations from being made at an earlier time and we have amended the regulation language in paragraph (b)(1)(i) accordingly. The rule now requires the State agency to obtain a judicial determination that it either made or was not required to make reasonable efforts to prevent a child's removal from home no later than 60 days from the date the child was removed from the home.

*Comment:* Many commenters believed that we were overly harsh in prohibiting title IV–E eligibility for an entire foster care episode if the reasonable efforts to prevent removal requirements were not satisfied. Some suggested that the State be permitted to establish the child's eligibility when and if this requirement is met at a later date.

*Response:* The requirement for the State to make reasonable efforts to prevent removals is a fundamental protection under the Act and one of several title IV–E eligibility criteria used in establishing eligibility. From both a practice and an eligibility perspective, it is impossible for the State to provide efforts to prevent the removal of a child from home after the fact.

In terms of practice, there is a profound effect on the child and family once a child is removed from home, even for a short time, that cannot be undone. If the child is returned after services have been delivered, or even immediately, the State has reunified the family, not prevented a removal.

The statute requires that title IV–E eligibility be established at the time of a removal. If the State does not make reasonable efforts to prevent a removal or fails to obtain a judicial determination with respect to such efforts, the child can never become eligible for title IV–E funding for that entire foster care episode because there is no opportunity to establish eligibility at a later date. Once title IV–E eligibility is initially established, the judicial determination regarding the reasonable efforts the State made to finalize a permanency plan is required to maintain title IV–E eligibility.

*Comment:* A couple of commenters stated that it was impossible to satisfy the proposed requirements for making reasonable efforts to prevent removals for unaccompanied refugee minors.

*Response:* We have no authority to waive title IV–E eligibility requirements for any child or group of children. If the State wishes to claim title IV–E funds for unaccompanied refugee minors, then

all title IV–E eligibility criteria must be satisfied.

*Section 1356.21(b)(2) Judicial Determination of Reasonable Efforts to Finalize a Permanency Plan*

This section (formerly § 1356.21(b)(3) and (b)(4) of the NPRM) describes the requirements for obtaining a judicial determination to finalize a permanency plan.

*Comment:* Most commenters expressed confusion regarding when the “clock” starts for obtaining judicial determinations that the State made reasonable efforts to reunify the child and family or to make and finalize an alternate permanency plan. A few commenters observed that often the permanency plan may change from reunification to an alternate permanency plan prior to the State obtaining a judicial determination regarding its efforts to reunify the child and family. These commenters requested clarification about which permanency plan the court must rely on to make its determination in such situations. A couple of commenters suggested that we not permit States to change the permanency plan outside a permanency hearing or without a court order so that the court has an opportunity to determine if the State agency did make reasonable efforts to reunify the child and family before sanctioning the change in the permanency plan.

*Response:* After reviewing the comments and the proposed requirements, we determined that our proposal in the NPRM with respect to reasonable efforts to reunify a child and family and to make and finalize alternate permanency plans was confusing and not responsive to actual practice. To simplify the requirements, we have consolidated the reasonable efforts requirements regarding efforts to reunify the child and family and to make and finalize alternate permanent placements into a single requirement related to making reasonable efforts to finalize a permanency plan. In new paragraph (b)(2), we require the State to obtain a judicial determination that it made reasonable efforts to finalize the permanency plan that is in effect, regardless of what it is, within 12 months of the date the child is considered to have entered foster care in accordance with the definition of such at § 1355.20. The State must obtain such a determination every 12 months thereafter while the child is in foster care. Our purpose in imposing this policy, as stated in the NPRM, is to tie the timing for obtaining reasonable efforts determinations regarding

permanency to the timing of the permanency hearing because it is a logical determination to make at such hearings and it would ease administrative burden.

In determining whether the State made reasonable efforts to finalize a permanency plan, the court's determination should be based on the permanency plan that is in effect at the time at which the agency is seeking such a determination. We are not requiring the State to obtain judicial determinations on its efforts regarding permanency plans that it has abandoned.

We realize that obtaining reasonable efforts determinations regarding finalizing permanency plans every 12 months while a child is in foster care is a significant departure from current practice and that States will need transition time to implement this requirement for children who have been in foster care for more than 12 months. Therefore, we will not take adverse action against States who cannot comply with this requirement for a period of 12 months from the effective date of this final rule.

Finally, we think it appropriate to permit the State agency to alter the permanency plan outside a permanency hearing and will not require the court to approve such a plan before the State agency can act on it. When a State agency has placement and care responsibility for a child, it is responsible for setting and acting on the appropriate permanency plan. We understand that, in some States, courts provide such active oversight during the course of a permanency hearing that the court actually sets the permanency plan. That is the State's prerogative. Federal law does not require the courts to play such a prescriptive role in the permanency planning process. Section 475(5)(C) of the Act requires the court to review the permanency plan presented to it by the State agency.

*Comment:* We received several comments objecting to the proposal that children, for whom judicial determinations are not made regarding reasonable efforts to reunify and to make and finalize alternate permanency plans, become ineligible for title IV–E funding until such a determination is made.

*Response:* We did not amend the regulation based on these comments because the requirements for judicial determinations are statutory. To be eligible for title IV–E funding, section 472(a)(1) of the Act requires the State to obtain a judicial determination regarding its reasonable efforts of the type described in section 471(a)(15) of

the Act. Section 471(a)(15) of the Act, among other things, requires the State to make reasonable efforts to finalize permanency plans. If these criteria are not satisfied, the child is ineligible for title IV-E funding.

*Comment:* We received a number of comments opposing the requirement that judicial determinations regarding reasonable efforts to finalize permanency plans be made at least every 12 months. These commenters suggested that such determinations should be required every six months to be consistent with the ASFA's focus on expedited permanency.

*Response:* We agree that six-month intervals for making determinations regarding reasonable efforts to effect a permanency plan may provide an incentive for expediting permanency. However, requiring such judicial determinations to be made at the interval suggested would limit the flexibility provided at section 475(5)(B) of the Act for holding the periodic reviews required therein before an administrative body rather than a court. We cannot justify a requirement that would limit flexibility provided by the statute, particularly since we know it would place a significant burden on the courts and State agencies. Therefore, we have made no changes to the regulation.

We believe that the six-month periodic reviews will encourage a timely permanency planning process. These reviews must determine, in part: "the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan \* \* \* and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship." Thus, the statute already compels States to review reasonable efforts to achieve permanency every six months.

*Comment:* One commenter requested that we amend the regulatory language to ensure that courts oversee reunification efforts between unaccompanied refugee children and the party designated as the child's permanent placement.

*Response:* The courts oversee the State agency's efforts to finalize permanency plans, regardless of what the permanency plan is or with whom the child is to be placed. Therefore, we do not believe we must regulate such an assurance for a particular group of children in foster care.

Section 1356.21(b)(3) Circumstances in Which Reasonable Efforts Are Not Required to Prevent a Child's Removal From Home or to Reunify the Child and Family

This section (formerly § 1356.21(b)(5) in the NPRM) describes the circumstances in which reasonable efforts to prevent a removal or to reunify a child with his or her family are not required.

*Comment:* Many commenters requested additional guidance in defining aggravated circumstances in which reasonable efforts are not required. The majority of commenters supported State autonomy in identifying those aggravated circumstances but wanted further guidance or clarification.

*Response:* Congress provided specific examples of aggravated circumstances in the statute which we have included in the regulation. Section 471(a)(15)(D)(i) of the Act requires the State to define, in law, those aggravated circumstances in which reasonable efforts are not required. We believe that the State legislative process will produce decisions that are based on public debate, consideration, and broad input from all interested and relevant parties. We strongly believe that providing Federal guidance beyond what is included in the statute is inconsistent with the intent of the statute to provide States with maximum flexibility in this area.

*Comment:* Several commenters urged us to permit the court to determine that reasonable efforts are not required in circumstances other than those enumerated at section 471(a)(15)(D) of the Act when the State agency provides evidence to that effect. These commenters believe that the interpretation that they are requesting is consistent with the Rule of Construction at section 478 of the Act. Many commenters made this suggestion because they were uncomfortable with the preamble discussion which submits that an assessment of the family that indicates that the child is not safe in the home would satisfy the reasonable efforts requirements.

*Response:* We understand the commenter's concern; however, the statute specifically enumerates those circumstances in which reasonable efforts are not required. Section 478 of the Act clarifies that the State court continues to have discretion when making judgments about the health and safety of the child. However, it does not grant ACF the authority to add or change the list at section 471(a)(15)(D) of the Act. As written, the statute requires the State to make reasonable

efforts in all cases unless one of the circumstances at section 471(a)(15)(D) of the Act exists.

The aforementioned interpretation of the statute should not be construed to support unwarranted attempts to preserve families. Rather, when reasonable efforts are required, the State agency and the courts must determine the level of effort that is reasonable, based on safety considerations and the circumstances of the family. Sometimes, based on its assessment of a family, the State agency determines that it is reasonable to make no effort to maintain the child in the home or to reunify the child and family. In such circumstances, if the court determines that the agency's assessment of the family is accurate and its actions were appropriate, the court should find that the agency's efforts in such cases were reasonable, not that reasonable efforts were not required.

*Comment:* One commenter recommended that we permit Indian tribes to 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 Act.

*Response:* 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.

*Comment:* In the preamble to proposed § 1356.21(b)(5), we explained that a court determination that reasonable efforts to prevent a child's removal were not required did not remove the State's obligation to make reasonable efforts to reunify the child and family. Only a judicial determination that reasonable efforts to reunify the child and family are not required removes that obligation. Several commenters requested that we

eliminate this requirement because they believe it to be unduly burdensome.

*Response:* We believe that States will frequently encounter circumstances in which they are exempt from making efforts to prevent a child's removal from the home but it is appropriate to make reasonable efforts to reunify the child and family. We think the policy described in the comment above ensures that decision making is based on the individual circumstances of the child and family rather than blanket exceptions. Moreover, the statute supports such an interpretation. Section 471(a)(15)(D) of the Act enumerates circumstances in which reasonable efforts of the type described at section 471(a)(15)(B) of the Act are not required. Two distinct types of reasonable efforts are described at section 471(a)(15)(B) of the Act: to prevent removals; and to reunify children and their families. Therefore, a judicial determination exempting the State from providing each type of reasonable effort must be made. We have retained this requirement.

*Comment:* A couple of commenters requested that we clarify that we are not prescribing the timing for judicial determinations that reasonable efforts are not required to reunify the family.

*Response:* The commenters are correct that we are not prescribing the time frame for judicial determinations that reasonable efforts to reunify the child and family are not required. We do not think it is appropriate to prescribe a time frame for obtaining such a determination and have made this clarification in paragraph (b)(3). However, all judicial determinations with respect to reasonable efforts to prevent removals, even determinations that such efforts are not required, must be obtained within the time frame prescribed in paragraph (b)(1), within 60 days of the date the child is removed from the home.

*Comment:* We received a number of comments regarding the list of felonies at § 1356.21(b)(5) used to identify when reasonable efforts are not required. The comments included requests for clarification regarding whether a criminal conviction is required, support for requiring a criminal conviction, and opposition to requiring a criminal conviction.

*Response:* We have amended § 1356.21(b)(3)(ii) to clarify that a parent must be convicted of one of the felonies enumerated before the court can determine that reasonable efforts are not required. (We have similarly amended language in § 1356.21(i)(1)(iii) which requires TPR when a parent is convicted of one of the enumerated felonies). The

statutory language specifically calls for a court of competent jurisdiction to find that one of the felonies was committed. In our opinion, this language requires a criminal conviction. As we stated in the NPRM, however, in circumstances in which the criminal proceedings have not been completed or are under appeal, the court that hears child welfare dependency cases determines whether it is reasonable to attempt to reunify the child with his/her parent. It is important for this decision to be based on the developmental needs of the child and the length of time associated with completion of the criminal proceedings or the appeals process.

#### *Section 1356.21(b)(4) Concurrent Planning*

This section (formerly § 1356.21(b)(6) in the NPRM) implements the statutory provision which provides States the option of using concurrent planning.

*Comment:* One commenter suggested that we require an assessment of every family to determine the appropriateness of concurrent planning before the State implements it for that family.

*Response:* We agree that the commenter's suggestion is consistent with good practice. However, it would be overly prescriptive to include such a requirement in regulation since concurrent planning is an option for the State, and not a mandate.

*Comment:* One commenter encouraged us to prohibit States from using concurrent planning for unaccompanied refugee minors.

*Response:* The choice to engage in concurrent planning is optional and should be made on a case-by-case basis. We see no reason to prohibit the use of this technique for a particular group of children in foster care.

*Comment:* One commenter asked if the State must present the concurrent plan to the court and if the court must make a reasonable efforts determination with respect to the concurrent plan.

*Response:* The answer to both questions is no. The State is not required to present the plan for the purposes of obtaining a reasonable efforts determination by the court. The concurrent planning option is addressed in the reasonable efforts section because, among other things, that section of the regulation addresses permanency planning activities, of which concurrent planning is one.

*Comment:* One commenter suggested we broaden the concurrent planning language in the regulation to include all types of permanency plans. As presented in the NPRM, we only address concurrent planning with respect to reunification and adoption.

The commenter thinks the regulation should clarify that concurrent planning may be used regardless of what the alternate permanency plan is.

*Response:* We agree and have amended the language in paragraph (b)(4) accordingly.

#### *Section 1356.21(b)(5) Use of the Federal Parent Locator Service*

This section (formerly § 1356.21(b)(7) in the NPRM) provides for the use of the Federal Parent Locator Service (FPLS) to search for absent parents in order to expedite permanency for children.

*Comment:* A number of commenters suggested we provide guidance regarding the timing for use of the Federal Parent Locator Service.

Comments ranged from suggesting that we encourage States to locate absent parents and/or putative fathers as soon as possible to requiring that such searches take place within 30 days of the child entering foster care.

*Response:* While we agree with the idea that searches for absent parents should be conducted as soon as possible after a child enters care, we do not think it is appropriate to include such practice level guidance in regulation. We have, however, made an editorial change in paragraph (b)(5) to note that we are not restricting when a State can seek the services of the FPLS.

#### *Section 1356.21(c) Contrary to the Welfare Determination*

This section sets forth the requirements that there be a judicial determination stating that remaining in the home would be contrary to the child's welfare.

*Comment:* We received numerous comments regarding the distinction in the NPRM between emergency and non-emergency removals. The comments were similar to those we received regarding reasonable efforts to prevent removals; that the distinction is not consistent with actual practice in many States.

*Response:* We concur and have removed the distinction between emergency and non-emergency removals in the final rule. Now a State will need to obtain a contrary to the welfare determination in the first court order removing the child from the home, regardless of whether there is an emergency or non-emergency situation.

*Comment:* Commenters overwhelmingly opposed our proposed requirement that contrary to the welfare determinations be made at the first hearing pertaining to the child's removal from home. The commenters said we were inappropriately overturning policy established by the

Departmental Appeals Board (DAB) decision #1508, which permitted States up to six months to obtain a contrary to the welfare determination.

*Response:* We recognize that some States may have made changes to their contrary to the welfare policies based on this DAB decision. However, at the time that the DAB made that ruling, the Department did not have regulations addressing the timing of contrary to the welfare determinations. Therefore, we are now taking this opportunity to clarify in regulation our policy on this issue. Our reasons for establishing this policy are set forth below:

The contrary to the welfare determination was the first of the existing protections afforded to children and their families by the Federal foster care program and has been in effect since the inception of the program in 1961 when it was operated under title IV-A. The statute then, and now, recognizes the severity of removing a child, even temporarily, from home. This protection is in place because Congress believed that judicial oversight would prevent unnecessary removals and act as a safeguard against potential inappropriate agency action. This policy is consistent with Congressional intent and stands as proposed in the NPRM. The contrary to the welfare determination must be made in the first court order sanctioning the removal of the child from home, as is explicitly required at section 472(a)(1) of the Act.

*Comment:* Several commenters requested that we clarify that we did not intend to consider an emergency order (sometimes referred to as a "pick-up order" or "ex-parte order") as the first court ruling for the purpose of meeting the contrary to the welfare requirements.

*Response:* We did not make any distinction about the type of order in which the contrary to the welfare determination is required. We mean the very first court order pertaining to the child's removal from home. If the emergency order is the first order pertaining to a child's removal from home, then the contrary to the welfare determination must be made in that order to establish title IV-E eligibility. We understand that some States must change their practices and even State statutes to meet this requirement. The critical nature of this protection requires us to maintain this policy.

*Comment:* One commenter suggested we eliminate the contrary to the welfare requirement because it provides an incentive for workers not to remove children from their homes.

*Response:* The contrary to the welfare determination is a statutory requirement

and a critical protection that must be afforded to all children and their families to assure that unnecessary removals are minimized. We have, therefore, made no change to the regulation.

*Comment:* A few commenters opposed the policy to make children for whom the contrary to the welfare requirements are not satisfied ineligible for title IV-E funding. Commenters thought we were particularly harsh in making the child ineligible for that entire foster care episode.

*Response:* Consistent with the reasonable efforts to prevent removals requirements, the contrary to the welfare determination is a critical statutory protection and a criterion for establishing title IV-E eligibility. Once a child is removed from home, the State cannot go back and fix an inappropriate removal. If a child's removal from home is not based on a judicial determination that it was contrary to the child's welfare to remain in the home, the child is ineligible for title IV-E funding for the entire foster care episode subsequent to that removal because there is no opportunity to satisfy this eligibility criterion at a later date. The same does not hold true for all other eligibility criteria. For example, judicial determinations regarding reasonable efforts to finalize a permanency plan, placement in a licensed foster family home or child care institution, and State agency responsibility for placement and care are all title IV-E eligibility criteria that can be reestablished if lost or established at a later time if missing at the beginning of a foster care episode. This is not the case with the contrary to the welfare determination.

*Comment:* A number of commenters pointed out a technical discrepancy between the contrary to the welfare and reasonable efforts to prevent removals requirements regarding the consequence for not meeting these requirements. In the NPRM, we stated that, if the reasonable efforts to prevent removals requirements are not met, the child is ineligible for title IV-E funding for the remainder of "that stay" in foster care. The language for the contrary to the welfare determination states that the child is not eligible for the duration of "his/her" stay in foster care. The commenters are concerned that the language for the contrary to the welfare requirements could be construed to mean the child is never eligible for title IV-E funding again.

*Response:* We have amended the language at § 1356.21(c) so that it is consistent with that at § 1356.21(b)(1). If the contrary to the welfare requirements are not satisfied, the child is not eligible

for title IV-E funding for the remainder of that stay in foster care.

*Comment:* One commenter suggested that unaccompanied refugee minors be exempt from the contrary to the welfare requirements.

*Response:* We have no authority to waive or exempt any group of children in foster care from this provision. It is a title IV-E eligibility criterion that must be satisfied if a State claims title IV-E funding for a child.

*Comment:* A few commenters requested that we accept a judicial determination that the removal of the child from the home was in the best interests of society in satisfying the contrary to the welfare requirements.

*Response:* This suggestion would not comport with the law or the intent of the title IV-E foster care program. The statute is clear that for title IV-E purposes a removal from the home must be based on a determination that remaining in the home would be contrary to the child's welfare. We have clarified this requirement previously in ACYF-PIQ-91-03 which states that, "\* \* \* if the court order indicates only that the child is a threat to the community, such language would not satisfy the requirement for a determination that continuation in the home would be contrary to the child's welfare \* \* \*". We find no basis to overturn this policy as it is intended to ensure that children are not unnecessarily removed from their homes and is based on the child's best interests.

#### Section 1356.21(d) Documentation of Judicial Determinations

This section establishes the documentation requirements for the reasonable efforts and contrary to the welfare determinations.

*Comment:* Many commenters wrote in support of our proposed policy of requiring judicial determinations to be explicit, made on a case-by-case basis, and so stated in the court order. Others felt that we were being overly prescriptive in this section. Those commenters expressed concern that this requirement prohibits the use of preprinted forms that include checklists for making the necessary judicial determinations. A few suggested that we permit the court order to reference the facts in a court report, related psychiatric or psycho-social report, or sustained petition to demonstrate that the determination was based on the individual circumstances of that case. A few commenters even suggested that we delete the paragraph in its entirety.

*Response:* In keeping with the supportive comments we received on

the need for individualized judicial determinations, we have not made changes in this section, but would like to clarify our reasons for the policy. Our purpose for proposing this policy can be found in the legislative history of the Federal foster care program. The Senate report on the bill characterized the required judicial determinations as “\* \* \* important safeguard(s) against inappropriate agency action \* \* \*” and made clear that such requirements were not to become “\* \* \* a mere *pro forma* exercise in paper shuffling to obtain Federal funding \* \* \*” (S. Rept. No. 336, 96th Cong., 2d Sess. 16 (1980)). We concluded, based on our review of State’ documentation of judicial determinations over the past years, that, in many instances, these important safeguards had become precisely what Congress was concerned that they not become.

Our primary concern is that judicial determinations be made on a case-by-case basis and it was not our intent to create a policy that was overly prescriptive and burdensome. States have a great deal of flexibility in satisfying this requirement. The suggestion that the court order reference the facts of a court report, related psychiatric or psycho-social report, or sustained petition as a mechanism for demonstrating that judicial determinations are made on a case-by-case basis is an excellent one and would satisfy this requirement. If the State can demonstrate that such determinations are made on a case-by-case basis through a checklist then that is acceptable also.

*Comment:* A few commenters asked for clarification regarding the language that must be contained in judicial determinations that satisfy title IV–E eligibility criteria. The commenters wanted to know if these determinations needed to use the exact terms “reasonable efforts” and “contrary to the welfare.”

*Response:* Existing policy does not require the judicial determinations to use the exact terminology of the statute. We have no intention of overturning this policy. In fact, in the preamble to this section in the NPRM, we specifically stated that,

\* \* \* (t)he judicial determinations themselves need not necessarily include the exact terms “contrary to the welfare” and “reasonable efforts,” but must convey that the court has determined that reasonable efforts have been made or are/were not required (as described in section 471(a)(15) of the Act), and that it would be contrary to the welfare of a child to remain at home.

*Comment:* One commenter was opposed to our requiring specific

judicial determinations. The commenter felt we should be able to cull out the fact that the court made the appropriate determinations by reading the hearing record.

*Response:* While we can allow some flexibility in this area, it is a statutory requirement that the specific judicial determinations regarding reasonable efforts and contrary to the welfare be explicit in court orders. Section 1356.21(d)(1) of the regulation states that we will accept transcripts of the court proceedings if the necessary judicial determinations are not explicit in the court orders.

*Comment:* Overwhelmingly, commenters were opposed to the prohibition on nunc pro tunc orders. Commenters generally felt that the States would be punished for the failure of the court to fulfill its responsibility. Some commenters suggested we permit nunc pro tunc orders only to clarify or correct technical errors.

*Response:* We placed the ban on nunc pro tunc orders because we discovered that they were being used months, sometimes years, later to meet reasonable efforts and contrary to the welfare requirements that had not been met at the time the original hearing took place. We are sensitive to the issue of technical errors. However, it is permissible for States to use transcripts of court proceedings to verify that judicial determinations were made in the absence of the necessary orders. We have, therefore, made no changes to the regulation to modify the ban on nunc pro tunc orders.

*Comment:* Some commenters opposed our decision not to accept judicial determinations regarding reasonable efforts and contrary to the welfare determinations which merely reference State statute.

*Response:* We believe that judicial determinations should be as meaningful as possible and child-specific in order to ensure that the circumstances of each child are reviewed individually. We believe that explicit documentation is a way to ensure that such determinations actually occur and could find no compelling argument to change our position. We will not accept judicial determinations that merely reference State statute to satisfy the reasonable efforts and contrary to the welfare determinations.

#### *Section 1356.21(e) Trial Home Visits*

This section defines trial home visits for the purposes of establishing title IV–E eligibility.

*Comment:* Most commenters supported allowing title IV–E eligibility

to continue for six months while a child is on a trial home visit.

*Response:* No response is necessary to these comments, but we changed the term “foster care setting,” to “foster care,” to have consistent terminology throughout the rule.

*Comment:* A commenter sought clarification of whether there is a regulatory definition of a trial home visit.

*Response:* There is no regulatory definition of the term “trial home visit,” as it is within the State’s discretion to define. We do not believe that it would be appropriate for us to develop a regulatory definition. We also do not believe that we could develop a definition that would be inclusive of the variety of State policies on trial home visits or that a definition would be helpful. In practice, a trial home visit is intended to be a short term option in preparation for returning the child home permanently.

*Comment:* A commenter asserted that the law does not recognize or define a trial home visit, and therefore, we have no authority to require a determination of title IV–E eligibility for children who reenter foster care after a trial home visit that lasts more than six months.

*Response:* While it is true that the statute does not explicitly address trial home visits and determinations of title IV–E eligibility, we believe our policy is consistent with the statute. Further, we are allowing maximum flexibility to States regarding establishing title IV–E eligibility if the child reenters foster care. If a trial home visit continues for an extended period, the circumstances of the original removal are likely to have changed. For that reason, a State must determine title IV–E eligibility upon a child’s reentry into foster care. When a trial home visit extends beyond six months and the child returns to foster care, the child is then considered to be entering a new placement.

*Comment:* A commenter sought clarification on whether a continuance of a hearing scheduled to address the trial home visit satisfied the requirement that for title IV–E funding to continue, a court must order a longer visit.

*Response:* The provision establishes a six-month outer limit for a trial home visit, except when a court orders a longer visit. A court continuance of a hearing regarding the trial home visit does not satisfy this requirement.

#### *Section 1356.21(f)—Case Review System*

This section establishes the case review system requirements for the title IV–E foster care program.

