Approved: March 6, 2000
Date

MINUTES OF THE SENATE WAYS & MEANS COMMITTEE.

The meeting was called to order by Chairperson Dave Kerr at 11:00 a.m. on February 29, 2000 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: Alan Conroy, Chief Fiscal Analyst, KLRD
Rae Anne Davis, KS Legislative Research Department
Debra Hollon, KS Legislative Research Department
Norman Furse, Revisor of Statutes
Michael Corrigan, Asst. Revisor of Statutes
Judy Bromich, Administrative Assistant to the Chairman
Ronda Miller, Committee Secretary

Conferees appearing before the committee:
Secretary Janet Schalansky, SRS
Joyce Allegrucci, Assistant Secretary for Children & Family Policy, SRS
Bruce Linhos, Childrens' Alliance
Melissa Ness, Kansas Childrens' Service League
Maureen Mahoney, General Counsel, Kaw Valley Center
Judge Tom Graber, 30th Judicial District, Wellington, Kansas
Don Hymer, Assistant District Attorney, Johnson County
Karen Langston, Sedgwick County District Attorney's Office

Others attending: See attached list

SB 633: Child in need of care; defining child in need of protection and youth in need of community intervention; creating the family services and community intervention fund

Kathie Sparks, Legislative Research Department, briefly noted the following provisions of **SB 633**:

- divides "child in need of care" into two categories; those who need community services and those who need protection
- requires the Secretary of SRS to prove that youth in need of community services can be put in out of home placement
- brings Kansas law into compliance with Federal Adoption and Safe Families Act (ASFA)
- allows judges, upon appointing permanent guardianship, to "discharge" a child from jurisdiction of the court
- allows SRS and KDHE to share information
- allows for the provision of childrens' services by for-profit entities
- requires county and district attorneys to list specifics when filing petitions alleging child in need of care

Secretary Janet Schalansky, Department of Social and Rehabilitation Services, appeared before the Committee in support of **SB 633** and reviewed her written testimony. (Attachment 1)

Joyce Allegrucci, Assistant Secretary for Children and Family Policy, SRS, reviewed her written testimony in support of **SB 633**. (Attachment 2) She pointed out that her written testimony includes answers to "Frequently Asked Questions about Youth In Need of Community Services." Other documents distributed to members on behalf of the Department of Social and Rehabilitation Services were proposed amendments to **SB 633** (Attachment 3) and copies of the "Federal Register Part II, Department of Health and Human Services, Administration for Children & Families, 45 CFR Parts 1355, 1356, and 1357, Title IV-E Foster Care Eligibility Reviews & Child & Family Services State Plan Reviews; Final

Rule." (Attachment 4)

In answer to a question, Asst. Secretary Allegrucci stated that no standards will be changed in the determination of "threat to safety" and added that staff training sessions on assessment are being held across the state.

Asst. Sec. Allegrucci told members that the Department believes that two-thirds of the 1800 Children in Need of Care who are not in that category due to abuse or neglect could be safely served in their homes with community services. She discussed the change in attitude about how to best protect children in need of care and called attention to information about "reactive attachment disorder." (Attachment 2, 39-47) In answer to a question, the Assistant Secretary stated that the current computer system is nearly 100% capable of handling the requirements necessary to comply with Title IV-E, but will need some corrective action. She indicated that currently the state receives $8 million in Title IV-E monies, and is working to increase that amount.

There was discussion of the Family Preservation program, and questions regarding the Department's simultaneous timing for the letting of contracts for that program and support for the implementation of **SB 633.** The Assistant Secretary stated that the families served under the Child in Need of Care Code are more troubled, need longer and more intensive services, and require longer follow-up than provided through Family Preservation. She said that Family Preservation would be a component of "Children in Need," but if all the families were put into that contract, it would be "swamped" with the number of families and the difficulty of services required by those families.

Bruce Linhos, representing the Children's Alliance of Kansas, appeared before the Committee in support of **SB 633** and reviewed his written testimony. (Attachment 5) Though he expressed support for the intent of **SB 633**, he also highlighted some issues and suggestions regarding its implementation.

Melissa Ness, Kansas Children's Service League, presented testimony in support of **SB 633**. (Attachment 6) Ms. Ness told members that the focus has shifted from removing children from their home to creating services that help keep families together. She stated that **SB 633** provides the framework to make the needs of these children a priority and attempts to keep the system contemporary. She added that KCSL's role with multi disciplinary teams has been to help with start-up and provide technical assistance. Ms. Ness commented that community programs across the state have different levels of sophistication and strength, and KCSL has conversed with SRS about using their grant to identify community services that are needed.