*Comment:* A few commenters requested that the regulations contain more guidance on how the case review system could determine the safety of the child and ensure that the child was maintained safely in the home.

*Response:* We believe that we can better respond to these comments through the provision of technical assistance as this is more of a practice issue. Nor do we think that prescribing how a State must maintain a child's safety would be useful, since safety considerations will vary on a case-by-case basis.

*Comment:* Another commenter suggested that the time frames for all case review requirements (permanency hearings, TPR and periodic reviews) were arbitrary, and should not be prescribed in regulations. The commenter recommended that the time frames should be flexible to accommodate court calendars.

*Response:* We do not have the authority to waive time frames for case review requirements because the law requires that States hold court hearings and periodic reviews within very specific time frames. We believe that States must be held accountable to these statutory time frames, and therefore, offer no changes to the case review system. A major goal of ASFA was to tighten case review time frames to prevent children from experiencing extended stays in foster care.

#### *Section 1356.21(g) Case Plan Requirements*

This section establishes the development and documentation requirements for case plans.

*Comment:* The majority of commenters on this section supported the requirement in § 1356.21(g)(1) that States develop the case plan with the child's parent or guardian.

*Response:* None needed.

*Comment:* Several commenters suggested that we amend § 1356.21(g)(1) to instruct the State to document a parent's inability or refusal to participate in the development of the case plan. Another commenter suggested that we require a State to document in the case plan the efforts caseworkers employed to engage the parent in the development of the plan.

*Response:* We expect that States will document efforts made to engage parents in developing the case plan, but we do not believe that it is necessary to prescribe this documentation. We believe it is especially critical that caseworkers engage parents early on because of the new time frames for permanency established by the ASFA.

*Comment:* A couple of commenters suggested that case plans be developed within 30 days of a State agency assuming responsibility for placement and providing services. One commenter believed that according to our proposed rule, case plans might not be developed until 120 days after a child has been actually removed from the home.

*Response:* The proposed rule at § 1356.21(g)(2) mirrored the language in existing regulations which required the case plan to be developed within 60 days of a State assuming responsibility for providing services, including placing the child. We are not convinced that shortening the time frame for developing case plans to 30 days will have any measurable effect on the quality and function of a case plan, and therefore, are not changing the regulation in this manner. We believe that one of the commenters may have misinterpreted the proposed rule to mean that States have up to 60 days from the date the child is considered to have entered care according to 475(5)(F) of the Act to develop the case plan. We would like to clarify that the date the child is considered to have entered foster care is irrelevant for purposes of developing the case plan. Rather, the case plan must be developed within 60 days of the child's removal from the home.

*Comment:* Some commenters suggested that we require specific steps in § 1356.21(g)(5) that a State should take to make and finalize alternate permanency placements.

*Response:* We believe that the specific steps a State agency makes to finalize alternate permanency placements are practice issues that need to be determined on a case-by-case basis. Therefore, we are not including these specific steps in regulation. A State agency can best formulate the steps necessary to achieve permanency based on the best interests of the child and the child's permanency plan. Court review and oversight of the permanency plan should provide an adequate check on State efforts in this area.

*Comment:* A few commenters suggested that we include in the final rule the language from section 475(1)(E) of the Act, which requires States, at a minimum, to document the steps and child-specific recruitment efforts if the child's permanency goal is adoption or placement in another permanent home. A couple of commenters also requested that we include in the final rule the statutory examples of child-specific recruitment efforts, *i.e.*, the use of State, regional and national adoption exchanges.

*Response:* We agree that a clearer statement of the requirement to document the steps to permanently place the child is warranted. We have, therefore, made changes to the language and included it in a new paragraph, 1356.21(g)(5). We have amended the language in the regulation so that the documentation of "child specific recruitment efforts" is only applicable to children with case plan goals of adoption and not to other permanency goals. We believe that the illustrative list which mentions adoption exchanges and the reference to recruitment limits the requirement to children with case plan goals of adoption. States still need to document the steps taken to secure a permanent placement for children with alternate permanency goals.

*Comment:* A commenter requested clarification on the differences between a case plan and a permanency plan.

*Response:* We use the term "case plan" to refer to a plan developed to meet the statutory requirements of sections 422(b)(10)(B)(ii), 471(a)(16), 475(1) and 475(5)(A) of the Act. The case plan is a written document which includes, in part: a description of the child's placement; a discussion of the safety and appropriateness of the placement; a plan for ensuring that the child and family receive services designed to facilitate the return of the child to a safe home or to another permanent placement; the health and educational records of the child; when appropriate, a description of the programs and services which will facilitate the child's transition from foster care to independent living; and, documentation of the steps to place the child in a permanent living arrangement.

The "permanency plan," while it may be described in the case plan or may be a portion of the case plan, is what the planned permanency living arrangement will be for the child, *e.g.*, reunification with the family, or adoption. We understand that some States use the term "permanency plan" synonymously with "case plan," because it conveys what the case plan is designed to accomplish. We do not believe that it is necessary to require States to use distinct terminology, as long as States meet the requirements of the statute and regulations.

*Comment:* A commenter suggested that we require courts to approve case plans.

*Response:* There is no statutory basis for requiring judicial approval of the State agency's case plan document. The court's role is to: exercise oversight of the permanency plan; review the State agency's reasonable efforts to prevent

removal from the home, reunify the child with the family and finalize permanent placements; and to conduct permanency hearings. The State agency is responsible for developing and implementing the case plan. We see no additional benefit in requiring court approval of the case plan.

In addition, we are clarifying in the regulation at § 1356.21(g)(3) that it is not permissible for courts to extend their responsibilities to include ordering a child's placement with a specific foster care provider. To be eligible for title IV-E foster care maintenance payments the child's placement and care responsibility must either lie with the State agency, or another public agency with whom the State has an agreement according to section 472(a)(2) of the Act. Once a court has ordered a placement with a specific provider, it has assumed the State agency's placement responsibility. Consequently, the State cannot claim FFP for that placement.

*Comment:* A couple of commenters requested that we specify that long term foster care is an appropriate permanency goal for unaccompanied refugee minors.

*Response:* The determination of the appropriateness of a permanency goal must be made by the State on a case-by-case basis and take into consideration the best interests of the child. The State agency is the responsible party for making this determination, with the oversight of the court. We, therefore, will not regulate appropriate permanency goals for any group of children.

*Comment:* A commenter suggested that we require case plans to address the child's developmental needs and acquisition of life skills.

*Response:* We believe that the statute at section 475(1) of the Act already requires States to document how the services provided will meet the needs of the child, and in the case of a child whose goal is independent living, the programs and services that will enable the child to transition into independent living. We do not believe that any additional regulation in this area is required.

#### *Section 1356.21(h) Application of Permanency Hearing Requirements*

This section implements the new ASFA requirements related to permanency hearings and modifies and clarifies existing policy. It also sets forth requirements for an administrative body appointed or approved by the court to conduct permanency hearings.

*Comment:* One commenter was concerned that children would become ineligible for title IV-E funding if the

permanency hearing requirements were not satisfied as prescribed.

*Response:* We agree that the language at paragraph (h)(1) presented the permanency hearing as an eligibility criterion. That is not the case and we have amended the paragraph to clarify that, in meeting the requirements of the permanency hearing, the State must comply with section 475(5)(C) of the Act and this paragraph. The permanency hearing is a State plan requirement. It is not a title IV-E eligibility criterion. If the State fails to meet the permanency hearing requirements, it is out of compliance with the State plan. The child does not become ineligible for title IV-E funding.

*Comment:* We received a number of comments regarding paragraph (h)(2) which provides guidance related to determining for whom the State must hold permanency hearings. Commenters thought the paragraph was confusing and unclear about whether we were referring to initial or subsequent permanency hearings. We also received a request not to refer to these permanent placements as "court sanctioned" because the commenter felt the terminology meant the court chooses the placement, which would make the placement ineligible for title IV-E funding.

*Response:* In the NPRM, we proposed to retain the provision in the current regulation for permitting the State to waive subsequent permanency hearings for children placed in permanent foster family homes. The number of comments received prompted us to review this section of the proposed rule against the statutory language as amended by ASFA. Based on that review, we have decided to delete the paragraph in its entirety. When ASFA was passed the language from the definition of permanency hearing in section 475(5)(C) of the Act that addressed children remaining in foster care on a "permanent or long term basis" was removed. Instead, the ASFA requires the State to document a compelling reason for establishing a permanency plan that does not call for the child to exit foster care through reunification, adoption, legal guardianship, or placement with a fit and willing relative. Therefore, all children in foster care must be afforded the benefit of permanency hearings while they are in foster care.

Although the paragraph in question has been deleted from the regulation, we wanted to take this opportunity to respond to the observation that the State may not claim FFP when the court orders a specific placement for a child. The commenter is correct. Section 472(a)(2) of the Act requires

responsibility for the child's placement and care to be with the State agency. When the court orders a specific placement, it in essence takes on the State's responsibility for the child's placement and the child becomes ineligible for title IV-E funding. To make this clear, we have amended § 1356.21(g) to note this restriction. The court may sanction a permanent foster family home through its oversight of the permanency plan, however, this does not give the court the authority to determine a specific placement for the child.

Finally, we recognize that States will need transition time to begin holding subsequent permanency hearings for children who formerly were exempt from this requirement. We will not take adverse action against a State that cannot comply with this requirement for a period of 12 months from the effective date of this final rule.

*Comment:* One commenter suggested that the requirement in paragraph (h)(2) for holding a permanency hearing within 30 days of a judicial determination that reasonable efforts are not required, be extended to circumstances beyond those identified at section 471(a)(15)(D) of the Act. Another wanted us to exempt unaccompanied refugee minors from this provision altogether.

*Response:* The statute is very specific to those circumstances enumerated at section 471(a)(15)(D) of the Act. We have no authority to expand that list. However, the State may hold a permanency hearing any time it deems it to be appropriate to do so. We also have no authority to exempt unaccompanied refugee minors from this requirement.

*Comment:* Some commenters noted that the language in § 1356.21(h)(3) (proposed § 1356.21(h)(4)) is inconsistent with the definition of "permanency hearing" at § 1355.20. The language at § 1356.21(h)(3) limited the alternate planned permanent living arrangement options to a foster family home.

*Response:* We concur with the commenter and have amended paragraph (h)(3) to use the exact statutory language, " \* \* \* another planned permanent living arrangement \* \* \*."

*Comment:* Some commenters objected to the inclusion of an example of a compelling reason for the State to choose another planned permanent living arrangement over reunification, guardianship, or adoption in the text of the regulation. These commenters believe that examples included in regulation become *de facto* policy.

*Response:* We do not believe that examples in regulation become *de facto* policy, nor were they intended to do so. However, we do not believe the example provided in the NPRM fully illustrates how to comply with this provision and have included additional examples in paragraph (h)(3) to more accurately reflect its intent.

*Section 1356.21(i) Requirements for Filing a Petition to Terminate Parental Rights Per Section 475(5)(E) of the Social Security Act*

This section implements the new ASFA provisions regarding termination of parental rights.

*Comment:* Many commenters sought exemptions for specific populations from the requirement for States to file or join TPR petitions for certain children who have been in foster care for 15 out of the most recent 22 months, abandoned infants, or children of parents who have committed certain felonies. Several commenters noted that many tribal cultures and traditions do not recognize the concepts of terminating parental rights and adoption, and requested a specific exemption from the application of the provision to tribes. Several commenters also wanted an exemption for unaccompanied refugee minors in foster care. The commenters noted that according to Federal regulations for child welfare services to unaccompanied refugee minors (see 45 CFR part 400, subpart H) such children "are not generally eligible for adoption since family reunification is the objective of the [unaccompanied refugee minor child welfare] program." Similarly, some advocates and providers who work to preserve or reunify foreign-born children with their families, noted that the TPR requirement may hinder international reunification efforts by switching the focus from reunification to adoption after fifteen months. A few commenters also wanted exemptions for juveniles adjudicated delinquent, children voluntarily placed in foster care, and children deemed "persons in need of services" who are not considered abused or neglected.

*Response:* We have no statutory authority to provide an exemption for particular populations from the requirement to file a TPR for certain children. Thus, we did not make any exemptions to the requirement in the regulation. The TPR requirement is designed to encourage State agencies to make timely decisions about permanency for children in foster care. Congress developed the TPR provision to be applied to all children in foster care, whatever their entry point into the

system. Exempting groups of children from the requirements would be contrary to ASFA's goal to shorten children's time in foster care. However, we are changing § 1356.21(i)(2)(ii) in two ways. First, to clarify that the State agency must apply the exceptions to the requirement to file a petition for TPR by considering the best interests of the individual child on a case-by-case basis. Second, we added two more examples of compelling reasons regarding unaccompanied refugee minors and situations involving international legal or foreign policy issues.

*Comment:* A commenter requested an explanation of how the TPR requirement applies to Indian tribes and the relationship to Indian Child Welfare Act requirements. A commenter suggested that the regulation clarify that tribal agencies can elect not to file a petition for TPR in certain circumstances.

*Response:* 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 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)(11) 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, we have 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.

*Comment:* We received many comments on the time frame in which a State must file a petition for TPR according to § 1356.21(i)(1)(i). Many commenters objected to our requiring a State to file a petition for TPR at the end of the child's fifteenth month in foster care, and suggested that we allow a grace period of up to 60 days. These commenters believed that to meet this time frame, a State agency would need to make decisions on permanency before the end of the fifteenth month, which they felt was unreasonable. A few commenters supported the provision as written. A commenter suggested that the State file before the end of the fifteenth month, and another suggested that we establish no time frames for filing the petition.

*Response:* We believe that States will have adequate time to prepare petitions for TPR, when appropriate, by the end of the child's fifteenth month in foster care. Furthermore, we can find no statutory basis for allowing a grace period for States to file a petition for TPR for children who have been in foster care for 15 out of the most recent 22 months. To meet the permanency hearing requirements, the State agency must prepare a permanency plan for the child to present to the court within 12 months. This will require the State agency to begin working with the family early on, so that the State agency can make appropriate decisions about permanency goals for the child, including whether to file a petition for TPR and pursue adoption.

*Comment:* A commenter suggested that once a State agency has determined that a child is an abandoned infant or a parent has committed certain felonies as described in section 475(5)(E) of the Act, the State file a petition within one week of that determination. The NPRM required that a State file such petitions within 60 days of the determination of abandonment or a parent's felony conviction.

*Response:* We do not concur with the commenter's suggestion to require a State to file a TPR petition within one week of a determination that the child is abandoned or that a parent has committed certain felonies. We continue to believe that 60 days is a reasonable period of time for the State agency to complete the necessary administrative and legal work required to file a petition for TPR.

*Comment:* A few commenters expressed uncertainty about whether a State must file a petition for TPR after a child has been in foster care for 15 months or 22 months.

*Response:* The State agency is required either to file a petition for TPR or document an exception to the requirement when a child has been in foster care for 15 cumulative months out of 22 months. If the child has been in care for 15 cumulative months, the State should not wait for 22 months of a child's stay in foster care to elapse before filing a petition for TPR. We do not believe that any change to the regulation is necessary.

*Comment:* A commenter expressed concern that the TPR requirement would be misinterpreted as prohibiting a State from filing a petition for TPR before a child has been in foster care for 15 months out of the most recent 22 months.

*Response:* We would like to clarify that a State continues to have the discretion to file a petition for TPR whenever it is in the best interests of the child to do so. In addition, Congress passed a Rule of Construction at section 103(d) of Public Law 105-89 reaffirming a State's ability to file a petition for TPR before it is mandated by Federal statute or for reasons other than those indicated in Federal law. Therefore, States should view the Federal statutory time frames of 15 out of 22 months of a child's stay in foster care as the maximum length of time that can elapse before a State agency must file a petition or document an exception for TPR.

*Comment:* We received a range of suggestions and comments on our proposal to exclude runaway episodes and trial home visits from the calculation of the 15-month time frame a child spends in foster care for TPR purposes. A few commenters opposed our exclusion of runaway episodes and trial home visits for various reasons. One commenter suggested that including trial visits and runaway episodes in the calculation was a way to ensure that no child languished in foster care. Another commenter suggested that we allow States to determine whether such time should be included. A third commenter was concerned that excluding runaway episodes and trial home visits increased the record keeping burden on States. A couple of commenters supported the provision as written. These commenters believed that our proposed policy is consistent with efforts to reunify the family when that is the goal.

*Response:* We considered all of these viewpoints and do not believe a change in the regulation is warranted. We believe that it is inappropriate to count time a child is on a runaway episode because during that time the agency is unable to provide services to the child or the family. Similarly, counting time

when a child is at home with the family toward the time for calculating when to file a petition for TPR is inappropriate. While the child may be in the legal custody and under the supervision of the State agency, both the child and the parent consider him or her to be at home. However, as we discussed above, the State has the discretion to file a petition for TPR whenever it is in the best interests of the child to do so.

*Comment:* A commenter suggested that we define the number of calendar or business days that constitute a month for the purposes of calculating 15 out of the 22 most recent months for the TPR requirement. The commenter suggested we define a month as 30 days, presumably so that time less than a month spent in foster care would not be counted toward the requirement.

*Response:* We have decided not to define a "month" and leave it to the State's discretion.

*Comment:* We received a range of comments to our proposal that States need only apply the provision to file a TPR petition when a child has been in care 15 out of the most recent 22 months once, when the State determines that an exception applies. Several commenters voiced support for the proposed rule as written. Another commenter supported the proposed provision overall, but suggested that we include language in the regulation that explicitly requires States periodically, to reevaluate the need to file a petition for termination of parental rights. Many commenters opposed the provision believing that children may stay indefinitely in foster care once a State makes an exception to the TPR requirement.

*Response:* We understand the concern that children may continue to languish in foster care once a State applies an exception if this decision is never reevaluated. Nevertheless, we did not change the one-time application of the TPR provision for two reasons. First, the statutory construction of the provision makes it applicable only once. Second, we believe that there are at least two existing opportunities for the State to reevaluate an exception to the TPR requirement: the six-month periodic review and the permanency hearing.

We encourage States to use the six-month periodic review to review the continuing appropriateness of an exception to the requirement to file a petition for TPR within the context of the requirements in section 475(5)(B) of the Act. States also have another opportunity to reevaluate the decision not to pursue a TPR petition at the permanency hearing, which must be held at least every 12 months. The permanency hearing must address

whether the child's permanency plan is to reunify the child with the family, file a petition for TPR and move toward adoption, or place the child with a fit and willing relative, legal guardian, or in another planned permanent living arrangement. The State is required to reevaluate the permanency plan during the course of the permanency hearing, regardless of whether the State agency has previously applied an exception to the requirement to file a petition for TPR. As such, we believe there are multiple safeguards to ensure that children do not languish in foster care.

*Comment:* A few commenters expressed doubt that States would use the exceptions in paragraph (i)(2) in appropriate cases and suggested that we discourage States from using the exceptions in the regulations. The commenters expressed concern that the exceptions could be used as a loophole to cover a State agency's deficiency in proper case planning or service delivery.

*Response:* We understand these concerns, however, the exceptions to the requirement to file a petition for TPR are statutory. We expect that States will apply the exceptions to filing a petition for TPR judiciously and on a case-by-case basis. We believe the intent of the requirement to file a petition for TPR for certain children was to encourage State agencies to make timely decisions about permanency for children in foster care. The exceptions were developed to allow State agencies to exercise individual case planning and seek an alternative permanent placement when adoption may not be appropriate or available for a child.

*Comment:* A couple of commenters raised concerns about the exception to filing a petition for TPR in situations where the child is placed with a relative. The commenters sought more guidance on how and when States should use this exception.

*Response:* The statute provides the State with the option not to file a petition for TPR when a child is placed with a relative. We encourage the use of relative placements as an option for ensuring that the child achieves permanency, and not only as a temporary placement. A State must continue to develop and reevaluate a child's case plan goal and conduct permanency hearings if the State decides not to file a petition for TPR because the child is placed with a relative. Relative placements should not preclude consideration of legalizing the permanency of the placement through adoption or legal guardianship.

*Comment:* The majority of comments supported our decision not to define the

term “compelling reason,” as it is used in section 475(5)(E) of the Act, to allow exceptions to the requirement to file a petition for TPR. A number of commenters wanted us to define the term.

*Response:* We concur with the majority of commenters who did not want us to define the term “compelling reason” as used in the statute and have made no changes to the regulation. We believe that the determination of what constitutes a “compelling reason” must be based on the individual circumstances of the child and the family, and that a Federal definition would not be helpful in that process. We believe that the examples provided on possible compelling reasons provide adequate guidance about the practical application of this term without limiting a State’s flexibility.

*Comment:* We received both criticism and support for listing two examples of a compelling reason not to file a petition for TPR. Many commenters did not want the two examples of compelling reasons included in the regulation for a variety of reasons. Some commenters believed that the examples would become “de facto policy,” and would therefore exempt groups of children from the requirement. Similarly, other commenters thought that specifying examples of compelling reasons was inconsistent with our decision not to define the term. Some commenters believed that the examples were too broad, and if used, would mitigate the effectiveness of the requirement.

On the other hand, many commenters supported the inclusion of the examples of compelling reasons. Some commenters expressed that the examples provided critical guidance to the field and would temper concerns about increases in the number of “junk” petitions and legal orphans. Other commenters wanted us to include the language from the preamble discussion on the examples in the regulation text, and some wanted us to expand the list of examples of compelling reasons. Commenters suggested that the expanded list of compelling reasons could include: A child belongs to a particular population (i.e., adjudicated delinquents, Indian tribal children, and unaccompanied refugee minors); a child has not completed treatment in a residential facility; a child’s parent had not been notified by the State agency that TPR was a possible outcome; a parent has made significant measurable progress to meet the requirements of the case plan; or, a child had a permanency goal other than adoption.

*Response:* In developing the two broad examples, we wished to provide

some basic guidance to States short of the definition that most commenters opposed. We have, therefore, decided to retain the two examples of compelling reasons in the proposed regulation and added two additional examples.

Unaccompanied refugee minors are those children who enter the country unaccompanied and are not destined to a parent, relative, or custodial adult. We received a number of comments noting that the Office of Refugee Resettlement (ORR) within the Department maintains a policy that reunification, in general, is the appropriate goal for these children while they are classified as unaccompanied refugee minors. ORR’s regulation at 45 CFR part 400, Subpart H, defines an unaccompanied refugee minor and the rare circumstances in which adoption may be appropriate. In order to clarify that we do not intend to contradict HHS policy in this regard, we are listing this as another example of a compelling reason for not filing or joining a petition for TPR. We have also added a fourth example to address situations in which international legal or foreign policy considerations may affect a child’s status. We are not including other populations as part of the examples of compelling reasons because we believe that the broad examples provide a framework that allows a State sufficient room to make decisions regarding filing a petition for TPR on a case-by-case basis that is in the best interests of an individual child.

*Comment:* One commenter suggested that the regulations clarify that compelling reasons for not filing for TPR may be defined in tribal policy. Another commenter suggested clarifying that the tribe rather than the State could document the compelling reason.

*Response:* The regulations are written from the State perspective because the State agency is ultimately responsible for the administration of the title IV–E program. If the tribe has responsibility for the placement and care of a child pursuant to a title IV–E agreement with a State, not only would it be permissible for the tribal agency to identify the compelling reason for not filing a petition for TPR, it would be the tribal agency’s responsibility. Tribes and States 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.

*Comment:* A commenter suggested that we clarify the terminology for the second compelling reason example in § 1356.21(i)(2)(ii)(B) from “insufficient grounds for filing a petition to terminate

parental rights exist,” to “no grounds to file a petition to terminate parental rights exist.”

*Response:* We concur that the suggested language more accurately conveys our point that a compelling reason for not filing a petition for TPR may be that there are no grounds in State law on which to pursue a legal action to terminate parental rights. Therefore, we have made the suggested change in the regulation text. States, however, are not permitted to have State laws that carve out groups of the foster care population to be exempted from the requirement to file a petition for TPR.

*Comment:* A commenter wanted us to elaborate on the exception to TPR where the State has not provided the services identified in the case plan. The commenter may be concerned that we were not encouraging States to provide services in a more timely way. Another commenter questioned whether this exception also applied in situations where the specified services were not available, how the determination is made, and by whom.

*Response:* This exception to the requirement to file a petition for TPR is taken directly from the statute, as are all of the exceptions. We do not believe it is necessary to elaborate in the regulation on how the State agency should make the determination that the necessary services have not been provided. The exception affirms that the provision of services, early in a child’s placement in foster care, is often crucial to either enabling the child to return to a safe and stable home or making a determination to move forward with a petition for TPR. By using the exception, a State agency can avoid penalizing the parent if the necessary services are not available or accessible to a parent or child. We encourage States to strengthen service delivery systems and to use this exception judiciously. We will be monitoring State’ use of all of the exceptions in the child and family services review.

*Comment:* Many commenters sought clarification about the requirement at § 1356.21(i)(3) for a State concurrently to recruit and approve an adoptive family for a child while a State petitions for TPR. Most commenters wanted language added to the regulation text that interpreted the statutory provision to mean that a State agency should begin the process of finding an adoptive family at the time a petition for TPR is filed. Some commenters were concerned that the proposed rule and statutory language imply or encourage a State agency to wait until it has an adoptive family available for the child before the State agency proceeds with filing a

petition for TPR. Another commenter wanted to know if this requirement could be waived for children who did not have a goal of adoption.

*Response:* We understand the commenter's concern regarding the wording of this requirement and have made some changes to the regulatory language in § 1356.21(i)(3). The final rule now clarifies that the State must begin the process to find an adoptive family for the child concurrently with filing a petition for TPR. We believe that this provision was developed to ensure that a child does not wait unnecessarily between the time a TPR is granted and the child's permanent placement in a home. The requirement should not be interpreted to suggest that a State wait until an adoptive family is found for a specific child before a TPR petition is filed. We cannot waive the requirement to find an adoptive family for a child concurrently with the filing of a petition for TPR as there is no statutory authority to do so.

*Comment:* Several commenters sought clarification on whether the fact that a child had been in foster care for 15 out of the most recent 22 months was legal grounds for a State to file a TPR petition. Some commenters believed that we should specifically exclude the time frame as grounds for a TPR, while others thought that we should require or permit the time frame to be grounds for TPR.

*Response:* States are neither required nor prohibited by Federal statute from making a child's length of stay in foster care legal grounds to file or grant a petition for TPR. We have made no changes to the regulation in response to these comments.

*Comment:* A couple of commenters asked for greater specificity on the roles of the court and the agency with respect to the exceptions to filing a petition for TPR for certain children in foster care. In the preamble to the NPRM we noted that there was no requirement for the court to make a judicial determination if a State made a compelling reason exception to filing a petition for TPR. A commenter disagreed and suggested that Congressional intent was for the State agency to make an evidentiary case to the court regarding whether an exception was appropriate for the child. Another commenter suggested that we specify that court decisions prevail in situations where the court and State agency disagree on pursuing TPR.

*Response:* The requirement to file a petition for TPR or to document an exception to the requirement is the State agency's responsibility. The statutory language is clear that for a compelling reason, or any other exception to the

requirement to file a petition for TPR, there is no requirement for a judicial determination. However, the State agency is to document in the case plan, which is available for court review, the compelling reason for why filing a petition for TPR is not in the best interests of the child. Clearly, courts play an important oversight role for children in foster care. The court exercises authority in making decisions at permanency hearings regarding the child's permanency plan. It is at these times that the court should review State agency decisions with regard to the requirement to file a petition for TPR. Finally, we have no authority to suggest that courts prevail in situations where there is a disagreement between the court and the State agency on filing a petition for TPR. We have made no change to the regulation in response to these comments.

*Comment:* Several commenters sought regulations on the responsibilities of courts and State agencies to finalize proceedings to terminate parental rights once the State agency has filed a petition for TPR. A couple of commenters proposed that we suggest a particular time frame for the court to finalize a TPR, and one suggested a time frame of six months. A third commenter suggested that we require the State agency to continue to file petitions for TPR if a court denies the original petition.

*Response:* We understand the concern that court and State agency delays occur once a petition for TPR is filed such that it could be several years before a child is finally adopted. However, our authority does not extend into the finalization of proceedings for termination of parental rights as this is a matter of State law. Therefore, we did not make any changes to the regulation in response to these comments.

*Comment:* A few commenters suggested that we note the importance of making reunification efforts with both parents and when necessary, filing TPR petitions on both parents.

*Response:* We believe that we have addressed this issue in a separate section of the regulation. We indicate in § 1356.21(b)(5) that State title IV-B/IV-E agencies can use the Federal Parent Locator Service (FPLS) in expediting permanency. In that paragraph we encourage States to use the FPLS to locate absent parents in order to explore permanent placements or pursue TPR. To avoid duplication, we chose to make such a statement in the reasonable efforts section to encourage States to find noncustodial parents early in a child's stay in foster care.

*Comment:* We received several comments that requested funding or program guidance on staff training, assessments, case planning, and concurrent planning around permanency.

*Response:* We believe that we can better provide practice-level guidance through technical assistance rather than through regulation.

#### *Section 1356.21(j) Child of a Minor Parent in Foster Care*

This section implements the statutory provision related to the title IV-E eligibility of the child of a minor parent who is in foster care.

*Comment:* A commenter suggested replacing "must include amounts \* \* \* " to "may include amounts \* \* \* " as some States give minor parents financial responsibility for the child.

*Response:* To revise this provision to be permissive would be in conflict with the statutory requirement. Section 475(4)(B) of the Act specifically requires that the foster care maintenance payment made on behalf of the minor parent "shall" include amounts that may be necessary to cover the foster care maintenance costs of a child of a minor parent when the parent and child are in the same foster family home or child care institution. We, therefore, did not change this paragraph of the regulation to reflect the commenter's suggestion.

#### *Section 1356.21(k) Removal From the Home of a Specified Relative and § 1356.21(l) Living With a Specified Relative*

Section 1356.21(k) describes, for the purposes of meeting the requirements of section 471(a)(1) of the Act, a "removal." Section 1356.21(l) sets forth the required conditions for living with a specified relative prior to removal from the home.

Because of the complexity of this issue, we thought it best to explain again how the policy has changed before discussing the comments on this section of the regulation. To be eligible for title IV-E funding, a child must, among other things, be removed from the home of a relative as the result of a voluntary placement agreement or a judicial determination that continuation in the home would be contrary to the child's welfare. Under prior policy, we interpreted the term "removal" to mean a physical removal. As a result, if a child was residing with an interim caretaker who was a relative between the time the child lived with the custodial parent and when he or she entered foster care, and the State intended to remove custody from the

parent but let the child remain with that interim caretaker relative, the child could not be eligible for title IV-E funding because the child was not physically removed from the home of a relative. This policy created a disincentive for relative placements. To remove this inequity between relative and nonrelative caregivers, we now permit the removal of the child from the home, in such circumstances, to be a "constructive" (*i.e.*, a nonphysical) removal.

As a result of the comments we received on this proposed policy, we closely examined the examples provided in the preamble to the NPRM and the proposed regulatory text against the statute. As a result of this further review, we do not believe that example (3) on page 50078 of the preamble should have been included. In example (3), the living with and removal from requirements were satisfied by a *physical* removal from the interim relative caretaker with whom the child lived for seven months. A physical removal from the home of an interim relative caretaker cannot satisfy title IV-E eligibility because it is not the result of a voluntary placement or a judicial determination, as required by section 472(a)(1) of the Act.

We offer a summary of examples to clarify when a child would be eligible for title IV-E foster care under the rule. These examples presume that the child is eligible for AFDC (according to the State plan in effect on July 16, 1996) in the home of the parent or other specified relative:

- The child lived with either a related or nonrelated interim caretaker for less than six months prior to the State's petition to the court for removal of the child. The State licenses the home as a foster family home and the child continues to reside in that home in foster care. The child is eligible for title IV-E foster care if he or she lived with the parent within six months of the State's petition to the court, and was constructively removed from the parent (*i.e.*, there was a paper removal of custody).

- The child lived with either a related or nonrelated interim caretaker for more than six months prior to the State's petition to the court. The State licenses the home as a foster family home and the child remains in that home in foster care. The child is ineligible for title IV-E foster care since he or she had not lived with the specified relative within six months of the State's petition to the court, and was not removed from the home of a relative. (The constructive removal does not apply to this situation because it had been more than six

months since the child lived with the parent.)

- The child lives with a related interim caretaker for seven months before the caretaker contacts the State to remove the child from his/her home. The agency petitions the court and the court removes custody from the parents and the agency physically removes the child from the home of the interim related caretaker. The child would not be eligible for title IV-E foster care since he or she had not lived with the parent or other specified relative from whom there was a constructive removal within six months of the initiation of court proceedings. (Although the child was physically removed from the home of the related interim caretaker, that removal cannot be used to determine title IV-E eligibility since the removal was not the result of a voluntary placement agreement or judicial determination, as required in section 472(a)(1) of the Act. Nor does constructive removal apply to this situation because it had been more than six months since the child lived with the parent from whom custody was removed.)

- The child lived with a nonrelated interim caretaker for seven months before the caretaker asks the State to remove the child from his/her home and place the child in foster care. The child is ineligible for title IV-E foster care because he or she had not lived with a parent or other specified relative within six months of the petition.

- The child is in a three-generation household in which the mother leaves the home. The grandmother contacts the State agency four months later and the agency petitions the court within six months of the date the child lived with the mother in the home. The State licenses the grandmother's home as a foster family home and the child continues to reside in the home in foster care. The child is eligible for title IV-E foster care since he or she lived with the parent within six months of the State's petition to the court, and was constructively removed from the parent's custody.

The regulatory text has been amended to reflect this change in policy and to more clearly delineate the requirements of living with and removal from the home of a specified relative.

*Comment:* Several commenters supported the policy on living with and removal from the home of a specified relative. One commenter noted that the new policy enhances a child's ability to remain with a relative and preserve the child's culture, as well as minimizes the number of out-of-home placements a child otherwise might experience.

*Response:* No changes were necessary in response to these comments.

*Comment:* Three commenters opposed the policy. Some of the commenters shared beliefs that: (1) The proposed policy creates a six-month statute of limitations period within which an abused and abandoned child must apply for foster care or be forever barred from receiving such benefits; (2) the policy impermissibly narrows title IV-E eligibility for children living with a relative; and (3) the policy discriminates against relative homes, and is in violation of the language and intent of ASFA.

*Response:* We have retained the proposed policy for the reasons that follow. In order to be eligible for title IV-E foster care, a child must be eligible for AFDC in his or her own home in the month of the voluntary placement agreement or initiation of court proceedings (*i.e.*, petition). However, if a child is not living with the custodial relative in the month of the voluntary placement agreement or petition, then the statute allows a six-month period during which the child may reside with an interim caretaker and still be eligible for title IV-E. In these circumstances, if a child is not living with the specified relative from whom he or she is being removed in the month of the voluntary placement agreement or petition, the child can be deemed eligible for that month if: (1) The child had been living with that specified relative at some time within the six-month period prior to that month; and (2) would have been eligible in the home of that specified relative in the month of the voluntary placement agreement or petition if the child had continued to reside with the relative. This is a longstanding Departmental policy based upon the statutory language in section 472(a)(4)(ii) of the Act, and consistent with the purpose of the program which is to provide continuing support for an AFDC-eligible child when he or she cannot live safely at home.

It is a misinterpretation to suggest that the proposed policy narrows title IV-E eligibility for children living with relative caretakers and is discriminatory against relatives as foster caretakers. Rather than limiting a child's eligibility or discriminating against relative homes, the policy supports children remaining with related caretakers when the State determines that they cannot live safely in their own homes, and applies the living with and removal from requirements equitably to both relative and nonrelative caretakers. Under the previous policy, if a parent left a child with a nonrelated caretaker and the agency petitioned the court for

removal of custody from the parent in less than six months from the date the child lived with the parent, the otherwise eligible child would have been eligible to receive title IV-E if the interim caretaker was subsequently licensed or approved as a foster family home by the State and the child remained in that home. Conversely, if the parent left the child with a related caretaker and the same circumstances existed, the otherwise eligible child would not have been eligible for title IV-E foster care because: (1) In the absence of the parents, the home and customary family setting was considered to have shifted to the home of the other relatives; and (2) the child was living with another relative at the time of petition and not physically removed from that home. The revised policy provides equitable treatment in either circumstance and encourages a child's continued placement with a relative caretaker when he or she cannot remain safely at home. The policy does not discriminate against relatives, and is consistent with the intent of ASFA.

*Comment:* Two commenters referenced the *Land v. Anderson* case and related litigation that are currently in the Ninth Circuit Court of Appeals. One commenter recommended that we follow the analysis in the *Land v. Anderson* case and the other commenter urged us to withdraw the proposed policy and await the outcome of the Ninth Circuit case.

*Response:* The final rule with respect to the issue before the above referenced court reflects longstanding Departmental policy that is in keeping with the statutory requirements. That policy continues to be in effect. Should the Ninth Circuit Court of Appeals rule against the Department, that decision would be subject to further review by the Supreme Court, and it would not, in any event, necessarily require a nationwide change in Federal law or policy. No changes were made to the regulation as a result of this comment.

*Comment:* One commenter suggested that the six-month time limit should be waived for relative care to support the child remaining with a family member.

*Response:* We are unable to waive the six-month time limit because it is statutory. The statute at section 472(a)(4) of the Act requires, among other things, that a child be living with and removed from the home of a specified relative at the time of the voluntary placement agreement or initiation of court proceedings. Section 472(a)(4)(B)(ii) of the Act provides an exception to that requirement by allowing a six-month period that the child can live with an interim caretaker

and still be eligible for title IV-E foster care. We do not have the authority to waive a statutory provision and, therefore, did not revise the regulations. The flexibility we have afforded States, however, is to allow constructive removals (*i.e.*, paper or nonphysical removals) in order to provide equal treatment for related and nonrelated caregivers.

*Comment:* One commenter supported allowing "legal" removals, but did not believe that the revised interpretation of the removal requirement was clearly expressed. The commenter suggested language be included that more clearly states that "legal" removals are allowed.

*Response:* We concur with the comment and have revised the regulatory language to clarify that either physical or constructive removals are allowed.

*Comment:* A commenter suggested that "interim caretaker" be defined.

*Response:* We have revised the regulatory language to clearly provide for the use of constructive removals. In doing so, we have removed all references to interim caretakers. Therefore, there is no need to define this term in the regulation.

*Comment:* A commenter expressed concern that the restriction of "within six months" appears to contradict other areas of title IV-E eligibility where removal from the home of a specified relative is a determining factor.

*Response:* Removal from the home of a specified relative is one of several criteria for title IV-E eligibility, as is the six-month living with requirement. The commenter did not cite references for the sections of the Act about which the concern was raised and we do not find any specific citation that conflicts with the six-month limitation. No changes were made to the regulation based upon this comment.

*Comment:* One commenter asked if a child must be AFDC eligible as if he or she had been living in his or her home in the removal month even in circumstances where the child is not physically removed from that home.

*Response:* In determining title IV-E foster care eligibility, a child must be eligible for AFDC in the month in which either a voluntary placement agreement is entered into or a petition to the court is initiated to remove the child from his or her home. If the child is not living with a specified relative at that time, then section 472(a)(4)(B)(ii) of the Act allows a six-month period of time during which the child could have been living with an interim caretaker. Under these circumstances, a child can be considered AFDC eligible in the month of the voluntary placement agreement or

petition if: (1) The child had been living with the specified relative at some time within the six-month period prior to that month; and (2) would have been eligible in the home of the specified relative in that month if he or she had continued to reside with the relative.

*Comment:* One commenter asked if there must be a physical removal for a child who lives with the same relative after legal custody is transferred to the State.

*Response:* Two possible scenarios can be derived from this question. In the first, a child is living with his or her parent, custody is transferred to the State but the child remains in the home of the parent. In this situation, the child is not in foster care and ineligible for title IV-E foster care. However, in a second scenario, the child is living with a related interim caretaker for less than six months prior to the State's petition to the court for removal of the child, and custody is removed from the parent. The related caretaker is licensed as a foster family home and the child continues to live in that home. In this situation, the child remains with the related caretaker, who is now a licensed foster parent, and the child is eligible for title IV-E foster care.

*Comment:* One commenter asked whether the child must have been living with the specified relative from whom custody is removed. The commenter pointed out that, at times, a child could be absent from such a home for six months or longer.

*Response:* Yes. The child must have been living with the specified relative from whom custody is removed at some time within the six-month period prior to the month of the voluntary placement agreement or initiation of court proceedings.

*Comment:* One commenter questioned the State agency's ability to make after the fact assessments of the need for foster care placement when families make such placements initially without the agency's involvement or determination that such placement/family disruption was necessary. The commenter expressed concern that this could create an incentive to get higher foster care rates in lieu of lower TANF rates.

*Response:* The purpose of title IV-E foster care is to provide assistance for the maintenance of AFDC-eligible children who cannot remain safely in their own homes. It is not for the purpose of maintaining children in the homes of noncustodial relatives when protection in their own home is not an issue. The revised policy assures equitable treatment for relative and nonrelative interim caretakers when the

child can no longer remain safely with the parent or other custodial relative. There are, however, certain requirements that must be met for AFDC-eligible children in every case: (1) There must be either a voluntary placement agreement between the custodial relative and the State agency, or court findings that it is contrary to the child's welfare to remain at home and that reasonable efforts have been made to prevent placement; (2) the foster care provider's home (whether related or not) must be fully licensed or approved in accordance with the State licensing standards; and (3) the protective and permanency requirements in the Act must be met. We want to emphasize that title IV-E foster care funds are available only when the child is at-risk in his or her own home and all other eligibility criteria are met.

#### *Section 1356.21(m) Review of Payments and Licensing Standards*

This section sets forth the State plan requirement regarding review of the appropriateness of payments under title IV-E, as well as State licensing/approval standards for foster homes. No comments were received on this paragraph and therefore we made no changes to the regulation.

#### *Section 1356.21(n) Foster Care Goals*

This section provides the requirements related to foster care goals that must be established by States.

*Comment:* One commenter requested an explanation of the criteria for these goals, and who will identify the goals.

*Response:* The criteria for establishing these goals, and who will identify the goals, is left to the individual States to determine. One example would be to set goals to reduce the number of children, in a given year, who have remained in foster care for at least 24 months by a certain percentage for each succeeding year and provide the steps that the State will take to achieve these incremental reductions. States also may want to align their foster care goals with those used for the annual report on State performance under section 479A of the Act.

#### *Section 1356.21(o) Notice and Opportunity To Be Heard*

This section implements the new requirement of the case review system that mandates giving notice of hearings and an opportunity to be heard to foster parents, preadoptive parents and relative caregivers.

*Comment:* We received several comments concerning the notification process for this requirement. Some

commenters suggested that the regulation not be prescriptive concerning who must provide the notice, while others recommended that we clarify the manner in which the notice is given and who is responsible for providing the notice. One commenter cautioned that we not presume that foster parents will receive notice in the same manner as other parties. Another commenter suggested that the State agency be responsible for providing notice. One commenter raised a concern that more court hearings could occur as a result of improper notice. Another commenter recommended that we state the intent of this provision is for notice to be given in a timely manner and that the hearings be conducted in a location accessible to the child's family.

*Response:* We concur with the commenters who suggested that the regulation not be prescriptive with respect to who must provide the notice of the opportunity to be heard. Since the State title IV-B/IV-E agency has the ultimate responsibility for implementing the case review system requirements in section 475(5) of the Act and we do not regulate the courts, we believe that such decisions are best left to the State. Although we expect that a State will choose to use the same procedure for giving notice to foster parents, relative caretakers, and preadoptive parents as it does for the parents and others who are parties to the case, this is a State decision.

We also agree with the comment that suggested we clarify that the notification of the opportunity to be heard be given in a timely manner and have revised paragraph (o) accordingly. The right to notification of an opportunity to be heard is meaningless unless the individuals are notified of the opportunity to be heard at the review or hearing in a timely manner.

In addition, we understood the suggestion that we require that the location of the reviews and hearings be accessible to parents to mean the parents from whom the child was removed and not the foster parents, preadoptive parents or relative caretakers. We did not revise the regulation as a result of this comment since such a requirement is not covered by the statutory provision, the purpose of which is to afford the primary caregivers for a child who is in an out-of-home placement the opportunity to provide relevant information about the child at the review and hearing.

*Comment:* One commenter suggested that the regulatory language for this section be the same as that in the Act.

*Response:* These regulations implement the Act and clarify for States the requirements related to the statutory provisions. We believe that this section needs additional language to clarify the statutory provisions and therefore have not revised the regulation in the suggested manner.

*Comment:* One commenter suggested that we require States to provide extended family members with written notice of a child's entrance into foster care, timelines and permanency goals.

*Response:* States are not prohibited from providing extended family members with written notification of a child's entrance into foster care, if doing so is appropriate for the situation, in the best interests of the child, and consistent with the administration of the State's title IV-E State plan. However, we believe that the suggestion goes beyond the statutory authority; therefore we have not made this a requirement in the regulation.

*Comment:* One commenter requested more guidance on what documentation the State has to give caregivers, e.g., court reports, in preparation for their appearance in court. This commenter also requested that we require States to provide notice to caregivers who have had the child for at least three months during the two years preceding the hearing.

*Response:* The requirement that States give foster parents, preadoptive parents and relative caretakers notice of and an opportunity to be heard affords these individuals with a right to provide input to these reviews and hearings. However, it does not confer a right to appear in person at the review or hearing. The requirement can be met as the State sees fit, such as by notification to the individuals that they have an opportunity to attend the review or hearing and provide input, or notification that they can provide written input for consideration at the review or hearing. Since this provision does not make these individuals a legal party to the case and does not give them a right to appear at the review or hearing, it is up to the State to determine what documentation, if any, to provide, consistent with Federal and State confidentiality laws.

In addition, requiring that a State provide notice of an opportunity to be heard to previous caregivers goes beyond the statutory language. The statute requires only that notice be given to caregivers "providing care" for the child. This does not, however, prohibit a State from offering previous caregivers the opportunity to be heard, if the State determines it is appropriate for a particular child's situation.

*Comment:* We received several comments requesting clarification around the types of hearings these individuals should be attending, and the extent of their participation in the hearings. One commenter recommended that the regulation clearly lay out the types of hearings at which foster parents, preadoptive parents and relative caretakers have notice/opportunity to be heard. Some commenters pointed out that section 475(5)(G) of the Act gives foster parents, preadoptive parents, and relative caregivers the right to notice and the opportunity to be heard at "any review or hearing," and is not limited to "any review or permanency hearing." However, one commenter did not feel it would make sense to give them the opportunity to participate in purely procedural hearings, such as discovery hearings or hearings addressing purely legal issues. One commenter requested that HHS delete the requirement that these individuals be provided an opportunity to be heard at the six-month case reviews, and that the decision to invite individuals other than the biological parents should be made on a case-by-case basis.

*Response:* The proposed regulation provides the types of hearings and reviews that require notice and an opportunity to be heard for foster parents, preadoptive parents and relative caretakers. We made a minor revision to the regulatory language, however, to clarify that the review is the six-month periodic review as described in section 475(5)(B) of the Act. We did not make any further revisions as a result of these comments as we do not believe that they can be supported by the statute. The statute specifically requires that these caretakers be provided notice and an opportunity to be heard at "any review or hearing" held with respect to the child. We, therefore, do not have the statutory authority to waive that requirement by allowing a State to determine on a case-by-case basis whether these caretakers should be provided an opportunity to be heard at the reviews. Also, as stated above, the notice and opportunity to be heard does not mean that these individuals have to be invited to the reviews and hearings. This requirement can be met by providing the caretakers with an opportunity to present either written or oral input that can then be considered at the review or hearing.

*Comment:* Some commenters suggested that these individuals should not have the right to be present during entire hearings or access to confidential information regarding biological parents

that is likely to be disclosed in a full hearing.

*Response:* We believe that the regulation is consistent with the statute with respect to the rights of the foster parents, preadoptive parents and relative caretakers regarding this provision and, therefore, did not make any changes. The provision only offers an opportunity to be heard and does not afford these individuals standing as a party in the case. As discussed in the preamble of the NPRM, the court, however, is not precluded from making appropriate rulings with respect to any of these individuals. Rather than prescribing in regulation that these individuals cannot be present during the entire hearing or be provided with confidential information, we believe those decisions are best left to the State and the court to determine, consistent with Federal and State confidentiality laws and the best interests of the child.

*Comment:* We received several comments concerning legal standing and party status for foster and preadoptive parents and relative caregivers. One commenter suggested adding language to the effect that the court can give standing to these individuals, and further recommended that the States set criteria for receiving standing, such as when the child has been in a particular foster home for a year. One commenter believes that these individuals need not be given the right to legal counsel because they do not have standing.

*Response:* State courts have the authority to make appropriate rulings with respect to these individuals. We believe that to impose requirements on States related to standing goes beyond the intent of the provision. In addition, the right to provide input on a case at a hearing does not convey the right to legal counsel to these individuals. We have not made any changes to the regulation in response to these comments.

#### *Section 1356.22 Implementation Requirements for Children Voluntarily Placed in Foster Care*

This section sets forth requirements States must meet to receive Federal financial participation (FFP) for children removed from home under a voluntary placement agreement.

*Comment:* We received several comments expressing concern around the application of the TPR requirement to children voluntarily placed in foster care. Some commenters believe that application of the TPR provision to this population goes beyond the statute. One commenter requested that unaccompanied refugee minors placed

voluntarily be exempt from the TPR provision.

*Response:* We do not have the statutory authority to provide an exemption from the requirement to file a TPR for particular populations of children. Thus, we did not change the regulation to provide an exemption for children, including unaccompanied refugee minors, placed in foster care by a voluntary placement agreement. The TPR requirement is designed to encourage State agencies to make timely decisions about permanency for children in foster care. Congress developed the TPR provision to be applied to all children in foster care, whatever their entry point into the system. Exempting groups of children from the requirements would be contrary to ASFA's goal to shorten a child's time in foster care. Exceptions to the requirement to file a petition for TPR must be applied on a case-by-case basis considering the best interests of the child, consistent with § 1356.21(i)(2).

*Comment:* Many commenters expressed concern that there are insufficient protections for parents who voluntarily place their children in foster care, and that States have an affirmative obligation to notify parents of the ASFA requirements. Some commenters suggested that States be required to provide written notification to the parents or guardian at the time they voluntarily place their children in foster care of the requirements for periodic reviews, case plans, permanency hearings, and the TPR provisions.