Judge Thomas Graber, 30th Judicial District, Wellington, Kansas appeared before the Committee and presented written testimony in opposition to **SB 633**. (Attachment 7) He stated that he does not know of one judge in Kansas who agrees with **SB 633** as it is written. Though no judge disputes that children in need of care may be better served at home, the question is how to accomplish that without putting children at risk. He stated that he believes **SB 633** may cause hazard and risk rather than provide protection or services for children. Judge Graber cited other reasons for his opposition to **SB 633** (both the original bill & the amended version provided by SRS:

- the amendments offered by SRS eliminate long term foster care as one of the approved options for planned permanent living arrangements and limit it to adoption or permanent guardianship. (He reviewed Sub H(3) of 1356.21)
- the court would be required to have approval from SRS for out of home placement (He noted that SRS is not always available and services are not uniform across the state. He stated that, under this proposal, if SRS has a recommendation to protect the safety of the child and the court finds that to be reasonable, the court could remove a child from the home only for the period of time required to implement their plan. If SRS recommends that services be provided in the home, the services need to be **in place** rather than just **available.)**
- the multi disciplinary committee is limited in **SB 633** to investigation by SRS (The Judge would propose that their use be expanded even when SRS is not involved in order to better coordinate services.)

- the bill allows too much sharing of information (Judge Graber stated that everyone on the list could issue a subpoena if denied access to information. He said that the Department of Education has expressed concern about potential violation of federal breech of confidentiality. He noted that the SRS' amendments leave penalty provisions in place.)

Judge Graber concluded by saying that though community services need to be provided, the manner of accomplishing that is not done effectively in **SB 633**. He stated that the corrections that SRS says they're making in compliance with federal regulations is not always factual. For instance, he said that there is no federal regulation that states that the court should be mandated to set a date when the child will return home during the permanency hearing. He stated that judges who are reviewing reintegration cases need alternatives if the family fails to make adjustments within the determined time frame. He asked that the Committee review the language in **SB 461** which he said conflicts with **SB 633**.)

Chairman Kerr asked that Judge Graber provide a summary of his critical objections for the Committee's consideration because of time constraints.

Karen Langston appeared before the Committee as a representative of the Sedgwick County District Attorney's Office and as a child welfare advocate. She said that she had worked with children in a juvenile court arena since 1975 and expressed her belief that portions of **SB 633** were not in the best interests of children. She presented her written testimony in opposition to **SB 633** as written (Attachment 8) and stated that she would provide amended testimony to address the proposed amendments offered by SRS and would also provide a bullet summary of her opposition. She asked that the Committee consider recommending **SB 633** as a topic for interim study because it makes sweeping changes to the current system prior to determining whether those changes would better serve children in need of care.

Ms. Langston stated that it is her belief that the definition of Child in Need of Care does not need to be changed and would, in fact, make it difficult for county and district attorneys to decide "where a child fits" before making a recommendation for placement. She said that the current system requires that attorneys comply with law which says that either a child is in an emergency situation or the attorney has to show that reasonable efforts to avoid out of home placement have been made before asking for SRS custody. In answer to a question, Ms. Langston stated that she believes the court system is in compliance with ASFA and is meeting requirements for receipt of Title IV-E monies. She added that SRS had not said , "You need to change something to allow us to comply." Ms. Langston expressed her support for funding to support services in the communities such as Family Preservation.

Don Hymer, Assistant District Attorney, Johnson County, presented written testimony in opposition to **SB 633**. (Attachment 9) He stated that he believes the driving force behind **SB 633** is budget constraints and expressed concern that the bill requires the approval of SRS to accomplish removing a child from the home in a "YINC" (Youth in Need of Care) situation. Mr. Hymer also expressed concern that the new definitions are not required in order to comply with AFSA and that the bill eliminates long term foster care. He told members that current statute mandates that every reasonable effort be made before a child is removed from the home, so there is no need to change the law. He stated that, in his opinion, there is no reason to rework the whole Child in Need of Care Code if petitions and journal entries are properly written.

Chairman Kerr asked if there are children who are currently placed in foster care who would be safe in their homes if services were provided. Mr. Hymer responded there are, but SRS has a policy that if a child is not in their custody they cannot provide services. He suggested changing the policy rather than the law. Chairman Kerr inquired whether Mr. Hymer had any reason to doubt the number of children in foster care that SRS claims would not have to be placed outside the home with the change in definition. Mr. Hymer responded that he did not know any specifics, but believed many of those children might be runaways or truants.