*Response:* The statute and the regulation provide sufficient protections to parents who voluntarily place their children in foster care. Section 472(f)(2) of the Act requires that the voluntary placement agreement specify, at a minimum, the legal status of the child and the rights and obligations of the parents or guardian, the child, and the agency while the child is in an out-of-home placement. Further, the statute at section 472(g) of the Act suggests that a voluntary placement agreement is a temporary status, such that the parents or guardian have the capacity and right to revoke such agreement unless a court determines that return to the home would be contrary to the best interests of the child. The regulation at § 1356.22(c) emphasizes the rights of the parents in this regard as it requires the State to have uniform procedures, consistent with State law, for revocation by the parents of a voluntary placement agreement. In addition, the regulation at § 1356.21(g) requires that the case plan be developed jointly with the parent or guardian. Furthermore, it is incumbent

upon the State to work toward a timely reunification when the case plan goal is to return the child to his or her parents or guardian. We, therefore, do not believe that it is necessary to further prescribe what the State must present to the parents or guardian when they voluntarily place a child in foster care.

*Comment:* One commenter was opposed to the requirement that States establish a procedure for revocation of a voluntary placement agreement by the parents. The commenter believed that this is an unnecessary requirement unless the Department has evidence suggesting that parents have difficulty revoking these agreements and having their children returned.

*Response:* The requirement that States establish a procedure for revocation of a voluntary placement agreement is not new. This has been included in the voluntary placement agreement requirements since the regulations were issued in 1983. In fact, at that time, the Department determined that since the practice among States in returning children voluntarily placed is sufficiently responsive, we did not need to impose further requirements on States to specify the timing and procedures for the return home of a voluntarily placed child, as public comment had suggested at that time. We believe the requirement that the State have uniform procedures, consistent with State law, for revocation of such agreements provides a safeguard for parents who voluntarily place their children into foster care and, therefore, did not revoke this requirement.

*Comment:* One commenter suggested that § 1356.22(a)(3) be revised to read, "45 CFR 1356.21 (f), (g), (h), and (i)."

*Response:* We concur with these comments and have amended the regulation accordingly. We agree that paragraph (f) should be included since it sets forth the sections of the statute to which a State must adhere in order to meet the case review system requirements. The case review system applies to all children in foster care, including children placed through a voluntary placement agreement. In addition, we concur with the inclusion of § 1356.21(g) in this provision since the State is required to develop a case plan for each child in foster care, including those voluntarily placed. We also agree with the exclusion of paragraph (j) since that sets forth the requirements for an infant born to, and placed with, a minor parent who is in foster care.

### *Section 1356.30 Safety Requirements for Foster Care and Adoptive Home Providers*

This section pertains to safety requirements for foster care and adoptive home providers, and sets forth conditions under which States cannot license or approve foster and adoptive homes if the State finds that prospective foster or adoptive parents have been convicted of certain crimes.

*Comment:* We received several comments and questions regarding the application of the criminal records check requirement to the individuals and groups contained within the definition of foster care in § 1355.20 of the regulation. Some commenters recommended that the criminal records check provision not be applied to child care facilities or to unlicensed relatives. One commenter suggested that child care facilities not be included in the requirement, but that upon discovery of a criminal record, the facility be required to undertake corrective action.

*Response:* To address these comments, we would like to clarify the requirements for States that institute the criminal records check provision and the requirements for States that do not. The criminal records check provision does not extend to child care facilities; the statute specifically limits this requirement to prospective foster and adoptive parents. However, in order to be an eligible provider for title IV-E funding purposes, in all cases where no criminal records check is conducted, the licensing file must include documentation that safety considerations with respect to the caretakers have been addressed. This safety documentation requirement applies to child care institutions in every situation and to prospective foster and adoptive parents in States that opt out of the criminal records check provision. Since this provision is a title IV-E funding requirement, it does not extend to relative homes that are not licensed or approved in accordance with State licensing standards because children placed in such homes are not eligible for title IV-E funding.

*Comment:* Two commenters asked if this section applies to currently licensed foster parents and approved adoptive parents whose licensure or approval predates the passage of ASFA.

*Response:* The provision applies to "prospective" foster and adoptive parents. Therefore, the provision applies to foster and adoptive parents who are licensed or approved after the date of enactment of the law (November 19, 1997), or the approved delayed effective

date if the State required legislation to implement the provision.

*Comment:* A commenter requested that we extend the requirements for a criminal records check by encouraging States to complete checks for any member of the household over the age of 18.

*Response:* To require that a State conduct criminal records checks for anyone other than prospective foster and adoptive parents goes beyond the statute.

*Comment:* One commenter requested clarification that this provision not be interpreted to require prospective foster/adoptive parents to be U.S. residents for the last five years. The commenter expressed belief that such an interpretation would be unfair to prospective caretakers of refugee minors.

*Response:* This provision does not impose a time-specified U.S. residency requirement on prospective foster and adoptive parents. However, for the State to claim title IV-E funds on behalf of a foster or an adoptive child, the prospective parent and the child must meet the requirements in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 related to qualified aliens. ACYF-CB-PIQ-99-01 provides guidance with respect to when alien foster and adoptive parents and children can be eligible for title IV-E.

*Comment:* Several comments were received requesting flexibility in awarding adoptive/foster home licenses to individuals who have been convicted of certain crimes within the last five years. There is a concern regarding the requirement to automatically deny eligibility to prospective adoptive and foster parents who have had drug convictions within five years. It was recommended that States be allowed to make individual assessments of the prospective parent's ability to care for a child. Also, it was recommended that States have flexibility in decisions concerning rehabilitated relatives.

*Response:* The statute is very explicit in specifying that in such situations "final approval shall not be granted." We, therefore, did not make the suggested changes because the statute does not support such an interpretation.

*Comment:* One commenter recommended that the phrase in § 1356.30(b)(4), "violent crime, including rape, sexual assault \* \* \*," be revised to reflect the ASFA language of "crime involving violence." The commenter was concerned that certain nonviolent crimes, such as robbery, may involve violent actions that should be considered when determining the

suitability of prospective foster and adoptive parents.

*Response:* We concur with this comment and have revised the regulation to reflect the statutory language.

*Comment:* A commenter expressed concern with the inconsistency of allowing States to reunite children with biological parents who have committed certain crimes, but denying child placements with foster or adoptive parents who have committed these same crimes.

*Response:* We do not believe the statute is inconsistent in this regard. Although the safety of children is the paramount concern in both in-home and out-of-home situations, biological parents, who have certain rights with respect to their children, cannot be compared to a foster parent, who is a substitute caretaker when the child cannot be maintained safely in his or her own home. It is up to a State's discretion to determine, in individual cases, whether a child and biological parent should be reunited in cases where the parent has been convicted of certain crimes. It also is incumbent upon the State in its custodial role of a child to provide scrutiny of its foster parents to assure they meet certain established safety (and other) standards before a child is placed in the home.

*Comment:* A question was raised about whether "a drug-related offense" includes an alcohol-related felony conviction.

*Response:* The criminal records check provision at section 471(a)(20)(A) of the Act would apply in such situations. Alcohol is considered a drug and a felony conviction for an alcohol-related offense is a serious crime. Therefore, unless the State opts out of the provision, an alcohol-related felony conviction within the last five years would prohibit the State from placing children with the individual for the purpose of foster care or adoption under title IV-E.

*Comment:* One commenter supported the criminal records check provision, but raised a concern that prospective foster and adoptive parents not be subjected to duplicate or multiple requirements when several jurisdictions, with differing licensing and background checks, are involved. The commenter noted that involvement of multiple jurisdictions in an adoption may sometimes become a stumbling block to achieving permanency and finalizing adoptions.

*Response:* This issue is a matter of State discretion. The criminal records check provision is intended to assure the safety of children in foster care and

adoptive placements. The State agency is responsible for determining the type of background checks necessary to meet the safety standards established by the State.

*Comment:* A commenter requested clarification concerning which criminal records check provisions apply to title IV-B and which apply to title IV-E. The commenter believes that § 1356.30(b), (c), and (d) are requirements only for title IV-E, and that (e) should be for children in licensed homes receiving title IV-E in States that opt out of the criminal records check requirement. The commenter suggests that an additional item (f) be added to address safety as a title IV-B requirement for all non-title IV-E out-of-home placements.

*Response:* The criminal records check requirement is both a title IV-E State plan provision and an eligibility requirement for title IV-E funding. The specific statutory language of the provision limits its authority to eligibility for the title IV-E foster care maintenance payment and adoption assistance programs under a State's title IV-E State plan. We, therefore, do not have the statutory authority to apply the requirement for criminal records checks to all non-title IV-E out-of-home placements of children and did not make this change in the regulation.

The regulation at § 1356.30(e), as proposed in the NPRM, would apply more broadly than only to those States that opt out of the criminal records check requirement. Since we may not have made this clear, we have separated the requirements of this paragraph into two sections for the final rule to clarify the criteria for title IV-E eligibility. We revised § 1356.30(e) to apply only in States that opt out of the criminal records check. We also added a paragraph (f) to set forth the safety requirements that must be addressed for child care institutions, which are not covered under the criminal records check provision. This revision only clarifies the requirements; it does not change the substance of the requirements in any way.

*Comment:* We received several comments concerning the inability to claim title IV-E until the criminal records check is completed. Commenters noted that the length of time required to complete background checks, particularly Federal Bureau of Investigations (FBI) checks, unfairly penalizes States. Several commenters recommended that States be allowed to claim FFP retroactively to the date of placement once the criminal records check has been completed, while others suggested that HHS allow provisional licensure for up to six months as long

as application for the criminal records check is made within 30 days of placement. Another commenter suggested that States be allowed to claim FFP if the safety of the placement is documented, including checking the names of prospective parents against the State's child abuse registry, while awaiting completion of the background check.

*Response:* Federal matching funds for payments to foster family homes under title IV-E cannot be permitted until all State requirements for licensure are satisfied. Further, the criminal records check provision restricts eligibility for title IV-E funding until after the home has been finally approved for the placement of a title IV-E eligible child. In fact, the plain language of the criminal records check provision requires such checks on prospective foster and adoptive parents "before" the parent can be approved for "placement of a child" for whom foster care maintenance payments or adoption assistance payments "are to be made." Accordingly, to allow a State to claim retroactively back to the date of placement would be in conflict with the statute which bases foster family home eligibility on licensure or approval of the home, including completion of a criminal records check.

However, we recognize that some time may elapse between the date the requirements are satisfied and the date on which the license or approval actually is issued to the foster home. We have concluded that 60 days is an ample period of time to allow between the time the State receives all the information on a home that is required to fully license or approve it and the date on which such license or approval is issued. Therefore, we have revised the definition of "foster family home" in the regulation to allow a State to claim title IV-E reimbursement for a period, not to exceed 60 days, between satisfaction of the approval or licensing requirements and the actual issuance of a full license or approval. This accommodation does not conflict with the statutory requirement that all licensure requirements must be satisfied before a foster home is eligible for title IV-E funding. Rather, it is recognition that a period of time may elapse between when the eligibility criteria are met and the time it takes a State to issue a license or approval.

*Comment:* One commenter opposed linking criminal records checks to title IV-E eligibility.

*Response:* Since the requirement for criminal records checks is statutorily linked to title IV-E eligibility, we did not change the regulation.

*Comment:* One commenter requested that we specify that the costs of conducting criminal records checks are allowable administrative costs under title IV-E.

*Response:* The regulations at § 1356.60(c)(2) allow States to claim costs associated with the recruitment and licensing of foster homes as administrative costs under title IV-E. ACYF-PA-83-01 identifies additional allowable administrative costs specific to the title IV-E adoption assistance program. Since the criminal records check provision is a condition of licensure or approval in States that do not opt out of the provision, costs associated with criminal records checks for prospective foster and adoptive parents are allowable under title IV-E when claimed pursuant to an approved cost allocation plan. No revisions were made to this section of the regulation since this is already covered in § 1356.60 which addresses fiscal requirements for title IV-E.

*Comment:* We received many comments concerning the levels of background checks required, e.g., local, State, and Federal. Comments ranged from those that approve of State discretion in deciding what level of checks to conduct, to those that believe HHS should require both State and Federal background checks. One commenter suggested that we require all States to conduct Federal criminal records checks on prospective parents who have been living in a State for less than two years, while another suggested we require States to conduct background checks in States where the prospective parent previously resided.

*Response:* We have carefully considered the comments in this area. We concur with the commenters who approved of State discretion with respect to the level of background checks to conduct and, therefore, did not make any changes to the regulation. Although the comments with respect to expanding the criminal records check requirement were good suggestions, we believe that, in the absence of any statutory direction in this area, such decisions are best left to the State. We do, however, encourage States to be thorough in their safety assessments of foster homes and to utilize the information sources available to them to the fullest extent possible to assure the safety of children in out-of-home placements.

*Comment:* We received some comments suggesting that HHS require more extensive background checks, including child abuse registries, domestic violence registries, and adult protective services records.

*Response:* These are good suggestions and we encourage States to routinely include checks of State registries to assist in determining whether a potential foster family home is safe. However, we believe that to require a State to include such checks under this provision goes beyond the statutory authority.

*Comment:* One commenter expressed concern that past suspicions of child abuse and neglect will be discarded, and suggested that a National central registry be established for child abuse and neglect records.

*Response:* The establishment of a National central registry, and a requirement that States participate in such a registry, goes beyond the statutory authority. We did not make any changes to the regulations based on this comment since it does not relate directly to criminal records checks.

*Comment:* Two commenters expressed concern that States may opt out of the criminal records check requirement.

*Response:* The statute specifically makes the criminal records check requirement a State option. However, § 1356.30(e) and (f) of the regulation require States that opt out of the requirement to address and document safety in foster and adoptive homes, as well as child care institutions.

*Comment:* One commenter requested that the regulations be revised to specify that an Indian tribe may 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.

*Response:* While we understand that Tribes often license or approve foster homes, we are unable to modify the regulation based on this comment. 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 Act and § 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) of the Act 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.

*Comment:* We received several comments asking for clarification concerning § 1356.30(e) and the procedures and documentation required to show that safety considerations have been made in States that have elected not to conduct or require criminal records checks. One commenter asked for guidance on what processes and procedures should be in place in lieu of a criminal records check. Another commenter suggested that the regulations require minimum documentation, such as: Written results of an on-site inspection of the home, group care facility, or institution; a statement that the home meets the minimal standards for health and safety; and an assurance that the caregivers have plans or procedures for protecting the safety of children.

*Response:* Although these were good suggestions, we do not believe that we have the statutory authority to specify the mechanism or documentation required to verify that safety considerations have been made. Although we leave that decision to the State, we continue to require that the licensing file for the foster family, adoptive family, child care institution and relative placement contain documentation that shows safety considerations have been addressed. In addition, we made a minor revision to the regulation to clarify that the documentation must verify that the safety considerations have been addressed. We strongly encourage States to conduct thorough safety checks and utilize all available information sources to the fullest to assure the safety of children in out-of-home placements.

*Comment:* One commenter asked for clarification that for States that have elected not to conduct or require criminal records checks, title IV-E may be claimed as long as the licensing file contains documentation that safety considerations have been addressed.

*Response:* We do not believe that a change is required in the regulation to confirm that title IV-E can be claimed in such circumstances. However, we have separated the requirements of this paragraph into two sections for the final rule to clarify the criteria for title IV-E eligibility. We revised § 1356.30(e) to apply only in States that opt out of the criminal records check. We also added a paragraph (f) to set forth the safety requirements that must be addressed for child care institutions, which are not covered under the criminal records check provision.

*Section 1356.50 Withholding of Funds for Noncompliance With the Approved Title IV-E State Plan.*

Although we did not propose amendments to § 1356.50 of the regulations in the NPRM, we are amending it in this final rule to bring the cross-references contained therein into conformity with the new regulations.

*Section 1356.60 Fiscal Requirements (Title IV-E)*

This section sets for the fiscal requirements and available federal financial participation for title IV-E costs

In § 1356.60(b) we have made a technical amendment to the existing regulation with regard to matching for title IV-E training, in order to make it consistent with the statute. The existing regulation at § 1356.60(c)(4) authorizes States to use administrative funds at a matching rate of 50% for the training of foster and adoptive parents and staff of licensed or approved child care institutions that provide care for children receiving assistance under title IV-E. The existing regulation also limits associated costs to per diem and travel expenses. Since the promulgation of that regulation, the statute has been amended by section 13715 of the Omnibus Budget Reconciliation Act of 1993, to authorize State' use of training funds at a 75% match rate for the short-term training of current or prospective foster or adoptive parents as well as staff of licensed child care institutions. Under the statute, a State's claims may include but are not limited to per diem and travel.

The Department has followed the overriding statutory language since it was enacted (see ACYF-PI-94-15 and ACYF-PA-90-01). However, we would like to take this opportunity to make the regulatory language consistent with the statute. Because this change is technical in nature, and does not affect policy, we have included this change in this final rule. We are rescinding existing paragraph § 1356.60(c)(4) and amending § 1356.60(b)(1) to make this technical change.

*Section 1356.71 Federal Review of the Eligibility of Children in Foster Care and the Eligibility of Foster Care Providers in Title IV-E Programs*

This section sets forth the requirements governing Federal reviews of State compliance with the title IV-E eligibility provisions as they apply to children and foster care providers under paragraphs (a) and (b) of section 472 of the Act.

*Section 1356.71(a) Purpose, Scope and Overview of the Process*

*Comment:* Three commenters were of the opinion that the title IV-E review, because its major focus is on documentation, is inconsistent with the new outcomes-based review for child and family services. Two commenters said that this review relies solely on individual case eligibility for payments absent any consideration of good casework practice and procedures.

*Response:* The title IV-E foster care eligibility review and the child and family services review are different in purpose and scope. The purpose of the title IV-E eligibility review is to validate the accuracy of a State's claims to assure that appropriate payments are made on behalf of eligible children, to eligible homes and institutions, at allowable rates. These determinations are made most effectively by an examination of the case record and payment documentation. The title IV-E review has been revised, within existing statutory constraints, to strengthen the State and Federal partnership through the provision of corrective action and technical assistance. While we acknowledge the importance of positive outcomes for the children and families the title IV-E foster care program serves, we also acknowledge our attendant stewardship responsibility in the administration of this program.

*Comment:* We received five comments indicating that the title IV-E eligibility review penalizes child welfare agencies when certain eligibility requirements beyond the State's control, specifically those related to the documentation of judicial determinations, are not met.

*Response:* We recognize that child welfare agencies ultimately may be held accountable and lose title IV-E funding when documentation of the required title IV-E judicial determinations is not secured. Because the statute specifically requires judicial determinations regarding contrary to the welfare and reasonable efforts, however, we have no authority or flexibility to modify these requirements. Where the statute permits, we have afforded State child welfare agencies additional time to obtain the required judicial determinations.

*Section 1356.71(b) Composition of Review Team and Preliminary Activities Preceding an On-Site Review*

This section describes the composition of the on-site review team and the preliminary activities which the State must undertake prior to the on-site review.

*Comment:* We received four comments regarding the composition of

the review team, including requests for specific representatives on the team, such as State foster care review board members, child advocates, and individuals with expertise on unaccompanied refugee minors. One commenter requested that we require States to include local agency staff on the review team.

*Response:* The purpose of the title IV-E financial review is to assess payment accuracy through an examination of case record documentation. Those individuals recommended above to participate on the title IV-E review team possess expertise that would be utilized more effectively on a review of service delivery issues, such as the child and family services review. During the title IV-E pilot reviews, we learned that the Federal/State team combination assisted States in identifying strategies for training, technical assistance and corrective action, and augmented the knowledge of State staff about title IV-E eligibility requirements. For these reasons, we see no benefit in expanding the review team composition to include external representatives. The State may, however, exercise its discretion in deciding the range of State and/or local staff to include on the team.

*Comment:* One commenter noted that the requirement that the State submit the complete payment history records for each sample case does not comport with the regulation governing records retention at 45 CFR part 74. The commenter inquired if ACF could require States to retain the payment history for a child in out-of-home care for more than three years. We received an additional comment about the difficulty of obtaining the payment history for a child in care for 10 years. A third commenter requested clarification regarding whether complete payment history encompassed only the six-month period under review or the complete life of the case. Another commenter said that complete payment history should be required only when the case is determined to be ineligible.

*Response:* There is no inconsistency between the requirement that a State provide the complete payment history and the regulation at 45 CFR 74.53(b) which, in pertinent part, states that "Financial records \* \* \* shall be retained for a period of three years from the date of submission of the *final expenditure report* \* \* \* ." (emphasis added). For a child in out-of-home care, the final expenditure report would not be submitted to ACF until such child is discharged from foster care. Since the title IV-E review is designed to look at a sample of more recent cases and because ASFA reinforces moving

children to permanency more expediently, we hope not to encounter any case where a child has been in foster care for 10 years. In those rare instances where we do review such a case, however, the payment history must reflect the title IV-E foster care payments for the duration of that child's placement, irrespective of the initial date of placement, if the case is still open and title IV-E payments continue to be made on that child's behalf. For these reasons, we do not agree that this requirement conflicts with 45 CFR part 74 and have made no modifications to this section.

We have concerns with the recommendation that the complete payment history be required only after a case is determined to be ineligible. The purpose of the title IV-E foster care eligibility review is to assure that appropriate payments are made on behalf of eligible children at allowable rates to eligible homes and institutions. Our experience has demonstrated that assuring that "appropriate payments are made \* \* \* at allowable rates" is determined as the result of identifying duplicate payments, overpayments, underpayments, erroneous payments and related fiscal issues for each case under review at the time the case is being reviewed. Therefore, we have made no modification to this section.

*Comment:* We received one comment that ACF should allow sufficient time for States to prepare for the review.

*Response:* We acknowledge our responsibility to assure that States receive ample notice in order to prepare for a title IV-E review. We recognize that the specific preparation time may vary by State and may change as States become more familiar with the process. Taking into consideration the fact that Federal staff also will require time to prepare adequately for each review, we do not anticipate the lack of advance notice becoming an issue and, therefore, prefer not to regulate the notification period. We fully expect that States and Regional Offices will negotiate this aspect of the review in a mutually agreeable manner.

#### *Section 1356.71(c) Sampling Guidance and Conduct of Review*

This section describes the process to be used to select the title IV-E foster care sample of children to be reviewed.

*Comment:* Two commenters recommended that the description of the alternative sampling frame to be utilized when AFCARS data are unavailable or deficient should specify that the period under review is six months.

*Response:* We concur and have revised paragraph (c)(1) to clarify that the period under review is to be consistent with one AFCARS six-month reporting period when an alternative sampling methodology is utilized.

*Comment:* We received numerous comments about the sample that included a range of concerns regarding its statistical validity, its applicability to States of differing sizes with varying populations of children in foster care, its accuracy and its reliability. Three commenters questioned the rationale for random sampling as the preferred methodology. Several commenters objected to the error rate thresholds as abstract and unreasonably high. One commenter supported the thresholds as fair and reasonable. Several commenters urged us not to regulate the sampling methodology at all.

*Response:* The proposed sampling methodology is designed to provide national consistency in sample selection, reduce the burden on States associated with drawing their own samples, utilize the AFCARS database, and assure statistical validity. In our attempt to achieve a balance between partnership and stewardship, we considered and evaluated several sampling methodologies. The methodology chosen was the result of internal deliberations with ACF statisticians and is similar to the sampling methodology deployed throughout the history of the title IV-E reviews, with a significant modification that affords States an opportunity for program improvement prior to an extrapolated disallowance. We chose simple random sampling as the preferred methodology as we believe it will result in the most representative sample. However, we expect that States will work closely with ACF statisticians in pulling a sample that is representative and fair. We further expect that regulating the sample will afford States and ACF maximum accuracy, uniformity, consistency, and reliability.

*Comment:* One commenter found the terms "first" and "second" confusing, particularly when applied to the subsequent three-year reviews.

*Response:* We concur and have modified this and related sections to use the terms "primary" and "secondary," respectively, to describe the reviews. The review of 80 cases is the primary review. In those instances where the 15 percent threshold is exceeded and the State enters into a PIP, followed by a review of 150 additional cases, this subsequent review will be referred to as the secondary review.

*Comment:* One commenter recommended that all States have an opportunity to have their primary review at the 15 percent threshold, since all primary reviews may not be completed within three years of the final rule. Another commenter noted that the title IV-E monitoring regulations do not indicate when ACF will begin conducting these reviews. A third commenter indicated that States should be afforded ample time to implement the various requirements.

*Response:* We agree in principle and have modified this section accordingly to reflect that each State's primary review will be subject to the 15 percent threshold. We fully anticipate that ACF and States will work together to assure that the primary reviews are held within a reasonable period of time after publication of the final rule. In any event, we do not expect that States will procrastinate in scheduling their primary reviews once they have been approached by ACF.

*Comment:* One commenter recommended that we delete the words "determined to be" from the discussion of disallowances in this section, noting that the disallowance will be applicable for the period of time that the case was ineligible and not from the date the reviewer discovered the ineligibility.

*Response:* We concur and have modified this section accordingly. Any disallowance will be applicable to the period of time during which the case is ineligible and not from the date the reviewer makes the determination of ineligibility.

*Comment:* Several commenters recommended that the secondary review should be limited to cases where children entered foster care after the PIP was implemented. Four commenters said that the final rules should not apply to children who entered foster care before the rule was finalized.

*Response:* We do not concur that the secondary review should include only cases of children who entered foster care after the program improvement plan was implemented or that the final rule apply only to children who entered foster care after its promulgation. We will apply the final rule prospectively so that States are only responsible for meeting the new requirements following the effective date of the final rule. Compliance with the requirements will be evaluated against the standards in effect at the time the action was taken. Therefore, the checklist will be modified so that we review for the ACF policy in effect at the time of the action and it reflects the transition time indicated in the pertinent sections of §§ 1355.20 and 1356.21(b)(2) related to

licensing of foster family homes and the reasonable efforts determination regarding finalizing permanency plans.

*Comment:* One commenter requested the discussion of the 10 percent and 15 percent error thresholds be clarified to make it apparent that the error threshold for the primary review is eight cases or fewer and four cases or fewer—not simply “8” and “4.”

*Response:* We agree and have modified the regulations such that they consistently express that the error threshold for the primary review is eight or fewer and four or fewer cases—not simply eight or four. We further have revised this section to clarify that the error rate applicable to the secondary review of 150 cases is 10%.

*Comment:* One commenter requested that unaccompanied refugee minors be excluded from the sample of title IV–E cases reviewed.

*Response:* Any child on whose behalf title IV–E payments were made is subject to review. No statutory basis exists to exclude any specific population from review and, consequently, no modifications were made to this section.

#### *Section 1356.71(d) Requirements Subject to Review*

This section describes the requirements subject to the title IV–E eligibility reviews.

*Comment:* One commenter noted that section 475(1) of the Act was inappropriately cross-referenced in paragraph (2).

*Response:* We concur and have changed this cross-reference to § 1356.30 which addresses the safety requirements for foster care and adoptive home providers.

*Comment:* One commenter suggested that all title IV–E requirements be reviewed, including sections 471(a)(16), 475(1) and 475(5)(B) of the Act which are the requirements for case plans and six-month periodic reviews.

*Response:* The focus of the title IV–E foster care eligibility review is those child eligibility criteria set forth at section 472(a)(1)–(4) of the Act and the criminal records checks required at section 471(a)(20) of the Act. The sections noted by the commenter are addressed in the child and family services review of State plan requirements, and we made no changes to this section.

#### *Section 1356.71(e) Review Instrument*

This section informs States that a checklist will be used to substantiate child and provider eligibility during the on-site title IV–E foster care eligibility review.

*Comment:* Three commenters requested that the review instrument be made available immediately rather than upon publication of the final rule.

*Response:* It would be premature for us to publish the review instrument until the rule becomes final. Once that occurs, we will modify the instrument to reflect the final rule and make it publicly available.

#### *Section 1356.71(f) Eligibility Determination—Child*

This section sets forth the case record requirement of documentation to verify a child’s eligibility.

*Comment:* Two commenters requested that the specific child eligibility requirements be included in this section.

*Response:* We concur that this would be helpful to States and have modified this section accordingly.

#### *Section 1356.71(g) Eligibility Determination—Provider*

This section sets forth the requirement for the licensing file for each case under review.

*Comment:* One commenter supports obtaining the licensing file and indicates that we should look “beyond” the actual license. Another commenter requested that the specific provider eligibility requirements be included in this section. A third commenter wanted to know the specific licensing standards to which States will be held accountable for the title IV–E foster care eligibility reviews. A fourth commenter requested clarification regarding the scope and extent of the provider review.

*Response:* The State plan requirement at section 471(a)(10) of the Act vests the State with the responsibility for establishing minimum licensing standards regarding safety, admissions policies, sanitation, and civil rights for foster family homes and child care institutions. The State is required to apply its licensing standards to any foster family home or child care institution receiving funds under titles IV–B and IV–E, and for the purposes of title IV–E, only place children in facilities that meet the Federal definition of a foster family home or child care institution. However, it is not within the scope of the title IV–E foster care eligibility review to examine the State licensing standards. For the title IV–E eligibility review, we will determine that the foster family home or facility has a valid license that encompasses the period of the child’s stay under review and that the safety requirements at § 1356.30 have been addressed. We made no changes to the regulation as a result of this comment.

During a title IV–E eligibility review, we will examine a provider’s license to determine that; it is an appropriate type of facility (*i.e.*, meets the definition of a foster family home or child care institution), the license is valid for the duration of the child’s placement, and the safety requirements at § 1356.30 have been addressed. We made no changes to the regulation as a result of this comment.

#### *Section 1356.71(h) Standards of Compliance*

This section defines the terms “substantial compliance” and “noncompliance,” and describes the disallowances and program improvement plan process.

*Comment:* One commenter indicated that reviews should be conducted annually, as opposed to at three-year intervals. Another commenter recommended that we conduct monthly audits. A third commenter suggested reviews at five-year instead of three-year intervals after a State completes its primary review.

*Response:* The frequency of the title IV–E reviews is not statutorily mandated. We decided that three years was a reasonable time frame, considering that some States may be required to develop a PIP after their primary review. For some States, the PIP will be effective for as long as one year. Furthermore, the title IV–E review is not the sole mechanism in place to assure the propriety and accuracy of State’ claiming procedures, since the ACF Regional Offices review the quarterly claims submitted by the States. For these reasons, and because States will be undergoing an intensive child and family services review following the publication of the final rule, we have made no modification to this section.

*Comment:* One commenter was of the opinion that more meaningful sanctions should be imposed. Another commenter supported ACF’s proposal for the disallowance of funds, indicating that it provides an incentive for States to come into compliance.

*Response:* We carefully considered various options in developing the penalty structure for ineligible cases and believe that our proposal achieves the appropriate balance between partnership and stewardship. We have developed a more collaborative approach with the goal of bringing about the desired results utilizing a process that includes technical assistance and corrective action.

### Section 1356.71(i) Program Improvement Plans

This section sets forth the requirement for States, determined not to be in substantial compliance, to develop a program improvement plan.

*Comment:* One commenter requested that we consider a provision for a State to negotiate the extension of a PIP in those instances when a legislative amendment is necessary for the State to achieve substantial compliance.

*Response:* We concur and have modified paragraph (i)(1)(i) to reflect that the duration of the program improvement plan will be determined jointly by the State and the ACF Regional Office, but shall not exceed one year, unless legislative action is required. In such cases, the State and ACF will negotiate the terms and length of the extension not to exceed the last day of the first legislative session after the date of the program improvement plan. We believe that this time frame is sufficient for a State to make necessary statutory changes to achieve substantial compliance.

*Comment:* Several commenters said that 60 days is insufficient time for a State to produce a comprehensive program improvement plan, since such a plan will require collaboration with multiple external entities. Proposed time frames ranged from 120 days to two years. Some commenters indicated that, under exceptional circumstances, a 30-day extension should be an option.

*Response:* An extensive period of time should not elapse from the completion of the on-site review to the development of the PIP. We do recognize, however, that occasionally circumstances may warrant the need for additional time for the State to collaborate with entities outside the child welfare agency, e.g., the court system. We have, therefore, amended paragraph (i)(2) to reflect a modification from 60 days to 90 days for the development of the PIP.

### Section 1356.71(j) Disallowance of Funds

This section sets describes how funds to be disallowed will be determined.

*Comment:* Two commenters noted that we reference a nonexistent paragraph "(k)" in the NPRM.

*Response:* We recognize this oversight and have removed the reference to paragraph (k) and clarified that, in the event that a State fails to submit a PIP, we will immediately proceed to the secondary review process.

*Comment:* One commenter noted that the sample period for a review after the completion of a PIP should be the first full AFCARS period subsequent to completion of the PIP.

*Response:* It is our intent to select a sample of cases from AFCARS for the secondary review after the PIP has been completed. In most instances, the most recent State AFCARS submission subsequent to the completion of the PIP will constitute the period under review.

*Comment:* One commenter recommends that the first review under the new protocol should be a joint pilot review with no disallowances taken in order to demonstrate ACF's assertion that the primary objectives of the reviews include promoting federal/state partnerships, focusing on program improvements and generating useful information.

*Response:* We conducted 12 title IV-E foster care eligibility pilot reviews over the past three years to inform the development of the new protocol. States were afforded many opportunities to volunteer for these pilots. We do not concur with the recommendation that we defer sanctions until after the primary review, since in the development of the process we already have suspended disallowances for more than three years.

*Comment:* One commenter requested clarification regarding the term "universe of claims paid." Another commenter requested clarification regarding the scope of the title IV-E foster care disallowance and what was included in it.

*Response:* The term "universe of claims paid" means the Federal share of allowable title IV-E foster care maintenance payments and administrative costs for the period of time the case is ineligible. All title IV-E funds expended during the quarter(s) the case is ineligible will be subject to disallowance, including funds for administrative costs. We have revised this paragraph in the final rule to specify which funds will be reduced.

### Part 1357—Requirements Applicable to Title IV-B

#### Section 1357.40 Direct Payments to Indian Tribal Organizations (Title IV-B, Subpart 1, Child Welfare Services)

This section provides the requirements for Indian Tribal Organizations to apply for and receive direct funds under title IV-B, subpart 1.

We made a technical change to § 1357.40 in the final rule to incorporate a 1995 change to the regulation that was mistakenly eliminated by a subsequent final rule. On June 2, 1995, we published a final rule (60 FR 28735–28737) amending the regulations governing direct payments to Indian Tribal Organizations (ITOs) for child welfare services. The revised regulations

added a description of the formula used to calculate the amount of Federal funds available to eligible ITOs under title IV-B. A new paragraph, § 1357.40(g)(6), was added to implement the new formula. On November 18, 1996, we published a comprehensive final rule for title IV-B, Child and Family Services (61 FR 58632–58663), which amended § 1357.40 and inadvertently omitted the paragraph including the grant formula for ITOs.

We are taking this opportunity to restore the grant formula for ITOs to the regulation as we have been using this formula since it was effective in FFY 1996 (see ACYF-IM-CB-95-28). We have, therefore, made a technical amendment to add the grant formula in a new paragraph, § 1357.40(d)(6).

### Impact Analysis

#### Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This final rule amends existing regulations concerning Child and Family Services by adding new requirements governing the review of a State's conformity with its State plan under titles IV-B and IV-E of the Social Security Act (the Act), and implements the provisions of the Social Security Act Amendments of 1994 (Pub. L. 103-432), the Multiethnic Placement Act (MEPA) as amended by Public Law 104-188, and certain provisions of the Adoption and Safe Families Act (ASFA) of 1997 (Pub. L. 105-89).

In addition, this final rule sets forth regulations that clarify certain eligibility criteria that govern the title IV-E foster care eligibility reviews that the Administration on Children, Youth and Families (ACYF) conducts to ensure a State agency's compliance with statutory requirements under the Act.

We received no comments on this section.

#### Executive Order 13132

Executive Order 13132 on Federalism applies to policies that have federalism implications, defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This rule does not have federalism implications as defined in the Executive Order.

*Family Well-Being Impact*

As required by Section 654 of the Treasury and General Government Appropriations Act of 1999, we have assessed the impact of this final rule on family well-being. The final rule implements requirements of titles IV-B and IV-E of the Social Security Act relating to Federal monitoring and oversight of State child welfare programs. The rule will promote child safety, child and family well-being and permanence for those children who must be removed from their families temporarily to assure their safety. The final rule will help to ensure that States are taking appropriate steps to protect children and to strengthen, support and stabilize both biological and adoptive families.

*Regulatory Flexibility Act of 1980*

The Regulatory Flexibility Act (5 U.S.C. Ch. 6) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses. For each rule with a "significant number of small entities" an analysis must be prepared describing the rule's impact on small entities. "Small entities" are defined by the Act to include small businesses, small nonprofit organizations and small governmental entities. These regulations do not affect small entities because they are applicable to State agencies that administer the child and family services programs and the foster care maintenance payments program.

We received no comments on this section.

*Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act (Pub. L. 104-4) requires agencies to prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation).

*Comment:* One commenter argued that the regulation was not in compliance with the Unfunded Mandates Reform Act (UMRA) because the ASFA requirements significantly increase the administrative burden and cost for State courts and agencies, which are not offset by an increase in Federal funding.

*Response:* Section 201 of the UMRA states that, "[e]ach agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." The UMRA is not applicable to the codification of the ASFA requirements because they are specifically set forth in law. Rather, it is the requirements and procedures of the child and family services review and the title IV-E eligibility review processes which come under the auspices of the UMRA.

This final rule does not impose any mandates on State, local, or tribal governments, or the private sector that will result in an annual expenditure of \$100,000,000 or more. We anticipate that one-third (17) of the States will be reviewed under both review procedures each year and that, each year, approximately five States will be required to complete a corrective action plan in response to section 471(a)(18) compliance issues, for an annual cost of \$352,420. This estimate is based on the burden hours associated with each information collection identified in the "Paperwork Reduction Act" section.

*Congressional Review*

This rule is not a major rule as defined in 5 U.S.C., Chapter 8.

*Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any

reporting or record-keeping requirements inherent in a proposed or final rule. This final rule contains information collection requirements in certain sections that the Department has submitted to OMB for its review.

The sections that contain information collection requirements are: 1355.33(b) on statewide assessments, and (c) on-site review; 1355.35(a) on program improvement plan; 1355.38(b) and (c) on corrective action plans; and 1356.71(i) on program improvement plan. Section 1356 on State plan document and submission requirements (OMB Number 0980-0141) and case plan requirements (OMB Number 0980-0140) contains information collections. However, these are approved collections and no changes are being made at this time.

The respondents to the information collection requirements in this rule are State agencies. The Department requires this collection of information: (1) In order to review State compliance with the provisions of the statute and implementing regulations of titles IV-B and IV-E of the Act; and (2) effectively implement the statutory requirement at section 1123A of the Act which requires that regulations be promulgated for the review of child and family services programs, and foster care and adoption assistance programs for conformity with State plan requirements.

*Comment:* A few commenters noted that the estimate for the burden hours associated with § 1355.33(c), the on-site portion of the child and family services review, was too low. The commenters observed that extensive training is required to prepare reviewers.

*Response:* We agree and have amended the estimate accordingly. In addition, we have significantly increased the estimated burden for the on-site portion of the child and family services review to account for the logistics associated with scheduling interviews.

Collection	Number of respondents	Number of responses	Average burden hours per response	Total burden hours
1355.33(b)—Statewide assessment .....	17—State agencies administering the title IV-B & E Programs.	17	240	4,080
1355.33(c)—On-site review .....	17—State agencies administering the title IV-B & E programs.	595	18	10,710
1355.35(a)—Program improvement plan .....	17—State agencies administering the titles IV-B & IV-E programs.	17	80	1,360
1355.38(b) and (c)—Corrective action plan .....	5—State agencies administering titles IV-B and IV-E.	5	80	400
1356.71(i)—Program improvement plan .....	17—State agencies administering the title IV-E program.	17	63	1,071

We received and considered 38 letters in response to the preclearance Notice (63 FR 52703 (October 1, 1998)) published in order to obtain approval of this information collection under the Paperwork Reduction Act. Several commenters submitted comments on the October 1, 1998 Notice in conjunction with their comments on the NPRM. The comment period for the October 1, 1998 Notice closed on December 1, 1998 while the comment period for the NPRM closed on December 17, 1998. In our opinion, to consider late comments constitutes an arbitrary extension of the comment period for certain groups or individuals. Those comments pertaining to the October 1, 1998 Notice that were submitted in conjunction with the comments on the NPRM were late and were not considered.

In the October 1, 1998 Notice, we published, in their entirety, the statewide assessment, on-site review instrument, and stakeholder interview guide used in conducting the child and family service review. Overwhelmingly, the comments we received were very technical in nature. Commenters offered specific suggestions for rephrasing or adding questions, for quantifying responses, for changes in terminology, and for increasing the objectivity of the instruments. In response to the comments received, each instrument has undergone significant revision. We streamlined the statewide assessment so that it targets State performance in satisfying the relevant State plan requirements and reports on the statewide data indicators used for determining substantial conformity. The on-site review instrument and stakeholder interview guide have been revised to increase objectivity in drawing conclusions regarding the State's performance in achieving the outcomes and in implementing the systemic factors. Copies of the instruments will be distributed to all State agencies and posted on the ACF web site immediately following the effective date of this regulation.

#### List of Subjects

##### 45 CFR Part 1355

Adoption and foster care, Child welfare, Grant programs-Social programs.

##### 45 CFR Part 1356

Adoption and foster care, Grant programs-social programs

##### 45 CFR Part 1357

Child and family services, Child welfare, Grant programs-Social programs

(Catalog of Federal Domestic Assistance Program Numbers 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; and 93.645, Child Welfare Services—State Grants)

Approved: September 23, 1999.

**Donna E. Shalala,**

*Secretary.*

Dated: August 25, 1999.

**Olivia A. Golden,**

*Assistant Secretary for Children and Families.*

For the reasons set forth in the preamble we are amending 45 CFR parts 1355, 1356, and 1357 to read as follows:

#### PART 1355—GENERAL

1. The authority citation for part 1355 continues to read as follows:

**Authority:** 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*, 42 U.S.C. 1302.

2. Section 1355.20 is amended by revising the definition of *Foster care* and by adding the following definitions in alphabetical order to read as follows:

##### § 1355.20 Definitions.

(a) \* \* \*

*Child care institution* means a private child care institution, or a public child care institution which accommodates no more than twenty-five children, and is licensed by the State in which it is situated or has been approved by the agency of such State or tribal licensing authority (with respect to child care institutions on or near Indian Reservations) responsible for licensing or approval of institutions of this type as meeting the standards established for such licensing. This definition must not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

\* \* \* \* \*

*Date a child is considered to have entered foster care* means the earlier of: The date of the first judicial finding that the child has been subjected to child abuse or neglect; or, the date that is 60 calendar days after the date on which the child is removed from the home pursuant to § 1356.21(k). A State may use a date earlier than that required in this paragraph, such as the date the child is physically removed from the home. This definition determines the date used in calculating all time period requirements for the periodic reviews, permanency hearings, and termination of parental rights provision in section 475(5) of the Act and for providing time-limited reunification services described at section 431(a)(7) of the Act. The

definition has no relationship to establishing initial title IV–E eligibility.

\* \* \* \* \*

*Entity*, as used in § 1355.38, means any organization or agency (e.g., a private child placing agency) that is separate and independent of the State agency; performs title IV–E functions pursuant to a contract or subcontract with the State agency; and, receives title IV–E funds. A State court is not an “entity” for the purposes of § 1355.38 except if an administrative arm of the State court carries out title IV–E administrative functions pursuant to a contract with the State agency.

*Foster care* means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

*Foster care maintenance payments* are payments made on behalf of a child eligible for title IV–E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers. Local travel associated with providing the items listed above is also an allowable expense. In the case of child care institutions, such term must include the reasonable costs of administration and operation of such institutions as are necessarily required to provide the items described in the preceding sentences. “Daily supervision” for which foster care maintenance payments may be made includes:

(1) *Foster family care*—licensed child care, when work responsibilities preclude foster parents from being at home when the child for whom they have care and responsibility in foster care is not in school, licensed child care when the foster parent is required to participate, without the child, in activities associated with parenting a child in foster care that are beyond the scope of ordinary parental duties, such as attendance at administrative or

judicial reviews, case conferences, or foster parent training. Payments to cover these costs may be: included in the basic foster care maintenance payment; a separate payment to the foster parent, or a separate payment to the child care provider; and

(2) *Child care institutions*—routine day-to-day direction and arrangements to ensure the well-being and safety of the child.

*Foster family home* means, for the purpose of title IV-E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the State licensing or approval authority(ies) (or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies)), that provides 24-hour out-of-home care for children. The term may include group homes, agency-operated boarding homes or other facilities licensed or approved for the purpose of providing foster care by the State agency responsible for approval or licensing of such facilities. Foster family homes that are approved must be held to the same standards as foster family homes that are licensed. Anything less than full licensure or approval is insufficient for meeting title IV-E eligibility requirements. States may, however, claim title IV-E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.

*Full review* means the joint Federal and State review of all federally-assisted child and family services programs in the States, including family preservation and support services, child protective services, foster care, adoption, and independent living services, for the purpose of determining the State's substantial conformity with the State plan requirements of titles IV-B and IV-E as listed in § 1355.34 of this part. A full review consists of two phases, the statewide assessment and a subsequent on-site review, as described in § 1355.33 of this part.

\* \* \* \* \*

*Legal guardianship* means a judicially-created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision-making. The term *legal guardian* means the caretaker in such a relationship.

*National Child Abuse and Neglect Data System (NCANDS)* means the voluntary national data collection and analysis system established by the Administration for Children and Families in response to a requirement in the Child Abuse Prevention and Treatment Act (Pub. L. 93-247), as amended.

*Partial review* means:

(1) For the purpose of the child and family services review, the joint Federal and State review of one or more federally-assisted child and family services program(s) in the States, including family preservation and support services, child protective services, foster care, adoption, and independent living services. A partial review may consist of any of the components of the full review, as mutually agreed upon by the State and the Administration for Children and Families as being sufficient to determine substantial conformity of the reviewed components with the State plan requirements of titles IV-B and IV-E as listed in § 1355.34 of this part; and

(2) For the purpose of title IV-B and title IV-E State plan compliance issues that are outside the prescribed child and family services review format, e.g., compliance with AFCARS requirements, a review of State laws, policies, regulations, or other information appropriate to the nature of the concern, to determine State plan compliance.

*Permanency hearing* means:

(1) The hearing required by section 475(5)(C) of the Act to determine the permanency plan for a child in foster care. Within this context, the court (including a Tribal court) or administrative body determines whether and, if applicable, when the child will be:

- (i) Returned to the parent;
- (ii) Placed for adoption, with the State filing a petition for termination of parental rights;
- (iii) Referred for legal guardianship;
- (iv) Placed permanently with a fit and willing relative; or
- (v) Placed in another planned permanent living arrangement, but only in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to follow one of the four specified options above.

(2) The permanency hearing must be held no later than 12 months after the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part or within 30 days of a judicial determination that reasonable efforts to

reunify the child and family are not required. After the initial permanency hearing, subsequent permanency hearings must be held not less frequently than every 12 months during the continuation of foster care. The permanency hearing must be conducted by a family or juvenile court or another court of competent jurisdiction or by an administrative body appointed or approved by the court which is not a part of or under the supervision or direction of the State agency. Paper reviews, *ex parte* hearings, agreed orders, or other actions or hearings which are not open to the participation of the parents of the child, the child (if of appropriate age), and foster parents or preadoptive parents (if any) are not permanency hearings.

\* \* \* \* \*

*Statewide assessment* means the initial phase of a full review of all federally-assisted child and family services programs in the States, including family preservation and support services, child protective services, foster care, adoption, and independent living services, for the purpose of determining, in part, the State's substantial conformity with the State plan requirements of titles IV-B and IV-E as listed in § 1355.34 of this part. The statewide assessment refers to the completion of the federally-prescribed assessment instrument by members of a review team that meet the requirements of § 1355.33(a)(2) of this part.

3. New §§ 1355.31 through 1355.39 are added to read as follows:

**§ 1355.31 Elements of the child and family services review system.**

*Scope.* Sections 1355.32 through 1355.37 of this part apply to reviews of child and family services programs administered by States under subparts 1 and 2 of title IV-B of the Act, and reviews of foster care and adoption assistance programs administered by States under title IV-E of the Act.

**§ 1355.32 Timetable for the reviews.**

(a) *Initial reviews.* Each State must complete an initial full review as described in § 1355.33 of this part during the four-year period after the final rule becomes effective.

(b) *Reviews following the initial review.*

(1) A State found to be operating in substantial conformity during an initial or subsequent review, as defined in § 1355.34 of this part, must:

- (i) Complete a full review every five years; and
- (ii) Submit a completed statewide assessment to ACF three years after the

on-site review. The statewide assessment will be reviewed jointly by the State and the Administration for Children and Families to determine the State's continuing substantial conformity with the State plan requirements subject to review. No formal approval of this interim statewide assessment by ACF is required.

(2) A State program found not to be operating in substantial conformity during an initial or subsequent review will:

(i) Be required to develop and implement a program improvement plan, as defined in § 1355.35 of this part; and

(ii) Begin a full review two years after approval of the program improvement plan.

(c) *Reinstatement of reviews based on information that a State is not in substantial conformity.*

(1) ACF may require a full or a partial review at any time, based on any information, regardless of the source, that indicates the State may no longer be operating in substantial conformity.

(2) Prior to reinstating a full or partial review, ACF will conduct an inquiry and require the State to submit additional data whenever ACF receives information that the State may not be in substantial conformity.

(3) If the additional information and inquiry indicates to ACF's satisfaction that the State is operating in substantial conformity, ACF will not proceed with any further review of the issue addressed by the inquiry. This inquiry will not substitute for the full reviews conducted by ACF under § 1355.32(b).

(4) ACF may proceed with a full or partial review if the State does not provide the additional information as requested, or the additional information confirms that the State may not be operating in substantial conformity.

(d) *Partial reviews based on noncompliance with State plan requirements that are outside the scope of a child and family services review.*

When ACF becomes aware of a title IV-B or title IV-E compliance issue that is outside the scope of the child and family services review process, we will:

(1) Conduct an inquiry and require the State to submit additional data.

(2) If the additional information and inquiry indicates to ACF's satisfaction that the State is in compliance, we will not proceed with any further review of the issue addressed by the inquiry.

(3) ACF will institute a partial review, appropriate to the nature of the concern, if the State does not provide the additional information as requested, or

the additional information confirms that the State may not be in compliance.

(4) If the partial review determines that the State is not in compliance with the applicable State plan requirement, the State must enter into a program improvement plan designed to bring the State into compliance. The terms, action steps and time-frames of the program improvement plan will be developed on a case-by-case basis by ACF and the State. The program improvement plan must take into consideration the extent of noncompliance and the impact of the noncompliance on the safety, permanency or well-being of children and families served through the State's title IV-B or IV-E allocation. If the State remains out of compliance, the State will be subject to a penalty related to the extent of the noncompliance.

(5) Review of AFCARS compliance will take place in accordance with 45 CFR 1355.40.