Maureen Mahoney, General Counsel for Kaw Valley Center in Wyandotte County, provided written testimony for Committee members to review at a later date. (Attachment 10) She expressed support of finding ways to help families rather than placing children in foster care, but voiced a number of concerns

regarding **SB 633** which are enumerated in her written testimony. She highlighted the truancy program in Wyandotte County which illustrates one of many collaborative programs that can be used or built upon across the state to meet the needs of these children. In answer to a question, Ms. Mahoney stated that SRS would have to do a lot of work on intake in order to expand the Family Preservation program to address the needs of these families.

Written testimony prepared by Carol Smith on behalf of the United Community Services of Johnson County was distributed to members for their review at a later date. (Attachment 11) It was noted that the testimony raises questions about service needs, the time frame, and funding issues which her organization believes should be reviewed.

Chairman Kerr apologized to conferees for running out of time, referred **SB 633** to the SRS budget subcommittee, and invited conferees to attend the subcommittee meetings.

The Chairman announced that he is referring **SB 649** and **HB 2624** to the KPERS issues subcommittee for consideration.

The meeting was adjourned at 12:45 p.m. The next meeting will be March 1, 2000.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE WAYS & MEANS COMMITTEE GUEST LIST

DATE: February 29, 2000

NAME	REPRESENTING
Greg Tugman	DoB
Thomas H. Ansley	Sumner Co. Dist. Ct.
Mark Gleeson	OJA
TK Shively	KS Legal Services
Dodie Wellshear Johnson	KS Action for Children
Gary Brunk	KS Action for Children
Carol Smith	United Com. Services of Jo Co.
Bob Harder	Independent
Dub Rakestraw	Family Service and Guidance Center - Topeka
Ellen Piekalkiewicz	Assoc. of CMHC
Bill Hougill	Governor's Office
Joanna Haworth	KU Student
Bruce Linhos	Children's Alliance
Kathy Porter	OJA
Keith R Landis	Christian Science Committee on Publication for Kansas
Doug Bowman	CCECDS
Stacey Herman	SRS
Laura Howard	SRS
Don Jordan	SRS
Kevin Baron	Hein/Weir Chtd.

State of Kansas Department of Social and Rehabilitation Services

Janet Schalansky, Secretary

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Senate Ways and Means
February 29, 2000

Senate Bill 633

Office of the Secretary
Janet Schalansky, Secretary
785-296-3271

Senate Ways an d Means Committee
Date February 29, 2000
Attachment # 1

Thank you, Mr. Chairman and committee members, for this opportunity to speak in support of Senate Bill 633. We believe this is one of the most important changes in the Child in Need of Care Code in many years, and it calls for the legislature to make important policy decisions. The primary goal of this bill is to prevent the unnecessary removal of children from their homes. This is accomplished by creating two categories under the child in need of care code: one would be children in need of protection, for those children who are abused or neglected and can not be kept safely in their own homes. The second would be youth in need of community services; for children who are safe at home but who need services for themselves and their family to function in their homes, schools, and communities. The second goal is to ensure compliance with the requirements of the Adoption and Safe Families Act of 1997 (ASFA) by assigning responsibility to SRS to provide the courts with the documentation required by ASFA.

SRS asked for this Legislation because we believe it is the right thing to do for children and families. The federal government obviously agrees with us, because they are requiring most of what we are proposing under the recently published regulations to carry out the Adoption and Safe Families ACT of 1997. We are not talking about children and youth who are not safe in their homes. The proposed amendments to the Kansas Code for Care of Children contained in this bill are submitted for your approval and seek to accomplish the following ends:

1. To enhance safety and permanence for children;

2. To ensure that children are only removed from their homes when it is necessary to protect them and that children are served where services can be most effective;

3. To comply with the new federal regulations which require child-by-child documentation of actions taken to avoid out-of-home placement and impose severe financial penalties on states for noncompliance.

We believe the provisions of this bill will accomplish these objectives. This legislation comes from the realization that damage does occur to children when they are removed from their homes, even if the removal is brief. Therefore, the action to remove a child from his or her family should only take place when there are no possible alternatives. This bill, along with the Governor's budget, provides for an expansion of services available to children at the community level to ensure more children are served in their homes and communities.

Senate Bill 633 brings to this committee two major policy questions:

1. Should the Child In Need of Care Code be changed to create two categories of child in need of care--child in need of protection and youth in need of community services--in order to ensure only children who need out-of-home placement are removed from their homes?