#### § 1355.33 Procedures for the review.

(a) The full child and family services reviews will:

(1) Consist of a two-phase process that includes a statewide assessment and an on-site review; and

(2) Be conducted by a team of Federal and State reviewers that includes:

(i) Staff of the State child and family services agency, including the State and local offices that represent the service areas that are the focus of any particular review;

(ii) Representatives selected by the State, in collaboration with the ACF Regional Office, from those with whom the State was required to consult in developing its CFSP, as described and required in 45 CFR part 1357.15(l);

(iii) Federal staff of HHS; and

(iv) Other individuals, as deemed appropriate and agreed upon by the State and ACF.

(b) *Statewide assessment.* The first phase of the full review will be a statewide assessment conducted by the internal and external State members of the review team. The statewide assessment must:

(1) Address each systemic factor under review, including the statewide information system; case review system; quality assurance system; staff training; service array; agency responsiveness to the community; and foster and adoptive parent licensing, recruitment and retention;

(2) Assess the outcome areas of safety, permanency, and well-being of children and families served by the State agency using data from AFCARS, NCANDS, or, for the initial review, another source approved by ACF. The State must also analyze and explain its performance in

meeting the national standards for the statewide data indicators;

(3) Assess the characteristics of the State agency that have the most significant impact on the agency's capacity to deliver services to children and families that will lead to improved outcomes;

(4) Assess the strengths and areas of the State's child and family services programs that require further examination through an on-site review;

(1) Include a listing of all the persons external to the State agency who participated in the preparation of the statewide assessment pursuant to §§ 1355.33(a)(2)(ii) and (iv); and

(2) Be completed and submitted to ACF within 4 months of the date that ACF transmits the information for the statewide assessment to the State.

(c) *On-site review.* The second phase of the full review will be an on-site review.

(1) The on-site review will cover the State's programs under titles IV-B and IV-E of the Act, including in-home services and foster care. It will be jointly planned by the State and ACF, and guided by information in the completed statewide assessment that identifies areas in need of improvement or further review.

(2) The on-site review may be concentrated in several specific political subdivisions of the State, as agreed upon by the ACF and the State; however, the State's largest metropolitan subdivision must be one of the locations selected.

(3) ACF has final approval of the selection of specific areas of the State's child and family services continuum described in paragraph (c)(1) of this section and selection of the political subdivisions referenced in paragraph (c)(2) of this section.

(4) Sources of information collected during the on-site review to determine substantial conformity must include, but are not limited to:

(i) Case records on children and families served by the agency;

(ii) Interviews with children and families whose case records have been reviewed and who are, or have been, recipients of services of the agency;

(iii) Interviews with caseworkers, foster parents, and service providers for the cases selected for the on-site review; and

(iv) Interviews with key stakeholders, both internal and external to the agency, which, at a minimum, must include those individuals who participated in the development of the State's CFSP required at 45 CFR 1357.15(1), courts, administrative review bodies, children's guardians ad litem and other

individuals or bodies assigned responsibility for representing the best interests of the child.

(5) The sample will range from 30–50 cases. Foster care cases must be drawn randomly from AFCARS, or, for the initial review, from another source approved by ACF and include children who entered foster care during the year under review. In-home cases must be drawn randomly from NCANDS or from another source approved by ACF. To ensure that all program areas are adequately represented, the sample size may be increased.

(6) The sample of 30–50 cases reviewed on-site will be selected from a randomly drawn oversample of no more than 150 cases. The oversample must be statistically significant at a 90 percent compliance rate (95 percent in subsequent reviews), with a tolerable sampling error of 5 percent and a confidence coefficient of 95 percent. The additional cases in the oversample not selected for the on-site review will form the sample of cases to be reviewed, if needed, in order to resolve discrepancies between the data indicators and the on-site reviews in accordance with paragraph (d)(2) of this section.

(d) *Resolution of discrepancies between the statewide assessment and the findings of the on-site portion of the review.* Discrepancies between the statewide assessment and the findings of the on-site portion of the review will be resolved by either of the following means, at the State's option:

(1) The submission of additional information by the State; or

(2) ACF and the State will review additional cases using only those indicators in which the discrepancy occurred. ACF and the State will determine jointly the number of additional cases to be reviewed, not to exceed a total of 150 cases to be selected as specified in paragraph (c)(6) of this section.

(e) *Partial review.* A partial child and family services review, when required, will be planned and conducted jointly by ACF and the State agency based on the nature of the concern. A partial review does not substitute for the full reviews as required under § 1355.32(b).

(f) *Notification.* Within 30 calendar days following either a partial child and family services review, full child and family services review, or the resolution of a discrepancy between the statewide assessment and the findings of the on-site portion of the review, ACF will notify the State agency in writing of whether the State is, or is not, operating in substantial conformity.

**§ 1355.34 Criteria for determining substantial conformity.**

(a) *Criteria to be satisfied.* ACF will determine a State's substantial conformity with title IV–B and title IV–E State plan requirements based on the following:

(1) Its ability to meet national standards, set by the Secretary, for statewide data indicators associated with specific outcomes for children and families;

(2) Its ability to meet criteria related to outcomes for children and families; and

(3) Its ability to meet criteria related to the State agency's capacity to deliver services leading to improved outcomes.

(b) *Criteria related to outcomes.*

(1) A State's substantial conformity will be determined by its ability to substantially achieve the following child and family service outcomes:

(i) *In the area of child safety:*

(A) Children are, first and foremost, protected from abuse and neglect; and,

(B) Children are safely maintained in their own homes whenever possible and appropriate;

(ii) *In the area of permanency for children:*

(A) Children have permanency and stability in their living situations; and

(B) The continuity of family relationships and connections is preserved for children; and

(iii) *In the area of child and family well-being:*

(A) Families have enhanced capacity to provide for their children's needs;

(B) Children receive appropriate services to meet their educational needs; and

(C) Children receive adequate services to meet their physical and mental health needs.

(2) A State's level of achievement with regard to each outcome reflects the extent to which a State has:

(i) Met the national standard(s) for the statewide data indicator(s) associated with that outcome, if applicable; and,

(ii) Implemented the following CFSP requirements or assurances:

(A) The requirements in 45 CFR 1357.15(p) regarding services designed to assure the safety and protection of children and the preservation and support of families;

(B) The requirements in 45 CFR 1357.15(q) regarding the permanency provisions for children and families in sections 422 and 471 of the Act;

(C) The requirements in section 422(b)(9) of the Act regarding recruitment of potential foster and adoptive families;

(D) The assurances by the State as required by section 422(b)(10)(C)(i) and

(ii) of the Act regarding policies and procedures for abandoned children;

(E) The requirements in section 422(b)(11) of the Act regarding the State's compliance with the Indian Child Welfare Act;

(F) The requirements in section 422(b)(12) of the Act regarding a State's plan for effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements; and,

(G) The requirements in section 471(a)(15) of the Act regarding reasonable efforts to prevent removals of children from their homes, to make it possible for children in foster care to safely return to their homes, or, when the child is not able to return home, to place the child in accordance with the permanency plan and complete the steps necessary to finalize the permanent placement.

(3) A State will be determined to be in substantial conformity if its performance on:

(i) Each statewide data indicator developed pursuant to paragraph (b)(4) of this section meets the national standard described in paragraph (b)(5) of this section; and,

(ii) Each outcome listed in paragraph (b)(1) of this section is rated as "substantially achieved" in 95 percent of the cases examined during the on-site review (90 percent of the cases for a State's initial review). Information from various sources (case records, interviews) will be examined for each outcome and a determination made as to the degree to which each outcome has been achieved for each case reviewed.

(4) The Secretary will, using AFCARS and NCANDS, develop statewide data indicators for each of the specific outcomes described in paragraph (b)(1) of this section for use in determining substantial conformity. The Secretary will add, amend, or suspend any such statewide data indicator(s) when appropriate. To the extent practical and feasible, the statewide data indicators will be consistent with those developed in accordance with section 203 of the Adoption and Safe Families Act of 1997 (Pub. L. 105–89).

(5) The initial national standards for the statewide data indicators described in paragraph (b)(4) of this section will be based on the 75th percentile of all State performance for that indicator, as reported in AFCARS or NCANDS. The Secretary may adjust these national standards if appropriate. The initial national standard will be set using the following data sources:

(i) The 1997 and 1998 submissions to NCANDS (or the most recent and complete 2 years available), for those

statewide data indicators associated with the safety outcomes; and,

(ii) The 1998b, 1999c, and 2000a submissions to AFCARS (or the most recent and complete report periods available), for those statewide data indicators associated with the permanency outcomes.

(c) *Criteria related to State agency capacity to deliver services leading to improved outcomes for children and families.* In addition to the criteria related to outcomes contained in paragraph (b) of this section, the State agency must also satisfy criteria related to the delivery of services. Based on information from the statewide assessment and onsite review, the State must meet the following criteria for each systemic factor in paragraphs (c)(2) through (c)(7) of this section to be considered in substantial conformity: All of the State plan requirements associated with the systemic factor must be in place, and no more than one of the state plan requirements fails to function as described in paragraphs (c)(2) through (c)(7) of this section. The systemic factor in paragraph (c)(1) of this section, is rated on the basis of only one State plan requirement. To be considered in substantial conformity, the State plan requirement associated with statewide information system capacity must be both in place and functioning as described in the requirement. ACF will use a rating scale to make the determinations of substantial conformity. The systemic factors under review are:

(1) *Statewide information system:* The State is operating a statewide information system that, at a minimum, can readily identify the status, demographic characteristics, location, and goals for the placement of every child who is (or within the immediately preceding 12 months, has been) in foster care (section 422(b)(10)(B)(i) of the Act);

(2) *Case review system:* The State has procedures in place that:

(i) Provide, for each child, a written case plan to be developed jointly with the child's parent(s) that includes provisions: for placing the child in the least restrictive, most family-like placement appropriate to his/her needs, and in close proximity to the parent's home where such placement is in the child's best interests; for visits with a child placed out of State at least every 12 months by a caseworker of the agency or of the agency in the State where the child is placed; and for documentation of the steps taken to make and finalize an adoptive or other permanent placement when the child cannot return home (sections

422(b)(10)(B)(ii), 471(a)(16) and 475(5)(A) of the Act);

(ii) Provide for periodic review of the status of each child no less frequently than once every six months by either a court or by administrative review (sections 422(b)(10)(B)(ii), 471(a)(16) and 475(5)(B) of the Act);

(iii) Assure that each child in foster care under the supervision of the State has a permanency hearing in a family or juvenile court or another court of competent jurisdiction (including a Tribal court), or by an administrative body appointed or approved by the court, which is not a part of or under the supervision or direction of the State agency, no later than 12 months from the date the child entered foster care (and not less frequently than every 12 months thereafter during the continuation of foster care) (sections 422(b)(10)(B)(ii), 471(a)(16) and 475(5)(C) of the Act);

(iv) Provide a process for termination of parental rights proceedings in accordance with sections 422(b)(10)(B)(ii), 475(5)(E) and (F) of the Act; and,

(v) Provide foster parents, preadoptive parents, and relative caregivers of children in foster care with notice of and an opportunity to be heard in any review or hearing held with respect to the child (sections 422(b)(10)(B)(ii) and 475(5)(G) of the Act).

(3) *Quality assurance system:* The State has developed and implemented standards to ensure that children in foster care placements are provided quality services that protect the safety and health of the children (section 471(a)(22)) and is operating an identifiable quality assurance system (45 CFR 1357.15(u)) as described in the CFSP that:

(i) Is in place in the jurisdictions within the State where services included in the CFSP are provided;

(ii) Is able to evaluate the adequacy and quality of services provided under the CFSP;

(iii) Is able to identify the strengths and needs of the service delivery system it evaluates;

(iv) Provides reports to agency administrators on the quality of services evaluated and needs for improvement; and

(v) Evaluates measures implemented to address identified problems.

(4) *Staff training:* The State is operating a staff development and training program (45 CFR 1357.15(t)) that:

(i) Supports the goals and objectives in the State's CFSP;

(ii) Addresses services provided under both subparts of title IV-B and

the training plan under title IV-E of the Act;

(iii) Provides training for all staff who provide family preservation and support services, child protective services, foster care services, adoption services and independent living services soon after they are employed and that includes the basic skills and knowledge required for their positions;

(iv) Provides ongoing training for staff that addresses the skills and knowledge base needed to carry out their duties with regard to the services included in the State's CFSP; and,

(v) Provides short-term training for current or prospective foster parents, adoptive parents, and the staff of State-licensed or State-approved child care institutions providing care to foster and adopted children receiving assistance under title IV-E that addresses the skills and knowledge base needed to carry out their duties with regard to caring for foster and adopted children.

(5) *Service array:* Information from the Statewide assessment and on-site review determines that the State has in place an array of services (45 CFR 1357.15(n) and section 422(b)(10)(B)(iii) and (iv) of the Act) that includes, at a minimum:

(i) Services that assess the strengths and needs of children and families assisted by the agency and are used to determine other service needs;

(ii) Services that address the needs of the family, as well as the individual child, in order to create a safe home environment;

(iii) Services designed to enable children at risk of foster care placement to remain with their families when their safety and well-being can be reasonably assured;

(iv) Services designed to help children achieve permanency by returning to families from which they have been removed, where appropriate, be placed for adoption or with a legal guardian or in some other planned, permanent living arrangement, and through post-legal adoption services;

(v) Services that are accessible to families and children in all political subdivisions covered in the State's CFSP; and,

(vi) Services that can be individualized to meet the unique needs of children and families served by the agency.

(6) *Agency responsiveness to the community:*

(i) The State, in implementing the provisions of the CFSP, engages in ongoing consultation with a broad array of individuals and organizations representing the State and county agencies responsible for implementing

the CFSP and other major stakeholders in the services delivery system including, at a minimum, tribal representatives, consumers, service providers, foster care providers, the juvenile court, and other public and private child and family serving agencies (45 CFR 1357.15(l)(4));

(ii) The agency develops, in consultation with these or similar representatives, annual reports of progress and services delivered pursuant to the CFSP (45 CFR 1357.16(a));

(iii) There is evidence that the agency's goals and objectives included in the CFSP reflect consideration of the major concerns of stakeholders consulted in developing the plan and on an ongoing basis (45 CFR 1357.15(m)); and

(iv) There is evidence that the State's services under the plan are coordinated with services or benefits under other Federal or federally-assisted programs serving the same populations to achieve the goals and objectives in the plan (45 CFR 1357.15(m)).

(7) *Foster and adoptive parent licensing, recruitment and retention:*

(i) The State has established and maintains standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes (section 471(a)(10) of the Act);

(ii) The standards so established are applied by the State to every licensed or approved foster family home or child care institution receiving funds under title IV-E or IV-B of the Act (section 471(a)(10) of the Act);

(iii) The State complies with the safety requirements for foster care and adoptive placements in accordance with sections 471(a)(16), 471(a)(20) and 475(1) of the Act and 45 CFR 1356.30;

(iv) The State has in place an identifiable process for assuring the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed (section 422(b)(9) of the Act); and,

(v) The State has developed and implemented plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children (section 422(b)(12) of the Act).

(d) *Availability of review instruments.* ACF will make available to the States copies of the review instruments, which will contain the specific standards to be used to determine substantial conformity, on an ongoing basis,

whenever significant revisions to the instruments are made.

**§ 1355.35 Program improvement plans.**

(a) *Mandatory program improvement plan.*

(1) States found not to be operating in substantial conformity shall develop a program improvement plan. The program improvement plan must:

(i) Be developed jointly by State and Federal staff in consultation with the review team;

(ii) Identify the areas in which the State's program is not in substantial conformity;

(iii) Set forth the goals, the action steps required to correct each identified weakness or deficiency, and dates by which each action step is to be completed in order to improve the specific areas;

(iv) Set forth the amount of progress the statewide data will make toward meeting the national standards;

(v) Establish benchmarks that will be used to measure the State's progress in implementing the program improvement plan and describe the methods that will be used to evaluate progress;

(vi) Identify how the action steps in the plan build on and make progress over prior program improvement plans;

(vii) Identify the technical assistance needs and sources of technical assistance, both Federal and non-Federal, which will be used to make the necessary improvements identified in the program improvement plan.

(2) In the event that ACF and the State cannot reach consensus regarding the content of a program improvement plan or the degree of program or data improvement to be achieved, ACF retains the final authority to assign the contents of the plan and/or the degree of improvement required for successful completion of the plan. Under such circumstances, ACF will render a written rationale for assigning such content or degree of improvement.

(b) *Voluntary program improvement plan.* States found to be operating in substantial conformity may voluntarily develop and implement a program improvement plan in collaboration with the ACF Regional Office, under the following circumstances:

(1) The State and Regional Office agree that there are areas of the State's child and family services programs in need of improvement which can be addressed through the development and implementation of a voluntary program improvement plan;

(2) ACF approval of the voluntary program improvement plan will not be required; and

(3) No penalty will be assessed for the State's failure to achieve the goals described in the voluntary program improvement plan.

(c) *Approval of program improvement plans.*

(1) A State determined not to be in substantial conformity must submit a program improvement plan to ACF for approval within 90 calendar days from the date the State receives the written notification from ACF that it is not operating in substantial conformity.

(2) Any program improvement plan will be approved by ACF if it meets the provisions of paragraph (a) of this section.

(3) If the program improvement plan does not meet the provisions of paragraph (a) of this section, the State will have 30 calendar days from the date it receives notice from ACF that the plan has not been approved to revise and resubmit the plan for approval.

(4) If the State does not submit a revised program improvement plan according to the provisions of paragraph (c)(3) of this section or if the plan does not meet the provisions of paragraph (a) of this section, withholding of funds pursuant to the provisions of § 1355.36 of this part will begin.

(d) *Duration of program improvement plans.*

(1) ACF retains the authority to establish time frames for the program improvement plan consistent with the seriousness and complexity of the remedies required for any areas determined not in substantial conformity, not to exceed two years.

(2) Particularly egregious areas of nonconformity impacting child safety must receive priority in both the content and time frames of the program improvement plans and must be addressed in less than two years.

(3) The Secretary may approve extensions of deadlines in a program improvement plan not to exceed one year. The circumstances under which requests for extensions will be approved are expected to be rare. The State must provide compelling documentation of the need for such an extension. Requests for extensions must be received by ACF at least 60 days prior to the affected completion date.

(4) States must provide quarterly status reports (unless ACF and the State agree upon less frequent reports) to ACF. Such reports must inform ACF of progress in implementing the measures of the plan.

(e) *Evaluating program improvement plans.* Program improvement plans will be evaluated jointly by the State agency and ACF, in collaboration with other members of the review team, as

described in the State's program improvement plan and in accordance with the following criteria:

(1) The methods and information used to measure progress must be sufficient to determine when and whether the State is operating in subsequent substantial conformity or has reached the negotiated standard with respect to statewide data indicators that fail to meet the national standard for that indicator;

(2) The frequency of evaluating progress will be determined jointly by the State and Federal team members, but no less than annually. Evaluation of progress will be performed in conjunction with the annual updates of the State's CFSP, as described in paragraph (f) of this section;

(3) Action steps may be jointly determined by the State and ACF to be achieved prior to projected completion dates, and will not require any further evaluation at a later date; and

(4) The State and ACF may jointly renegotiate the terms and conditions of the program improvement plan as needed, provided that:

(i) The renegotiated plan is designed to correct the areas of the State's program determined not to be in substantial conformity and/or achieve a standard for the statewide data indicators that is acceptable to ACF;

(ii) The amount of time needed to implement the provisions of the plan does not extend beyond three years from the date the original program improvement plan was approved;

(iii) The terms of the renegotiated plan are approved by ACF; and

(iv) The Secretary approves any extensions beyond the two-year limit.

(f) *Integration of program improvement plans with CFSP planning.* The elements of the program improvement plan must be incorporated into the goals and objectives of the State's CFSP. Progress in implementing the program improvement plan must be included in the annual reviews and progress reports related to the CFSP required in 45 CFR 1357.16.

**§ 1355.36 Withholding Federal funds due to failure to achieve substantial conformity or failure to successfully complete a program improvement plan.**

(a) *For the purposes of this section:*

(1) The term "title IV-B funds" refers to the State's combined allocation of title IV-B subpart 1 and subpart 2 funds; and

(2) The term "title IV-E funds" refers to the State's reimbursement for administrative costs for the foster care program under title IV-E.

(b) *Determination of the amount of Federal funds to be withheld.* ACF will

determine the amount of the State title IV-B and IV-E funds to be withheld due to a finding that the State is not operating in substantial conformity, as follows:

(1) A State will have the opportunity to develop and complete a program improvement plan prior to any withholding of funds.

(2) Title IV-B and IV-E funds will not be withheld from a State if the determination of nonconformity was caused by the State's correct use of formal written statements of Federal law or policy provided the State by DHHS.

(3) A portion of the State's title IV-B and IV-E funds will be withheld by ACF for the year under review and for each succeeding year until the State either successfully completes a program improvement plan or is found to be operating in substantial conformity.

(4) The amount of title IV-B and title IV-E funds subject to withholding due to a determination that a State is not operating in substantial conformity is based on a pool of funds defined as follows:

(i) The State's allotment of title IV-B funds for each of the years to which the withholding applies; and

(ii) An amount equivalent to 10 percent of the State's Federal claims for title IV-E foster care administrative costs for each of the years to which withholding applies;

(5) The amount of funds to be withheld from the pool in paragraph (b)(4) of this section will be computed as follows:

(i) Except as provided for in paragraphs (b)(7) and (b)(8) of this section, an amount equivalent to one percent of the funds described in paragraph (b)(4) of this section for each of the years to which withholding applies will be withheld for each of the seven outcomes listed in § 1355.34(b)(1) of this part that is determined not to be substantially achieved; and

(ii) Except as provided for in paragraphs (b)(7) and (b)(8) of this section, an amount equivalent to one percent of the funds described in paragraph (b)(4) of this section for each of the years to which withholding applies will be withheld for each of the seven systemic factors listed in § 1355.34(c) of this part that is determined not to be in substantial conformity.

(6) Except as provided for in paragraphs (b)(7), (b)(8), and (e)(4) of this section, in the event the State is determined to be in nonconformity on each of the seven outcomes and each of the seven systemic factors subject to review, the maximum amount of title IV-B and title IV-E funds to be

withheld due to the State's failure to comply is 14 percent per year of the funds described in paragraph (b)(4) of this section for each year.

(7) States determined not to be in substantial conformity that fail to correct the areas of nonconformity through the successful completion of a program improvement plan, and are determined to be in nonconformity on the second full review following the first full review in which a determination of nonconformity was made will be subject to increased withholding as follows:

(i) The amount of funds described in paragraph (b)(5) of this section will increase to two percent for each of the seven outcomes and each of the seven systemic factors that continues in nonconformity since the immediately preceding child and family services review;

(ii) The increased withholding of funds for areas of continuous nonconformity is subject to the provisions of paragraphs (c), (d), and (e) of this section;

(iii) The maximum amount of title IV-B and title IV-E funds to be withheld due to the State's failure to comply on the second full review following the first full review in which the determination of nonconformity was made is 28 percent of the funds described in paragraph (b)(4) of this section for each year to which the withholding of funds applies.

(8) States determined not to be in substantial conformity that fail to correct the areas of nonconformity through the successful completion of a program improvement plan, and are determined to be in nonconformity on the third and any subsequent full reviews following the first full review in which a determination of nonconformity was made will be subject to increased withholding as follows:

(i) The amount of funds described in paragraph (b)(5) of this section will increase to three percent for each of the seven outcomes and each of the seven systemic factors that continues in nonconformity since the immediately preceding child and family services review;

(ii) The increased withholding of funds for areas of continuous nonconformity is subject to the provisions of paragraphs (c), (d), and (e) of this section;

(iii) The maximum amount of title IV-B and title IV-E funds to be withheld due to the State's failure to comply on the third and any subsequent full reviews following the first full review in which the determination of nonconformity was made is 42 percent

of the funds described in paragraph (b)(4) of this section for each year to which the withholding of funds applies.

(c) *Suspension of withholding.*

(1) For States determined not to be operating in substantial conformity, ACF will suspend the withholding of the State title IV-B and title IV-E funds during the time that a program improvement plan is in effect, provided that:

(i) The program improvement plan conforms to the provisions of § 1355.35 of this part; and

(ii) The State is actively implementing the provisions of the program improvement plan.

(2) Suspension of the withholding of funds is limited to three years following each review, or the amount of time approved for implementation of the program improvement plan, whichever is less.

(d) *Terminating the withholding of funds.* For States determined not to be in substantial conformity, ACF will terminate the withholding of the State's title IV-B and title IV-E funds related to the nonconformity upon determination by the State and ACF that the State has achieved substantial conformity or has successfully completed a program improvement plan. ACF will rescind the withholding of the portion of title IV-B and title IV-E funds related to specific goals or action steps as of the date at the end of the quarter in which they were determined to have been achieved.

(e) *Withholding of funds.*

(1) States determined not to be in substantial conformity that fail to successfully complete a program improvement plan will be notified by ACF of this final determination of nonconformity in writing within 10 business days after the relevant completion date specified in the plan, and advised of the amount of title IV-B and title IV-E funds which are to be withheld.

(2) Title IV-B and title IV-E funds will be withheld based on the following:

(i) If the State fails to submit status reports in accordance with § 1355.35(d)(4), or if such reports indicate that the State is not making satisfactory progress toward achieving goals or actions steps, funds will be withheld at that time for a period beginning October 1 of the fiscal year for which the determination of nonconformity was made and ending on the specified completion date for the affected goal or action step.

(ii) Funds related to goals and action steps that have not been achieved by the specified completion date will be withheld at that time for a period beginning October 1 of the fiscal year for

which the determination of nonconformity was made and ending on the completion date of the affected goal or action step; and

(iii) The withholding of funds commensurate with the level of nonconformity at the end of the program improvement plan will begin at the latest completion date specified in the program improvement plan and will continue until a subsequent full review determines the State to be in substantial conformity or the State successfully completes a program improvement plan developed as a result of that subsequent full review.