2. **When safety is not an issue**, should the Secretary of SRS be an equal partner with the courts in determining when a child should come into the custody of the Secretary?

State of Kansas Department of Social and Rehabilitation Services

Janet Schalansky, Secretary

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Senate Ways and Means
February 29, 2000

Senate Bill 633

Children and Family Policy
Joyce Allegrucci, Assistant Secretary
785-368-6448

Senate Ways and Means Committee
Date February 29, 2000
Attachment # 2

Mr. Chairman and members of the committee, I am very pleased to have the opportunity to come before you today to explain the proposals set out in Senate Bill 633.

In the Senate Ways and Means Committee Report of the 1999 legislative session, you called for SRS to "consider diverting additional children into family preservation instead of foster care." This proposal allows us to strengthen all services available to children and their families, including family preservation. This bill does not preclude a single child from being taken into SRS custody when necessary for his or her protection. This bill has several parts:

Family Services and Community Intervention Fund

First the bill establishes a separate fund to receive money to support services in the communities for children and families. In his budget, Governor Graves recommended an investment of $5.1 million for this initiative. **SRS offered up SGF dollars from foster care which I will be begging to have restored if this bill does not pass.** SRS was chosen as the convening and administering agency of the initiative for Youth In Need of Community Services because it is the state's Medicaid agency and has the experience and expertise required for determining eligibility for federal funding and drawing down federal matching dollars for services to eligible youth and families. **SRS is also the state agency responsible for drawing down and administering federal Title IV-E funds and that role is critical in this proposal.**

Youth in Need of Community Services (YINCS)

Next the bill creates two categories of Child In Need of Care–Child in Need of Protection, and Youth in Need of Community Services. This bill would require the Courts and the Secretary of SRS to agree about the need for custody before a Youth in Need of Community Services could be placed in the custody of SRS. It is very important that you note that with appropriate documentation as required by the Adoption and Safe Families Act (ASFA), a judge could find any child in either category to be in need of protection and place them in the custody of the Secretary.

Over the past five years, Kansas has expanded funding for services to children by millions of dollars. However, there is one group of young people who have not yet been served well. We usually think of them as older children who have been identified by a variety of labels including status offenders, truants, runaways, children without parental control, children with severe emotional disturbances, and other descriptions. However, actual data shows us they are all ages and their presenting problems encompass a wide range of behavioral and family issues.

They come into foster care for reasons other than abuse or neglect in their home. Often parents have told us they "gave up custody" of these children in order to get services; sometimes judges and district attorneys told us they put these children into custody in order to get services and often SRS recommended custody in order to provide services.

Description of Population

In a survey of this population conducted on November 12, 1999, we were somewhat surprised to discover that a majority of these youth are girls. We were not surprised to find that these young people have a variety of problems. Some are medically fragile; some have substance abuse problems; some have severe emotional disturbances or conduct disorders; some have mental illness; some have mental, developmental or physical disabilities; some have a combination of these, and many have suffered past abuse or neglect. They come to us through police protective custody, through juvenile intake, or through reports to SRS, and they become children in need of care—non abuse and neglect (CINC-NAN). More than 1800 of these young people were placed in foster care during FY 1999 because we have not known what else to do with them. However, most of them are not well-served in foster care because the foster care system is designed to serve children who are in need of protection and we believe that approximately 1200 of those 1800 Children in Need of Care (CINC) would fall into the category of Youth in Need of Community Services (YINCS). The other 600 were children or youth who came to us as non abuse/neglect, but for whom we found significant safety issues and they would be children in need of protection who need to be in foster care.

Today, we are asking you to help us create a new collaboration to serve these children—Youth in Need of Community Services. This is not a new program or a new bureaucracy; it is a system of services—an improved way to serve children, youth and families using the same services, the same programs, and the same expertise of our communities in a new way, and filling in service gaps that exist for particular children. This collaboration will involve the youth and his/her family and all of the community systems available to impact that youth and family's life to make positive changes. It may include SRS with its full range of family support services, the health care system; the juvenile justice system; the educational system; mental health and substance abuse services; the private provider system; court services and the business and faith and civic communities. Not all partners will be involved with each child, but all partners will be instrumental in making this a successful collaboration.

Comprehensive Collaborative Process

In order to identify needs and to begin building the community capacity to provide services for these children and families, SRS first began by examining the current foster care system. We used the quarterly evaluation conducted by James Bell Associates and advice and results of work groups of the Continuous Quality Improvement Council, outcomes from the private contracts, evaluation from the monitoring of the foster care lawsuit settlement, a series of meetings and work sessions with private providers and SRS staff. Through last summer and fall, we held a series of discussions and work groups with judges and district and county attorneys, juvenile justice and some with educators and advocates. We also gathered input about community capacity from a series of Connect Kansas forums. Finally, in late fall1999, we decided to pursue the new proposal and in January of this year, we began a series of briefings and dialogues for stakeholders and partners, including meetings with parents of children in the system—those briefings are ongoing.

Designing the Framework

Also in January and early February, we held four sessions with work groups specifically to design the framework for this service system. Those work groups included representatives from every entity we could think of who will be part of a community service delivery system including judges, county/district attorneys, court services officers, educators at every level from the State Board of Education to classroom teachers and special ed directors, service providers, health department at state and local level, SRS at every level and across every division, substance abuse experts, mental health experts at several levels, representatives of persons with developmental disabilities, researchers and evaluators. In addition to the four sessions held in Topeka, similar groups came together in Sedgwick County to address some unique issues in that community and draft a framework. Using the work of those groups, SRS is now examining all of the funding issues involved with matching federal dollars and SRS and the Juvenile Justice Authority (JJA) are working to put together the framework of the system which will be in place on July 1, 2000.

Why Now?

Mr. Chairman, I ask your patience for me to share with the committee the reasons for my optimism that this can be accomplished now. New four-year contracts for family preservation , foster care, and adoption have been offered--within budget. That system is stabilized--even with some transitions that will take place between contractors. We received 19 proposals from nine different providers for family preservation services throughout the state, yet we contracted with only two of those. This means, in addition to these two, there are at least seven others that are capable of providing these services around the state. Those proposals call for the same kind of networking, collaboration, access to community-based services, and coordination that

will be required for Youth In Need of Community Services. There are some gaps in some communities. Numerous providers including the current family preservation providers and many other service providers who have learned about this initiative, including some community mental health centers, emergency shelters, foster care providers, foster parents, and even local hospitals, have indicated a willingness to diversify and retool their services to fill the gaps. Many communities are already organized to provide the kind of services, collaboration, and coordination needed; many others are close and others will need guidance and technical assistance.

We have no intention of trying to implement this in all 105 counties at the same time. SRS and JJA are working together to identify target counties for full implementation and the SRS area directors and chiefs have pledged to make sure each case is examined child by child in the other counties [as required by the Adoption and Safe Families Act (ASFA)] so that no child comes into foster care needlessly.

This framework is specifically intended to provide communities and judges with new options beyond the foster care system (which is designed to remove and protect children who have been abused and neglected) or the juvenile justice system (which is designed to lock up violent adolescents to protect the public safety). We believe it is also a huge step toward building community capacity for earlier intervention and the prevention that we have all sought for so many years.

Adoption and Safe Families Act (ASFA) Implementation

Currently the state is in jeopardy of violating the Adoption and Safe Families Act of 1997. ASFA demands effective "reasonable efforts" to prevent the out-of-home placement of children.

On January 25, 2000, the final regulations to implement AFSA were published in the Federal Register-- while we were working with the work groups to design the community services framework. The regulations and the initiative for community services are directly related. The regulations take effect March 27, 2000, and provide very strict requirements for court orders to reflect child by child documentation of efforts made to prevent out-of-home placement for children either in the custody of the Secretary of SRS or the Commissioner of the JJA. The regulations also impose severe loss of federal IV-E dollars for states who do not comply with the requirements. If we do not meet the requirements for each child up front and document those efforts appropriately, that failure will result in the child's not being eligible for federal Title IV-E funding for the duration of that foster care episode. We cannot recover or correct that child's eligibility.

Previously, all that was required to meet the reasonable efforts standard was language that is now set out in Kansas statute to be incorporated by reference into the court order. The new regulations go deeper and require the Federal Department of Health and Human Services to perform audits and determine, not only that court orders now specifically address reasonable efforts, but that the efforts are documented and that they actually occurred.

We have been notified that Kansas will be the first state in federal Region VII to have IV-E eligibility audited under these new requirements. That audit will take place this year between July 1 and September 30. Our files must contain documentation of the required judicial determination.

After March 27, 2000 not only must there be a journal entry, but each journal entry must set out the specific efforts undertaken for each child. Failure to meet these requirements would mean the loss of Title IV-E eligibility for each child and could result in severe penalties for the state if these children come into foster care.