(3) When the date the State is determined to be in substantial conformity or to have successfully completed a program improvement plan falls within a specific quarter, the amount of funds to be withheld will be computed to the end of that quarter.

(4) A State agency that refuses to participate in the development or implementation of a program improvement plan, as required by ACF, will be subject to the maximum increased withholding of 42 percent of its title IV-B and title IV-E funds, as described in paragraph (b)(8) of this section, for each year or portion thereof to which the withholding of funds applies.

(5) The State agency will be liable for interest on the amount of funds withheld by the Department, in accordance with the provisions of 45 CFR 30.13.

**§ 1355.37 Opportunity for Public Inspection of Review Reports and Materials.**

The State agency must make available for public review and inspection all statewide assessments (§ 1355.33(b)), report of findings (§ 1355.33(e)), and program improvement plans (§ 1355.35(a)) developed as a result of a full or partial child and family services review.

**§ 1355.38 Enforcement of section 471(a)(18) of the Act regarding the removal of barriers to interethnic adoption.**

(a) *Determination that a violation has occurred in the absence of a court finding.*

(1) If ACF becomes aware of a possible section 471(a)(18) violation, whether in the course of a child and family services review, the filing of a complaint, or through some other mechanism, it will refer such a case to the Department's Office for Civil Rights (OCR) for investigation.

(2) Based on the findings of the OCR investigation, ACF will determine if a violation of section 471(a)(18) has occurred. A section 471(a)(18) violation occurs if a State or an entity in the State:

(i) Has denied to any person the opportunity to become an adoptive or foster parent on the basis of the race, color, or national origin of the person, or of the child, involved;

(ii) Has delayed or denied the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved; or,

(iii) With respect to a State, maintains any statute, regulation, policy, procedure, or practice that on its face, is a violation as defined in paragraphs (a)(2)(i) and (2)(ii) of this section.

(3) ACF will provide the State or entity with written notification of its determination.

(4) If there has been no violation, there will be no further action. If ACF determines that there has been a violation of section 471(a)(18), it will take enforcement action as described in this section.

(5) Compliance with the Indian Child Welfare Act of 1978 (Pub. L. 95-608) does not constitute a violation of section 471(a)(18).

(b) *Corrective action and penalties for violations with respect to a person or based on a court finding.*

(1) A State found to be in violation of section 471(a)(18) with respect to a person, as described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section, will be penalized in accordance with paragraph (g)(2) of this section. A State determined to be in violation of section 471(a)(18) of the Act as a result of a court finding will be penalized in accordance with paragraph (g)(4) of this section. The State may develop, obtain approval of, and implement a plan of corrective action any time after it receives written notification from ACF that it is in violation of section 471(a)(18) of the Act.

(2) Corrective action plans are subject to ACF approval.

(3) If the corrective action plan does not meet the provisions of paragraph (d) of this section, the State must revise and resubmit the plan for approval until it has an approved plan.

(4) A State found to be in violation of section 471(a)(18) by a court must notify ACF within 30 days from the date of entry of the final judgement once all appeals have been exhausted, declined, or the appeal period has expired.

(c) *Corrective action for violations resulting from a State's statute, regulation, policy, procedure, or practice.*

(1) A State found to have committed a violation of the type described in paragraph (a)(2)(iii) of this section must develop and submit a corrective action plan within 30 days of receiving written

notification from ACF that it is in violation of section 471(a)(18). Once the plan is approved the State will have to complete the corrective action and come into compliance. If the State fails to complete the corrective action plan within six months and come into compliance, a penalty will be imposed in accordance with paragraph (g)(3) of this section.

(2) Corrective action plans are subject to ACF approval.

(3) If the corrective action plan does not meet the provisions of paragraph (d) of this section, the State must revise and resubmit the plan within 30 days from the date it receives a written notice from ACF that the plan has not been approved. If the State does not submit a revised corrective action plan according to the provisions of paragraph (d) of this section, withholding of funds pursuant to the provisions of paragraph (g) of this section will apply.

(d) *Contents of a corrective action plan.* A corrective action plan must:

(1) Identify the issues to be addressed;

(2) Set forth the steps for taking corrective action;

(3) Identify any technical assistance needs and Federal and non-Federal sources of technical assistance which will be used to complete the action steps; and,

(4) Specify the completion date. This date will be no later than 6 months from the date ACF approves the corrective action plan.

(e) *Evaluation of corrective action plans.* ACF will evaluate corrective action plans and notify the State (in writing) of its success or failure to complete the plan within 30 calendar days. If the State has failed to complete the corrective action plan, ACF will calculate the amount of reduction in the State's title IV-E payment and include this information in the written notification of failure to complete the plan.

(f) *Funds to be withheld.* The term "title IV-E funds" refers to the amount of Federal funds advanced or paid to the State for allowable costs incurred by a State for foster care maintenance payments, adoption assistance payments, administrative, and training costs under title IV-E and the State's allotment for the Independent Living program.

(g) *Reduction of title IV-E funds.*

(1) Title IV-E funds shall be reduced in specified amounts in accordance with paragraph (h) of this section under the following circumstances:

(i) A determination that a State is in violation of section 471(a)(18) of the Act with respect to a person as described in

paragraphs (a)(2)(i) and (a)(2)(ii) of this section, or;

(ii) After a State's failure to implement and complete a corrective action plan and come into compliance as described in paragraph (c) of this section.

(2) Once ACF notifies a State, in writing, that it has committed a section 471(a)(18) violation with respect to a person, the State's title IV-E funds will be reduced for the fiscal quarter in which the State received such written notification and for each succeeding quarter within that fiscal year or until the State completes a corrective action plan and comes into compliance, whichever is earlier.

(3) For States that fail to complete a corrective action plan within 6 months, title IV-E funds will be reduced by ACF for the fiscal quarter in which the State received notification of its violation. The reduction will continue for each succeeding quarter within that fiscal year or until the State completes the corrective action plan and comes into compliance, whichever is earlier.

(4) If, as a result of a court finding, a State is determined to be in violation of section 471(a)(18) of the Act, ACF will assess a penalty without further investigation. Once the State is notified (in writing) of the violation, its title IV-E funds will be reduced for the fiscal quarter in which the court finding was made and for each succeeding quarter within that fiscal year or until the State completes a corrective action plan and comes into compliance, whichever is sooner.

(5) The maximum number of quarters that a State will have its title IV-E funds reduced due to a finding of a State's failure to conform to section 471(a)(18) of the Act is limited to the number of quarters within the fiscal year in which a determination of nonconformity was made. However, an uncorrected violation may result in a subsequent review, another finding, and additional penalties.

(6) No penalty will be imposed for a court finding of a violation of section 471(a)(18) until the judgement is final and all appeals have been exhausted, declined, or the appeal period has expired.

(h) *Determination of the amount of reduction of Federal funds.* ACF will determine the reduction in title IV-E funds due to a section 471(a)(18) violation in accordance with section 474(d)(1) of the Act.

(1) State agencies that violate section 471(a)(18) with respect to a person or fail to implement or complete a corrective action plan as described in paragraph (c) of this section will be

subject to a penalty. The penalty structure will follow section 474(d)(1) of the Act. Penalties will be levied for the quarter of the fiscal year in which the State is notified of its section 471(a)(18) violation, and for each succeeding quarter within that fiscal year until the State comes into compliance with section 471(a)(18). The reduction in title IV-E funds will be computed as follows:

(i) 2 percent of the State's title IV-E funds for the fiscal year quarter, as defined in paragraph (f) of this section, for the first finding of noncompliance in that fiscal year;

(ii) 3 percent of the State's title IV-E funds for the fiscal year quarter, as defined in paragraph (f) of this section, for the second finding of noncompliance in that fiscal year;

(iii) 5 percent of the State's title IV-E funds for the fiscal year quarter, as defined in paragraph (f) of this section, for the third or subsequent finding of noncompliance in that fiscal year.

(2) Any entity (other than the State agency) which violates section 471(a)(18) of the Act during a fiscal quarter with respect to any person must remit to the Secretary all title IV-E funds paid to it by the State during the quarter in which the entity is notified of its violation.

(3) No fiscal year payment to a State will be reduced by more than 5 percent of its title IV-E funds, as defined in paragraph (f) of this section, where the State has been determined to be out of compliance with section 471(a)(18) of the Act.

(4) The State agency or entity, as applicable, will be liable for interest on the amount of funds reduced by the Department, in accordance with the provisions of 45 CFR 30.13.

#### **§ 1355.39 Administrative and judicial review.**

States determined not to be in substantial conformity with titles IV-B and IV-E State plan requirements, or a State or entity in violation of section 471(a)(18) of the Act:

(a) May appeal, pursuant to 45 CFR part 16, the final determination and any subsequent withholding of, or reduction in, funds to the HHS Departmental Appeals Board within 60 days after receipt of a notice of nonconformity described in § 1355.36(e)(1) of this part, or receipt of a notice of noncompliance by ACF as described in § 1355.38(a)(3) of this part; and

(b) Will have the opportunity to obtain judicial review of an adverse decision of the Departmental Appeals Board within 60 days after the State or entity receives notice of the decision by the Board. Appeals of adverse

Department Appeals Board decisions must be made to the district court of the United States for the judicial district in which the principal or headquarters office of the agency responsible for administering the program is located.

(c) The procedure described in paragraphs (a) and (b) of this section will not apply to a finding that a State or entity has been determined to be in violation of section 471(a)(18) which is based on a judicial decision.

4. Amend § 1355.40 by revising the second sentence in paragraph (a)(2) to read as follows:

§ 1355.40 Foster care and adoption data collection.

(a) Scope of the data collection system.

- (1) \* \* \*
(2) \* \* \* This includes American Indian children covered under the assurances in section 422(b)(10) of the Act on the same basis as any other child. \* \* \*

Appendix A to Part 1355—Foster Care Data Elements

5. Appendix A to part 1355 is amended as follows:

- a. Amend Section I by revising data elements II.C.1. and heading of 2., IX.C.1., headings of 2. and 4., and IX.C.3.
b. Amend Section II by revising the first paragraph on "Reporting population" and the instruction paragraphs II.C. and IX.C., and
c. Remove paragraph IX.D. to read as follows:

Section I—Foster Care Data Elements

- II. Child's Demographic Information
\* \* \* \* \*

- C. Race/Ethnicity
1. Race
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
2. Hispanic or Latino Ethnicity \_\_\_\_\_
\* \* \* \* \*

IX. Foster Family Home-Parent(s) Data (To be answered only if Section V., Part A. CURRENT PLACEMENT SETTING is 1, 2 or 3)

- \* \* \* \* \*
C. Race/Ethnicity
1. Race of 1st Foster Caretaker
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White

- f. Unable to Determine
2. Hispanic or Latino Ethnicity of 1st Foster Caretaker \_\_\_\_\_
\* \* \* \* \*
3. Race of 2nd Foster Caretaker (If Applicable)
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
4. Hispanic or Latino Ethnicity of 2nd Foster Caretaker (If applicable) \_\_\_\_\_
\* \* \* \* \*

Section II—Definitions of and Instructions for Foster Care Data Elements

Reporting population. The population to be included in this reporting system includes all children in foster care under the responsibility of the State agency administering or supervising the administration of the title IV-B Child and Family Services State plan and the title IV-E State plan; that is, all children who are required to be provided the assurances of section 422(b)(10) of the Social Security Act.

II. Child's Demographic Information

- \* \* \* \* \*
C. Race/Ethnicity\*\*
1. Race—In general, a person's race is determined by how they define themselves or by how others define them. In the case of young children, parents determine the race of the child. Indicate all races (a through e) that apply with a "1." For those that do not apply, indicate a "0." Indicate "f. Unable to Determine" with a "1" if it applies and a "0" if it does not.

American Indian or Alaska Native—A person having origins in any of the original peoples of North or South America (including Central America), and who maintains tribal affiliation or community attachment.

Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

Black or African American—A person having origins in any of the black racial groups of Africa.

Native Hawaiian or Other Pacific Islander—A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Unable to Determine—The specific race category is "unable to determine" because the child is very young or is severely disabled and no person is available to identify the child's race. "Unable to determine" is also used if the parent, relative or guardian is unwilling to identify the child's race.

2. Hispanic or Latino Ethnicity—Answer "yes" if the child is of Mexican, Puerto Rican, Cuban, Central or South American

origin, or a person of other Spanish cultural origin regardless of race. Whether or not a person is Hispanic or Latino is determined by how they define themselves or by how others define them. In the case of young children, parents determine the ethnicity of the child. "Unable to Determine" is used because the child is very young or is severely disabled and no person is available to determine whether or not the child is Hispanic or Latino. "Unable to determine" is also used if the parent, relative or guardian is unwilling to identify the child's ethnicity.

\* \* \* \* \*

IX. Family Foster Home-Parent(s) Data

\* \* \* \* \*

C. Race—Indicate the race for each of the foster parent(s). See instructions and definitions for the race categories under data element II.C.1. Use "f. Unable to Determine" only when a parent is unwilling to identify his or her race. Hispanic or Latino Ethnicity—Indicate the ethnicity for each of the foster parent(s). See instructions and definitions under data element II.C.2. Use "f. Unable to Determine" only when a parent is unwilling to identify his or her ethnicity.

\* \* \* \* \*

Appendix B to Part 1355—Adoption Data Elements

6. Appendix B to part 1355 is amended as follows:

- a. Amend Section I by revising data elements II.C.1., headings of 2. and 4., II.C.3., II.C. and VI.C. b. Amend Section II by revising the instruction paragraphs II.C. and VI.C. to read as follows:

Section I—Adoption Data Elements

\* \* \* \* \*

II. Child's Demographic Information

\* \* \* \* \*

- C. Race/Ethnicity
1. Race
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
2. Hispanic or Latino Ethnicity \_\_\_\_\_
\* \* \* \* \*

VI. Adoptive Parents

\* \* \* \* \*

- C. Race/Ethnicity
1. Adoptive Mother's Race (If Applicable)
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
2. Hispanic or Latino Ethnicity of Mother (If Applicable) \_\_\_\_\_
\* \* \* \* \*
3. Adoptive Father's Race (If Applicable)
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander

- e. White
- f. Unable to Determine
- 4. Hispanic or Latino Ethnicity of Father (If Applicable) \_\_\_\_\_

\* \* \* \* \*

**Section II—Definitions of Instructions for Adoption Data Elements**

\* \* \* \* \*

**II. Child's Demographic Information**

\* \* \* \* \*

**C. Race/Ethnicity**

1. Race—In general, a person's race is determined by how they define themselves or by how others define them. In the case of young children, parents determine the race of the child. Indicate all races (a–e) that apply with a "1." For those that do not apply, indicate a "0." Indicate "f. Unable to Determine" with a 1" if it applies and a "0" if it does not.

American Indian or Alaska Native—A person having origins in any of the original peoples of North or South America (including Central America), and who maintains tribal affiliation or community attachment.

Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

Black or African American—A person having origins in any of the black racial groups of Africa.

Native Hawaiian or Other Pacific Islander—A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Unable to Determine—The specific race category is "unable to determine" because the child is very young or is severely disabled and no person is available to identify the child's race. "Unable to determine" is also used if the parent, relative or guardian is unwilling to identify the child's race.

2. Hispanic or Latino Ethnicity—Answer "yes" if the child is of Mexican, Puerto Rican, Cuban, Central or South American origin, or a person of other Spanish cultural origin regardless of race. Whether or not a person is Hispanic or Latino is determined by how they define themselves or by how others define them. In the case of young children, parents determine the ethnicity of the child. "Unable to Determine" is used because the child is very young or is severely disabled and no other person is available to determine whether or not the child is Hispanic or Latino. "Unable to determine" is also used if the parent, relative or guardian is unwilling to identify the child's ethnicity.

\* \* \* \* \*

**VI. Adoptive Parents**

\* \* \* \* \*

C. Race/Ethnicity—Indicate the race/ethnicity for each of the adoptive parent(s). See instructions and definitions for the race/ethnicity categories under data element II.C. Use "f. Unable to Determine" only when a parent is unwilling to identify his or her race or ethnicity.

\* \* \* \* \*

**Appendix D to Part 1355—Foster Care and Adoption Record Layouts**

7. Appendix D to part 1355 is amended as follows:

a. Amend Section A by revising 1.b.(2) and (3), revising the Element No., Data element description, and No. of numeric characters columns of the table under c. for certain elements, and revising the number of "Total characters";

b. Amend Section A by revising 2.b.(3) and the table under c. including the No. of characters for Element No. 02 and the number for "Record Length";

c. Amend Section B by revising 1.b.(2) and (3), revising the Element No., Data element description, and No. of numeric characters columns of the table under c. for certain elements, and revising the number of "Total characters"; and

d. Amend Section B by revising 2.b.(3) and the table under c. including the No. of characters for Element No. 02 and the number for "Record Length", to read as follows:

**A. Foster Care**

**1. Foster Care Semi-Annual Detailed Data Elements Record**

a. \* \* \*

b. \* \* \*

(2) Enter date values in year, month and day order (YYYYMMDD), e.g., 19991030 for October 30, 1999, or year and month order (YYYYMM), e.g., 199910 for October 1999. Leave the element value blank if dates are not applicable.

(3) For elements 8, 11–15, 26–40, 52, 54 and 59–65, which are "select all that apply" elements, enter a "1" for each element that applies, enter a zero for non-applicable elements.

\* \* \* \* \*

c. foster care Semi-Annual Detailed Data elements Record layout follows:

Element No.	Appendix A data element	Data element description	No. of numeric characters
02	I.B.	Report period ending date .....	6
05	I.E.	Date of most recent periodic review .....	8
06	II.A.	Child's date of birth .....	8
08	II.C.1.	Race .....	
08a		American Indian or Alaska native .....	1
08b		Asian .....	1
08c		Black or African American .....	1
08d		Native Hawaiian or Other Pacific Islander .....	1
08e		White .....	1
08f		Unable to Determine .....	1
09	II.C.2.	Hispanic or Latino Ethnicity .....	1
18	III.A.1.	Date of first removal from home .....	8

Element No.	Appendix A data element	Data element description	No. of numeric characters
20	III.A.3.	Date child was discharged from last foster care episode .....	8
21	III.A.4.	Date of latest removal from home .....	8
22	III.A.5.	Removal transaction date .....	8
23	III.B.1.	Date of placement in current foster care setting .....	8
45	VII.B.1.	Year of birth (1st principal caretaker) .....	4
46	VII.B.2.	Year of birth (2nd principal caretaker) .....	4
47	VIII.A.	Date of mother's parental rights termination .....	8
48	VIII.B.	Date of legal or putative father's parental rights .....	8
50	IX.B.1.	Year of birth (1st foster caretaker) .....	4
51	IX.B.2.	Year of birth (2nd foster caretaker) .....	4
52	IX.C.1.	Race of 1st foster caretaker .....	
52a		American Indian or Alaska Native .....	1
52b		Asian .....	1
52c		Black or African American .....	1
52d		Native Hawaiian or Other Pacific Islander .....	1
52e		White .....	1
52f		Unable to Determine .....	1
53	IX.C.2.	Hispanic or Latino ethnicity of 1st foster caretaker .....	1
54	IX.C.3.	Race of 2nd foster caretaker .....	
54a		American Indian or Alaska Native .....	1
54b		Asian .....	1
54c		Black or African American .....	1
54d		Native Hawaiian or Other Pacific Islander .....	1
54e		White .....	1
54f		Unable to Determine .....	1
55	IX.C.4.	Hispanic or Latino ethnicity of 2nd foster caretaker .....	1
56	X.A.1.	Date of discharge from foster care .....	8
57	X.A.2.	Foster care discharge transaction date .....	8
Total Characters .....			197

2. Foster Care Semi-Annual Summary Data Elements Record

- a. \* \* \*
- b. \* \* \*

(3) Enter date values in year, month order (YYYYMM), e.g., 199912 for December 1999.

c. Foster Care Semi-Annual Summary Data Elements Record Layout follows:

Element No.	Summary data file	No. of characters
02	Report period ending date (YYYYMM).	6
	Record Length	174

**B. Adoption**

1. Adoption Semi-Annual Detailed Data Elements Record

- a. \* \* \*

- b. \* \* \*

(2) Enter date values in year, month and day order (YYYYMMDD), e.g., 19991030 for October 30, 1999, or year and month order (YYYYMM), e.g., 199910 for October 1999. Leave the element value blank if dates are not applicable.

(3) For elements 7, 11-15, 25, 27 and 29-32 which are "select all that apply" elements, enter a "1" for each element that applies; enter a zero for non-applicable elements.

c. Adoption Semi-Annual Detailed Data Elements Record Layout follows:

Element No.	Appendix B data element	Data element description	No. of numeric characters
02	I.B.	Report period ending date .....	6
05	II.A.	Date of birth .....	6
07	II.C.1	Race.	
07a		American Indian or Alaska Native .....	1
07b		Asian .....	1
07c		Black or African American .....	1
07d		Native Hawaiian or Other Pacific Islander .....	1

Element No.	Appendix B data element	Data element description	No. of numeric characters
07e		White .....	1
07f		Unable to Determine .....	1
08	II.C.2.	Hispanic or Latino ethnicity .....	1
		* * * * *	
16	IV.A.1	Mother's year of birth .....	4
17	IV.A.2.	Father's (Putative or legal) year of birth .....	4
		* * * * *	
19	V.A.1.	Date of mother's termination of parental rights .....	8
20	V.A.2.	Date of father's termination of parental rights .....	8
21	V.B.	Date adoption legalized .....	8
		* * * * *	
23	VI.B.1.	Mother's year of birth (if applicable) .....	4
24	VI.B.2.	Father's year of birth (if applicable) .....	4
25	VI.C.1.	Adoptive mother's race .....	
25a		American Indian or Alaska Native .....	1
25b		Asian .....	1
25c		Black or African American .....	1
25d		Native Hawaiian or Other Pacific Islander .....	1
25e		White .....	1
25f		Unable to Determine .....	1
26	VI.C.2.	Hispanic or Latino Ethnicity .....	1
27	VI.C.3.	Adoptive father's race .....	
27a		American Indian or Alaska Native .....	1
27b		Asian .....	1
27c		Black or African American .....	1
27d		Native Hawaiian or Other Pacific Islander .....	1
27e		White .....	1
27f		Unable to Determine .....	1
28	VI.C.4.	Hispanic or Latino Ethnicity .....	1
		Total Characters .....	111

2. Adoption Semi-Annual Summary Data Elements Record

- a. \* \* \*
- b. \* \* \*

(3) Enter data values in year, month order (YYYYMM), e.g., 199912 for December 1999.

c. Adoption Semi-Annual Summary Data Element Record Layout follows:

Element No.	Summary data file	No. of characters
02	Report period ending date (YYYYMM).	6
	Record Length	174

Appendix E to Part 1355—Data Standards

8. Appendix E to part 1355 is amended as follows:

a. Amend Section A.2. by adding paragraph a.(18);

b. Revise Section A.3. paragraph a.(1), and the element description for Element No. 09, 53, and 55 of the chart under b.(2);

c. Amend Section B.2. by revising paragraph a.(8) and adding paragraph a.(9); and

d. In Section B.3. revise paragraph a.(1), the element description for Element No. 08, 26 and 28 of the chart under b.(2), to read as follows:

A. Foster Care

\* \* \* \* \*

2. Detailed Data File Submission Standards

a. \* \* \*

(18) In Elements 8, 52, and 54, race categories ("a" through "e") and "f. Unable to Determine" cannot be coded "0," for it does not apply. If any of the race categories apply and are coded as "1" then "f. Unable to Determine" cannot also apply.

3. Missing Data Standards

\* \* \* \* \*

a. \* \* \*

(1) Data elements whose values fail internal consistency validations as outlined in A.2.a.(1)–(18) above, and

Element No.	Element description
09	Child's Hispanic or Latino Ethnicity
53	Hispanic or Latino Ethnicity of 1st foster caretaker

\* \* \* \* \*

\* \* \* \* \*

Element No.	Element description
55	Hispanic or Latino Ethnicity of 2nd foster caretaker

\* \* \* \* \*

B. Adoption

\* \* \* \* \*

2. Detailed Data Elements File Submission Standards

a. \* \* \*

(8) If the "Family Structure" (Element 22) is option 3, Single Female, then the Mother's Year of Birth (Element 23), the "Adoptive Mother's Race" (Element 25) and "Hispanic or Latino Ethnicity" (Element 26) must be completed. Similarly, if the "Family Structure" (Element 22) is option 4, Single Male, then the Father's Year of Birth (Element 24), the Adoptive Father's Race" (Element 27) and "Hispanic or Latino Ethnicity" (Element 28) must be completed. If the "Family Structure" (Element 22) is option 1 or 2, then both Mother's and Father's "Year of Birth," "Race" and "Hispanic or Latino Ethnicity" must be completed.

(9) In Elements 7, 25, and 27, race categories ("a" through "e") and "f. Unable to Determine" cannot be coded "0," for it does not apply. If any of the race categories apply and are coded as "1" then "f. Unable to Determine" cannot also apply.