Senate Bill 633 addresses these concerns by putting in place a system to assure that efforts to maintain children in their homes are undertaken in all situations except where the safety risks warrant immediate removal. Further, the bill places on SRS the responsibility for documenting the efforts that have been attempted to allow the child to remain at home or to document that remaining in the home is against the welfare of the child as required by ASFA. This will provide the Courts with the necessary evidence and documentation for the specific findings they are required to make and document.

Permanent Guardianship and Technical Changes

There are several other changes incorporated into Senate Bill 633. One deals with a provision for permanent guardianship for children for whom adoption is not a viable option. The new ASFA regulations recognize only four permanencies for children in foster care: reunification, adoption, legal guardianship, or placement with a fit and willing relative. Any other plan for permanency requires documentation of a compelling reason and a finding by the Court that a compelling reason exists. Last year the legislature established permanent guardianship and appropriated funds for permanent guardian subsidy. However, the option provided required the dismissal of the child in need of care case and that language presented a legal dilemma and also left judges without appropriate judicial oversight. This bill corrects both situations. We should note that Senate Bill 461 in Senate Judiciary Committee makes the same corrections, but in slightly different language. We ask you to note that differences in the two bills would need to be reconciled.

There are several other changes in this bill, some of which are technical, and some of which make more substantive changes such as a provision for changes in confidentiality. In working with some of the judges after the bill was introduced, we find they have concerns with some of these sections that need to be addressed and they will offer some alternatives. We will be happy to work with the committee, the judges and others, and then with the revisor's office to clarify the language of the bill.

You will hear from judges and other advocates about their concerns with this bill. As you listen to all of us, I hope you will consider the roles and responsibilities of all of us. When I first came to SRS a year ago, I was astounded to discover how little SRS and the courts and even the legislature understood about each other's role in these children's lives. First, I found that many of us do not understand how much damage is done to a child when we remove her/him from home and family. **For all of us, every child's safety is paramount without question**. However, we need to understand that even in the most severe cases and even when a child is not safe, there is harm to that child's sense of self and belonging and attachment. Once damaged, those pieces are not easily repaired. We must make sure we cause the least additional trauma possible as we help the child. Second, I was surprised to learn how each of us considers ourselves as a system around these children and family, but we have a much more difficult time seeing all of us at the same time as THE CHILD WELFARE system.

Then we need to understand that the **Court** is responsible only for the child and the case in front of it at the moment. Every case should be decided on its own merits and in the best interests of the child. To make those decisions, the Courts rely on all of the rest of us connected with the child for complete, accurate and timely information and for our best professional skills and judgment regarding that child and that situation at the moment. Judges should not have to concern themselves with our budgets nor our contracts but neither are judges social workers or therapists who should have to make clinical decisions about what is best for a child. Their responsibility is to follow and apply the law.

Social workers must also focus first on the best interests of the child and family and their needs at the moment, but social workers also have to respond to the department for which they work and the forces impacting it from the outside. Requirements for law and policy implementation and best practice of social work including application of clinical knowledge, documentation, communication, delivery and coordination of services all have a bearing on the social worker every day.

At the state department of **SRS**, we are not only responsible for the best interests of the individual child and family, but to our social workers for the tools and support they need to do their job, to the Courts, to the Governor and to the Legislature and to the federal government for administration and policy implementation and sound management, including fiscal management.

You, the **Legislature**, are concerned about the best interests of children and families. You are responsible to the citizens and taxpayers for balanced laws and sound program and fiscal policy and for adequate appropriations to carry out assigned responsibilities. You also have the task to coordinate and implement state laws and policies with federal laws and policies. The federal government has spoken with it's policy and regulations regarding the right thing to do for children and families.

The primary concern of judges and social workers every day should be what is in the best interest of each child. In addition to those concerns for children, you and I also have to concern ourselves with being responsive to the taxpayers and to the federal government and to any other source of funds for the child welfare system.

Senate Bill 633 brings to this committee two major policy questions:

1. Should the Child In Need of Care Code be changed to create two categories of child in need of care--child in need of protection, and a youth in need of community services--in order to ensure only children who need out-of-home placement are removed from their homes?

2. **When safety is <u>not</u> an issue**, should the Secretary of SRS be an equal partner with the Courts in determining when a child should come into the custody of the Secretary?

We believe that keeping children--who are safe--in their homes and communities is the right thing to do. We are asking for reasonable and responsible changes that provide for the protection of children, that ensure that no child comes into foster care needlessly, that provide for children and families to receive services in their home and community and that allows SRS to protect the integrity and ability of the state to draw down federal dollars.

I thank you for your patience and will stand for questions.

State Department of Social and Rehabilitation Services
Children and Family Policy Division

February 29, 2000

Frequently Asked Questions about Youth in Need of Community Services

Why not just expand family preservation?

These children and families would not be best served by current family preservation program that is intensive and short-term. The reason we have not yet succeeded with these children and families is that they need longer intensive services coupled with long-term or intermittent less intensive services.

While current family preservation service providers could "easily gear up" to serve these families under contract, that would not help build the community capacity to coordinate services already there and fill gaps – which is the ultimate way to move to prevention.

Why is this statute needed?

The law is applied differently in different judicial and county/district attorney jurisdictions. Judges are autonomous in their courtroom. County/district attorneys are elected and responsive to the public as well as the best interests of the child. The federal ASFA law must be implemented uniformly across the state. IV-E eligibility is the same for every child in the state and cannot be corrected if we miss it on any child.

How is Youth In Need of Community Services funded?

The governor has recommended $5.1 million in FY 2001 which will be allocated to SRS area offices and used to match community dollars and services and "fill gaps" in services for particular children.

Why set up a separate fund?

Accountability. These dollars are specifically for serving children and families so that children do not come into foster care. They must accomplish that purpose.

Also, the legislation allows the Secretary of SRS to receive funds from other sources to expand the resources available for this population of children and families.

How will funds be used?

To leverage community resources for these children and families and to fill gaps in services available for individual children.

What happens if the bill does not pass?

The money in the governor's budget recommendation for FY 2001 which was removed from foster care will need to be restored. $15.3 million all funds.

Are there other states with similar structures?

Eleven other states have similar systems in place. Some administer through their social service agencies such as SRS; some administer through their juvenile justice system; one administers through the education system and another has set up a separate community collaboration system.

What are the differences between references to "child" and "youth"?

We intentionally called one child and one youth because, as you know, SRS lives on acronyms and it would be unworkable to have two identical--so we will have CINCs (children in need of care) and YINCS (youth in need of community services).

Youth in Need of Community Services

February 10, 2000

Over the past five years, the State of Kansas has invested more than $736 million **additional** dollars in Kansas children:

Program	SGF①	Tobacco①	All Funds①
Child Care	6.3		18.5
Early Head Start	0.0		5.1
HealthWave	10.8		38.6
Medicaid/Medikan	13.2	1.8	31.0
Developmental Disability Services	5.0	3.0	10.0
Children's Mental Health Services	0.8	6.0	8.4
Custody/Adoption	0.3		56.0
Family Preservation/Family Services	2.7		2.5
Operating Aid to USD's②	531.9		576.8
Special Education Services	45.1		64.1
Medicaid for Special Education Services	0.0		19.0
JJA Prevention	0.0		4.2
JJA Community Services	10.4		11.3
JJA Community Corrections	0.2	10.8	0.2
All Other③	14.8		-109.7
Total	641.5		736.0

① Numbers listed are figures in millions of dollars.

② The Division of Budget indicated that per pupil state aid has increased $144 per student during this time. Various educators have stated that most of this increase went to relieve local property taxes and that this increase went to the taxpayers--not to the students.

③ The all funds number is a result of a decrease in AFDC and a change in reporting Food Stamps in the Children's Budget.

With all of this investment, there is one group of young people who have not yet been served well–the throwaway kids of Kansas. We usually think of them as older children who have been identified by a variety of labels including status offenders, truants, runaways, children out of parental control, children with severe emotional disturbances and other descriptions. However, actual data shows us they are all ages and their present problems encompass a wide range of behavioral and family issues. Nearly 1,800 of these young people are currently in foster care because we have not known what else to do with them. However, most of them are not well-served in foster care because foster care is a system designed to serve children who are in need of protection and these are youth in need of community services.

Today we want to create a new collaboration to save the throwaway kids–these youth in need of community services. This is not a new program or a new bureaucracy; it is a system–an improved way to serve children, youth and families using the same services, the same programs, and the same expertise of our communities in a new way.

This collaboration will involve the youth and his/her family and all of the community systems that are needed to impact that youth's life to make positive changes. It may include SRS with its family support services, economic support services, health care system, and child care/early education system; the juvenile justice system; the educational system; mental health and substance abuse services; the private provider system; and the business and faith communities.