\* \* \* \* \*

3. Missing Data Standards

\* \* \* \* \*

a. \* \* \*

(1) Data elements whose values fail internal consistency validations as outlined in 2.a.(1)–(9) above, and

\* \* \* \* \*

Element No.	Element description
08	Is the child of Hispanic or Latino ethnicity?
26	Hispanic or Latino ethnicity of mother
28	Hispanic or Latino ethnicity of father

**PART 1356—REQUIREMENTS APPLICABLE TO TITLE IV–E**

9. The authority citation for Part 1356 continues to read as follows:

**Authority:** 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*, and 42 U.S.C. 1302.

10. Section 1356.20 is amended by revising the first two sentences of paragraph (e)(4) to read as follows:

**§ 1356.20 State plan document and submission requirements.**

\* \* \* \* \*

(e) \* \* \*

(4) *Action.* Each Regional Administrator, ACF, has the authority to approve State plans and amendments thereto which provide for the administration of foster care maintenance payments and adoption assistance programs under section 471 of the Act. The Commissioner, ACYF, retains the authority to determine that proposed plan material is not approvable, or that a previously approved plan no longer meets the requirements for approval. \* \* \*

\* \* \* \* \*

11. Section 1356.21 is revised to read as follows:

**§ 1356.21 Foster care maintenance payments program implementation requirements.**

(a) *Statutory and regulatory requirements of the Federal foster care program.* To implement the foster care maintenance payments program provisions of the title IV–E State plan and to be eligible to receive Federal financial participation (FFP) for foster care maintenance payments under this part, a State must meet the requirements of this section, 45 CFR 1356.22, 45 CFR

1356.30, and sections 472, 475(1), 475(4), 475(5) and 475(6) of the Act.

(b) *Reasonable efforts.* The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child’s safety is assured; to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. In order to satisfy the “reasonable efforts” requirements of section 471(a)(15) (as implemented through section 472(a)(1) of the Act), the State must meet the requirements of paragraphs (b) and (d) of this section. In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child’s health and safety must be the State’s paramount concern.

(1) *Judicial determination of reasonable efforts to prevent a child’s removal from the home.*

(i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the title IV–E foster care maintenance payments program for the duration of that stay in foster care.

(2) *Judicial determination of reasonable efforts to finalize a permanency plan.*

(i) The State agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part, and at least once every twelve months thereafter while the child is in foster care.

(ii) If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made, the child becomes ineligible under title IV–E from the end of the twelfth month following the date the child is considered to have

entered foster care in accordance with the definition at § 1355.20 of this part, or the end of the month in which the most recent judicial determination of reasonable efforts to finalize a permanency plan was made, and remains ineligible until such a judicial determination is made.

(3) *Circumstances in which reasonable efforts are not required to prevent a child’s removal from home or to reunify the child and family.*

Reasonable efforts to prevent a child’s removal from home or to reunify the child and family are not required if the State agency obtains a judicial determination that such efforts are not required because:

(i) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) A court of competent jurisdiction has determined that the parent has been convicted of:

(A) Murder (which would have been an offense under section 1111(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(B) Voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(C) Aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter; or

(D) A felony assault that results in serious bodily injury to the child or another child of the parent; or,

(iii) The parental rights of the parent with respect to a sibling have been terminated involuntarily.

(4) *Concurrent planning.* Reasonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child and family.

(5) *Use of the Federal Parent Locator Service.* The State agency may seek the services of the Federal Parent Locator Service to search for absent parents at any point in order to facilitate a permanency plan.

(c) *Contrary to the welfare determination.* Under section 472(a)(1) of the Act, a child’s removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that

continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care.

(d) *Documentation of judicial determinations.* The judicial determinations regarding contrary to the welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan in effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order.

(1) If the reasonable efforts and contrary to the welfare judicial determinations are not included as required in the court orders identified in paragraphs (b) and (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that these required determinations have been made.

(2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts and contrary to the welfare judicial determinations.

(3) Court orders that reference State law to substantiate judicial determinations are not acceptable, even if State law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare or that removal can only be ordered after reasonable efforts have been made.

(e) *Trial home visits.* A trial home visit may not exceed six months in duration, unless a court orders a longer trial home visit. If a trial home visit extends beyond six months and has not been authorized by the court, or exceeds the time period the court has deemed appropriate, and the child is subsequently returned to foster care, that placement must then be considered a new placement and title IV-E eligibility must be newly established. Under these circumstances the judicial determinations regarding contrary to the welfare and reasonable efforts to prevent removal are required.

(f) *Case review system.* In order to satisfy the provisions of section 471(a)(16) of the Act regarding a case review system, each State's case review

system must meet the requirements of sections 475(5) and 475(6) of the Act.

(g) *Case plan requirements.* In order to satisfy the case plan requirements of sections 471(a)(16), 475(1) and 475(5) (A) and (D) of the Act, the State agency must promulgate policy materials and instructions for use by State and local staff to determine the appropriateness of and necessity for the foster care placement of the child. The case plan for each child must:

(1) Be a written document, which is a discrete part of the case record, in a format determined by the State, which is developed jointly with the parent(s) or guardian of the child in foster care; and

(2) Be developed within a reasonable period, to be established by the State, but in no event later than 60 days from the child's removal from the home pursuant to paragraph (k) of this section;

(3) Include a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the case plan goal is reunification and a discussion of how the placement is consistent with the best interests and special needs of the child. (FFP is not available when a court orders a placement with a specific foster care provider);

(4) Include a description of the services offered and provided to prevent removal of the child from the home and to reunify the family; and

(5) Document the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home in accordance with sections 475(1)(E) and (5)(E) of the Act. When the case plan goal is adoption, at a minimum, such documentation shall include child-specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems.

(This requirement has been approved by the Office of Management and Budget (OMB) under OMB control number 0980-0140)

(h) *Application of the permanency hearing requirements.*

(1) To meet the requirements of the permanency hearing, the State must, among other requirements, comply with section 475(5)(C) of the Act.

(2) In accordance with paragraph (b)(3) of this section, when a court determines that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days of that determination, unless the requirements of the

permanency hearing are fulfilled at the hearing in which the court determines that reasonable efforts to reunify the child and family are not required.

(3) If the State concludes, after considering reunification, adoption, legal guardianship, or permanent placement with a fit and willing relative, that the most appropriate permanency plan for a child is placement in another planned permanent living arrangement, the State must document to the court the compelling reason for the alternate plan. Examples of a compelling reason for establishing such a permanency plan may include:

(i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan;

(ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or,

(iii) the Tribe has identified another planned permanent living arrangement for the child.

(4) When an administrative body, appointed or approved by the court, conducts the permanency hearing, the procedural safeguards set forth in the definition of *permanency hearing* must be so extended by the administrative body.

(i) *Application of the requirements for filing a petition to terminate parental rights at section 475(5)(E) of the Social Security Act.* (1) Subject to the exceptions in paragraph (i)(2) of this section, the State must file a petition (or, if such a petition has been filed by another party, seek to be joined as a party to the petition) to terminate the parental rights of a parent(s):

(i) Whose child has been in foster care under the responsibility of the State for 15 of the most recent 22 months. The petition must be filed by the end of the child's fifteenth month in foster care. In calculating when to file a petition for termination of parental rights, the State:

(A) Must calculate the 15 out of the most recent 22 month period from the date the child entered foster care as defined at section 475(5)(F) of the Act;

(B) Must use a cumulative method of calculation when a child experiences multiple exits from and entries into foster care during the 22 month period;

(C) Must not include trial home visits or runaway episodes in calculating 15 months in foster care; and,

(D) Need only apply section 475(5)(E) of the Act to a child once if the State

does not file a petition because one of the exceptions at paragraph (i)(2) of this section applies;

(ii) Whose child has been determined by a court of competent jurisdiction to be an abandoned infant (as defined under State law). The petition to terminate parental rights must be filed within 60 days of the judicial determination that the child is an abandoned infant; or,

(iii) Who has been convicted of one of the felonies listed at paragraph (b)(3)(ii) of this section. Under such circumstances, the petition to terminate parental rights must be filed within 60 days of a judicial determination that reasonable efforts to reunify the child and parent are not required.

(2) The State may elect not to file or join a petition to terminate the parental rights of a parent per paragraph (i)(1) of this section if:

(i) At the option of the State, the child is being cared for by a relative;

(ii) The State agency has documented in the case plan (which must be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the individual child. Compelling reasons for not filing a petition to terminate parental rights include, but are not limited to:

(A) Adoption is not the appropriate permanency goal for the child; or,

(B) No grounds to file a petition to terminate parental rights exist; or,

(C) The child is an unaccompanied refugee minor as defined in 45 CFR 400.111; or

(D) There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights; or

(iii) The State agency has not provided to the family, consistent with the time period in the case plan, services that the State deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required.

(3) When the State files or joins a petition to terminate parental rights in accordance with paragraph (i)(1) of this section, it must concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child.

(j) *Child of a minor parent in foster care.* Foster care maintenance payments made on behalf of a child placed in a foster family home or child care institution, who is the parent of a son or daughter in the same home or institution, must include amounts which are necessary to cover costs incurred on behalf of the child's son or daughter. Said costs must be limited to funds expended on those items

described in the definition of *foster care maintenance payments*.

(k) *Removal from the home of a specified relative.*

(1) For the purposes of meeting the requirements of section 472(a)(1) of the Act, a removal from the home must occur pursuant to:

(i) A voluntary placement agreement entered into by a parent or relative which leads to a physical or constructive removal (i.e., a non-physical or paper removal of custody) of the child from the home; or

(ii) A judicial order for a physical or constructive removal of the child from a parent or specified relative.

(2) A removal has not occurred in situations where legal custody is removed from the parent or relative and the child remains with the same relative in that home under supervision by the State agency.

(3) A child is considered constructively removed on the date of the first judicial order removing custody, even temporarily, from the appropriate specified relative or the date that the voluntary placement agreement is signed by all relevant parties.

(l) *Living with a specified relative.* For purposes of meeting the requirements for living with a specified relative prior to removal from the home under section 472(a)(1) of the Act and all of the conditions under section 472(a)(4), one of the two following situations must apply:

(1) The child was living with the parent or specified relative, and was AFDC eligible in that home in the month of the voluntary placement agreement or initiation of court proceedings; or

(2) The child had been living with the parent or specified relative within six months of the month of the voluntary placement agreement or the initiation of court proceedings, and the child would have been AFDC eligible in that month if s/he had still been living in that home.

(m) *Review of payments and licensing standards.* In meeting the requirements of section 471(a)(11) of the Act, the State must review at reasonable, specific, time-limited periods to be established by the State:

(1) The amount of the payments made for foster care maintenance and adoption assistance to assure their continued appropriateness; and

(2) The licensing or approval standards for child care institutions and foster family homes.

(n) *Foster care goals.* The specific foster care goals required under section 471(a)(14) of the Act must be incorporated into State law by statute or

administrative regulation with the force of law.

(o) *Notice and opportunity to be heard.* The State must provide the foster parent(s) of a child and any preadoptive parent or relative providing care for the child with timely notice of and an opportunity to be heard in permanency hearings and six-month periodic reviews held with respect to the child during the time the child is in the care of such foster parent, preadoptive parent, or relative caregiver. Notice of and an opportunity to be heard does not include the right to standing as a party to the case.

12. Section 1356.30 is redesignated as § 1356.22 and revised to read as follows:

**§ 1356.22 Implementation requirements for children voluntarily placed in foster care.**

(a) As a condition of receipt of Federal financial participation (FFP) in foster care maintenance payments for a dependent child removed from his home under a voluntary placement agreement, the State must meet the requirements of:

(1) Section 472 of the Act, as amended;

(2) Sections 422(b)(10) and 475(5) of the Act;

(3) 45 CFR 1356.21 (f), (g), (h), and (i); and

(4) The requirements of this section.

(b) Federal financial participation is available only for voluntary foster care maintenance expenditures made within the first 180 days of the child's placement in foster care unless there has been a judicial determination by a court of competent jurisdiction, within the first 180 days of such placement, to the effect that the continued voluntary placement is in the best interests of the child.

(c) The State agency must establish and maintain a uniform procedure or system, consistent with State law, for revocation by the parent(s) of a voluntary placement agreement and return of the child.

13. New § 1356.30 is added to read as follows:

**§ 1356.30 Safety requirements for foster care and adoptive home providers.**

(a) Unless an election provided for in paragraph (d) of this section is made, the State must provide documentation that criminal records checks have been conducted with respect to prospective foster and adoptive parents.

(b) The State may not approve or license any prospective foster or adoptive parent, nor may the State claim FFP for any foster care maintenance or adoption assistance payment made on behalf of a child placed in a foster home

operated under the auspices of a child placing agency or on behalf of a child placed in an adoptive home through a private adoption agency, if the State finds that, based on a criminal records check conducted in accordance with paragraph (a) of this section, a court of competent jurisdiction has determined that the prospective foster or adoptive parent has been convicted of a felony involving:

- (1) Child abuse or neglect;
- (2) Spousal abuse;
- (3) A crime against a child or children (including child pornography); or,
- (4) A crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery.

(c) The State may not approve or license any prospective foster or adoptive parent, nor may the State claim FFP for any foster care maintenance or adoption assistance payment made on behalf of a child placed in a foster home operated under the auspices of a child placing agency or on behalf of a child placed in an adoptive home through a private adoption agency, if the State finds, based on a criminal records check conducted in accordance with paragraph (a) of this section, that a court of competent jurisdiction has determined that the prospective foster or adoptive parent has, within the last five years, been convicted of a felony involving:

- (1) Physical assault;
- (2) Battery; or,
- (3) A drug-related offense.

(d)(1) The State may elect not to conduct or require criminal records checks on prospective foster or adoptive parents by:

(i) Notifying the Secretary in a letter from the Governor; or

(ii) Enacting State legislation.

(2) Such an election also removes the State's obligation to comport with paragraphs (b) and (c) of this section.

(e) In all cases where the State opts out of the criminal records check requirement, the licensing file for that foster or adoptive family must contain documentation which verifies that safety considerations with respect to the caretaker(s) have been addressed.

(f) In order for a child care institution to be eligible for title IV-E funding, the licensing file for the institution must contain documentation which verifies that safety considerations with respect to the staff of the institution have been addressed.

14. Section 1356.50 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 1356.50 Withholding of funds for noncompliance with the approved title IV-E State plan.**

(a) To be in compliance with the title IV-E State plan requirements, a State must meet the requirements of the Act and 45 CFR 1356.20, 1356.21, 1356.30, and 1356.40 of this part.

(b) To be in compliance with the title IV-E State plan requirements, a State that chooses to claim FFP for voluntary placements must meet the requirements of the Act, 45 CFR 1356.22 and paragraph (a) of this section; and

\* \* \* \* \*

15. Section 1356.60 is amended by revising paragraph (b)(1) and removing paragraph (c)(4) to read as follows:

**§ 1356.60 Fiscal requirements (title IV-E).**

\* \* \* \* \*

(b) *Federal matching funds for State and local training for foster care and adoption assistance under title IV-E.*

(1) Federal financial participation is available at the rate of seventy-five percent (75%) in the costs of:

(i) Training personnel employed or preparing for employment by the State or local agency administering the plan, and;

(ii) Providing short-term training (including travel and per diem expenses) to current or prospective foster or adoptive parents and the members of the state licensed or approved child care institutions providing care to foster and adopted children receiving title IV-E assistance.

\* \* \* \* \*

**§§ 1356.65 and 1356.70 [Removed]**

16. Sections 1356.65 and 1356.70 are removed.

17. New § 1356.71 is added to read as follows:

**§ 1356.71 Federal review of the eligibility of children in foster care and the eligibility of foster care providers in title IV-E programs.**

(a) *Purpose, scope and overview of the process.*

(1) This section sets forth requirements governing Federal reviews of State compliance with the title IV-E eligibility provisions as they apply to children and foster care providers under paragraphs (a) and (b) of section 472 of the Act.

(2) The requirements of this section apply to State agencies that receive Federal payments for foster care under title IV-E of the Act.

(3) The review process begins with a primary review of foster care cases for the title IV-E eligibility requirements. States determined to be in substantial compliance based on the primary

review will not be subject to another review for three years. States that are determined not to be in compliance will develop and implement a program improvement plan designed to correct the areas of non-compliance, and a secondary review will be conducted after completion of the program improvement plan.

(b) *Composition of review team and preliminary activities preceding an on-site review.*

(1) The review team must be composed of representatives of the State agency, and ACF's Regional and Central Offices.

(2) The State must provide ACF with the complete payment history for each of the sample and oversample cases prior to the on-site review.

(c) *Sampling guidance and conduct of review.*

(1) The list of sampling units in the target population (*i.e.*, the sampling frame) will be drawn by ACF statistical staff from the Adoption and Foster Care Analysis and Reporting System (AFCARS) data which are transmitted by the State agency to ACF. The sampling frame will consist of cases of children who were eligible for foster care maintenance payments during the reporting period reflected in a State's most recent AFCARS data submission. For the initial primary review, if these data are not available or are deficient, an alternative sampling frame, consistent with one AFCARS six-month reporting period, will be selected by ACF in conjunction with the State agency.

(2) A sample of 80 cases (plus a 10 percent oversample of eight cases) from the title IV-E foster care program will be selected for the primary review utilizing probability sampling methodologies. Usually, the chosen methodology will be simple random sampling, but other probability samples may be utilized, when necessary and appropriate.

(3) Cases from the oversample will be substituted and reviewed for each of the original sample of 80 cases which is found to be in error.

(4) At the completion of the primary review, the review team will determine the number of ineligible cases. When the total number of ineligible cases does not exceed eight, ACF can conclude with a probability of 88 percent that in a population of 1000 or more cases the population ineligibility case error rate is less than 15 percent and the State will be considered in substantial compliance. For primary reviews held subsequent to the initial primary reviews, the acceptable population ineligibility case error rate threshold will be reduced from less than 15 percent (eight or fewer ineligible cases)

to less than 10 percent (four or fewer ineligible cases)). A State agency which meets this standard is considered to be in "substantial compliance" (see paragraph (h) of this section). A disallowance will be assessed for the ineligible cases for the period of time the cases are ineligible.

(5) A State which has been determined to be in "noncompliance" (*i.e.*, not in substantial compliance) will be required to develop a program improvement plan according to the specifications discussed in paragraph (i) of this section, as well as undergo a secondary review. For the secondary review, a sample of 150 cases (plus a 10 percent oversample of 15 cases) will be drawn from the most recent AFCARS submission. Usually, the chosen methodology will be simple random sampling, but other probability samples may be utilized, when necessary and appropriate. Cases from the oversample will be substituted and reviewed for each of the original sample of 150 cases which is found to be in error.

(6) At the completion of the secondary review, the review team will calculate both the sample case ineligibility and dollar error rates for the cases determined ineligible during the review. An extrapolated disallowance equal to the lower limit of a 90 percent confidence interval for the population total dollars in error for the amount of time corresponding to the AFCARS reporting period will be assessed if both the child/provider (case) ineligibility and dollar error rates exceed 10 percent. If neither, or only one, of the error rates exceeds 10 percent, a disallowance will be assessed for the ineligible cases for the period of time the cases are ineligible.

(d) *Requirements subject to review.* States will be reviewed against the requirements of title IV-E of the Act regarding:

(1) The eligibility of the children on whose behalf the foster care maintenance payments are made (section 472(a)(1)-(4) of the Act) to include:

(i) Judicial determinations regarding "reasonable efforts" and "contrary to the welfare" in accordance with § 1356.21(b) and (c), respectively;

(ii) Voluntary placement agreements in accordance with § 1356.22;

(iii) Responsibility for placement and care vested with the State agency;

(iv) Placement in a licensed foster family home or child care institution; and,

(v) eligibility for AFDC under such State plan as it was in effect on July 16, 1996.

(2) Allowable payments made to foster care providers who comport with sections 471(a)(10), 471(a)(20), 472(b) and (c) of the Act and § 1356.30.

(e) *Review instrument.* A title IV-E foster care eligibility review checklist will be used when conducting the eligibility review.

(f) *Eligibility determination—child.* The case record of the child must contain sufficient documentation to verify a child's eligibility in accordance with paragraph (d)(1) of this section, in order to substantiate payments made on the child's behalf.

(g) *Eligibility determination—provider.*

(1) For each case being reviewed, the State agency must make available a licensing file which contains the licensing history, including a copy of the certificate of licensure/approval or letter of approval, for each of the providers in the following categories:

(i) Public child care institutions with 25 children or less in residence;

(ii) Private child care institutions;

(iii) Group homes; and

(iv) Foster family homes, including relative homes.

(2) The licensing file must contain documentation that the State has complied with the safety requirements for foster and adoptive placements in accordance with § 1356.30.

(3) If the licensing file does not contain sufficient information to support a child's placement in a licensed facility, the State agency may provide supplemental information from other sources (*e.g.*, a computerized database).

(h) *Standards of compliance.*

(1) Disallowances will be taken, and plans for program improvement required, based on the extent to which a State is not in substantial compliance with recipient or provider eligibility provisions of title IV-E, or applicable regulations in 45 CFR parts 1355 and 1356.

(2) Substantial compliance and noncompliance are defined as follows:

(i) *Substantial compliance*—For the primary review (of the sample of 80 cases), no more than eight of the title IV-E cases reviewed may be determined to be ineligible. (This critical number of allowable "errors," *i.e.*, ineligible cases, is reduced to four errors or less in primary reviews held subsequent to the initial primary review). For the secondary review (if required), *substantial compliance* means either the case ineligibility or dollar error rate does not exceed 10 percent.

(ii) *Noncompliance*—means not in substantial compliance. For the primary review (of the sample of 80 cases), nine

or more of the title IV-E cases reviewed must be determined to be ineligible. (This critical number of allowable "errors," *i.e.*, ineligible cases, is reduced to five or more in primary reviews subsequent to the initial primary review). For the secondary review (if required), *noncompliance* means both the case ineligibility and dollar error rates exceed 10 percent.

(3) ACF will notify the State in writing within 30 calendar days after the completion of the review of whether the State is, or is not, operating in substantial compliance.

(4) States which are determined to be in substantial compliance must undergo a subsequent review after a minimum of three years.

(i) *Program improvement plans.*

(1) States which are determined to be in noncompliance with recipient or provider eligibility provisions of title IV-E, or applicable regulations in 45 CFR Parts 1355 and 1356, will develop a program improvement plan designed to correct the areas determined not to be in substantial compliance. The program improvement plan will:

(i) Be developed jointly by State and Federal staff;

(ii) Identify the areas in which the State's program is not in substantial compliance;

(iii) Not extend beyond one year. A State will have a maximum of one year in which to implement and complete the provisions of the program improvement plan unless State legislative action is required. In such instances, an extension may be granted with the State and ACF negotiating the terms and length of such extension that shall not exceed the last day of the first legislative session after the date of the program improvement plan; and

(iv) Include:

(A) Specific goals;

(B) The action steps required to correct each identified weakness or deficiency; and,

(C) a date by which each of the action steps is to be completed.

(2) States determined not to be in substantial compliance as a result of a primary review must submit the program improvement plan to ACF for approval within 90 calendar days from the date the State receives written notification that it is not in substantial compliance. This deadline may be extended an additional 30 calendar days when a State agency submits additional documentation to ACF in support of cases determined to be ineligible as a result of the on-site eligibility review.

(3) The ACF Regional Office will intermittently review, in conjunction with the State agency, the State's

progress in completing the prescribed action steps in the program improvement plan.

(4) If a State agency does not submit an approvable program improvement plan in accordance with the provisions of paragraphs (i)(1) and (2) of this section, ACF will move to a secondary review in accordance with paragraph (c) of this section.

(j) *Disallowance of funds.* The amount of funds to be disallowed will be determined by the extent to which a State is not in substantial compliance with recipient or provider eligibility provisions of title IV-E, or applicable regulations in 45 CFR parts 1355 and 1356.

(1) States which are in found to be in substantial compliance during the primary or secondary review will have disallowances (if any) determined on the basis of individual cases reviewed and found to be in error. The amount of disallowance will be computed on the basis of payments associated with ineligible cases for the entire period of time that each case has been ineligible.

(2) States which are found to be in noncompliance during the primary review will have disallowances determined on the basis of individual cases reviewed and found to be in error, and must implement a program

improvement plan in accordance with the provisions contained within it. A secondary review will be conducted no later than during the AFCARS reporting period which immediately follows the program improvement plan completion date on a sample of 150 cases drawn from the State's most recent AFCARS data. If both the case ineligibility and dollar error rates exceed 10 percent the State is in noncompliance and an additional disallowance will be determined based on extrapolation from the sample to the universe of claims paid for the duration of the AFCARS reporting period (*i.e.*, all title IV-E funds expended for a case during the quarter(s) that case is ineligible). If either the case ineligibility or dollar rate does not exceed 10 percent, the amount of disallowance will be computed on the basis of payments associated with ineligible cases for the entire period of time the case has been determined to be ineligible.

(3) The State agency will be liable for interest on the amount of funds disallowed by the Department, in accordance with the provisions of 45 CFR 30.13.

(4) States may appeal any disallowance actions taken by ACF to the HHS Departmental Appeals Board in

accordance with regulations at 45 CFR Part 16.

#### **PART 1357—REQUIREMENTS APPLICABLE TO TITLE IV-B**

18. The authority citation for part 1357 continues to read as follows:

*Authority:* 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*; 42 U.S.C. 1302.

19. Section 1357.40 is amended by revising paragraph (d)(6) to read as follows:

#### **§ 1357.40 Direct payments to Indian Tribal Organizations (title IV-B, subpart 1, child welfare services).**

\* \* \* \* \*

(d) \* \* \*

(6) In order to determine the amount of Federal funds available for a direct grant to an eligible ITO, the Department shall first divide the State's title IV-B allotment by the number of children in the State, then multiply the resulting amount by a multiplication factor determined by the Secretary, and then multiply that amount by the number of Indian children in the ITO population. The multiplication factor will be set at a level designed to achieve the purposes of the act and revised as appropriate.

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