Every cabinet secretary and the Commissioners of Education and the Juvenile Justice Authority will be asked to pledge their department's participation in this collaboration; and the local private non-profit or for-profit contracting partners of any cabinet department will be expected to participate in this collaboration. Local communities, law enforcement, education, the courts, prosecutors and service providers will be requested and encouraged to participate.

This initiative is targeted to assist the young people of Kansas for whom we have not yet made the right decisions nor a productive investment of resources. These young people have a variety of problems and often a complex set of complications in their lives. Some have substance abuse problems; some have severe emotional disturbances or conduct disorders; some have mental retardation or mental illness; some have developmental or physical disabilities; some have a combination of these and many have suffered past abuse or neglect. They come to us through police protective custody, or through juvenile intake, or through reports to SRS, and become children in need of care–who are not being abused or neglected.

At the present time, these young people are often served–or mis-served–in the custody of the Commissioner of the Juvenile Justice Authority or the Secretary of Social and Rehabilitation Services. They are often removed from their homes and their communities because either the parents, schools, SRS, juvenile justice system, courts, law enforcement, or mental health centers do not know what to do with them and do not know how to serve them.

We have tried to serve these children in systems not designed to serve them--and we have largely failed. We have all tried—most parents do the best they can, schools try special education or alternative learning centers, SRS tries family services, law enforcement puts them in police protective custody, district and county attorneys often try diversion or informal supervision, and finally, they

end up in foster care or detention centers or state hospitals and often suspended from school. We have failed because we tried to address the problems of children outside of their family, home and community. Our solutions were dictated, not by what the child needed, but by the child's presenting behavior at the moment or the funding stream we were accessing. We have served them removed from their family and community when the very thing they needed most was to be served with their family and within their community.

In addition we have failed our courts because we offered them either inadequate alternatives or no alternatives. When we give judges only a choice of systems designed to remove children who have been abused and neglected, or designed to lock up violent adolescents to protect the public safety; we have ignored an entire group of Kansas children who will not get better in foster care or in detention or in a state hospital. And we are in jeopardy of violating the Adoption and Safe Families Act of 1997 that demands "reasonable efforts" to prevent the out-of-home placement of children.

These youngsters have become the throwaway youth of Kansas. We must find a way to help them become responsible, contributing members of our communities today or we will surely find them in our state institutions—prisons and state hospitals—tomorrow, because their behaviors will have become truly out of control and they will have harmed someone or themselves.

To continue to serve these youth as we have means to rob foster care services of funds needed for children who are abused and neglected, or to rob the juvenile justice system of funds it needs for violent offenders, or to place them in state hospitals and leave no room for children and youth who are seriously mentally ill. The system these youth need is to be found in their home community, with various services from a variety of sources. Existing funding streams for these services must be coordinated efficiently and brought together to serve the youth.

To underscore our commitment to children, youth and families, this administration will recommend an investment of dollars to be used by the Secretary of Social and Rehabilitation Services to provide a match with local resources brought to the collaboration by other partners--including city and county funds, court services, school district funds and special education funds, health department resources, community foundation, private foundation or corporate funds, juvenile justice prevention funds, substance abuse services, SRS family services, mental health center services, faith community and other charitable funds--pooled together specifically to provide the services needed for children who will be described as children and youth in need of community services. SRS has been chosen as the convening and administering agency

of the community collaboration initiative because it is the state's Medicaid agency and has the experience and expertise required for determining eligibility for federal funding and for drawing down federal matching dollars for services to eligible youth and families.

The matching of these funds should not be confused with community collaborative funds for primary prevention efforts around the state. Youth in need of services funds are for services to a specific population of youth and will be distributed on a proportionate county-by-county basis. The purpose of the community collaboration will be to establish a network of services needed by each youth who require services but do not require the protection of the state.

In the Senate Ways and Means Committee Report of the 1999 legislative session, the committee called for SRS to "consider diverting additional children into family preservation instead of foster care". This proposal will strengthen all family services–including family preservation.

Community collaboration in prevention services for very young children and for appropriate services for older children provides an opportunity for strengthening Kansas families and communities.

Truants, Runaways, Youth Not Under Parental Control
What Do Other States Do?

States label youth who exhibit problem behaviors by a variety of names: Troubled youth, status offenders, non-serious offenders, runaway and at-risk youth, children in need of services, and dependent children. The statutes generally identify behavior such as truancy, early sexual activity, runaway, and failure to respond to parental control and directives. In Kansas these behaviors plus a short list of others [e.g., certain acts prohibited by state law, city ordinance, or county resolution; firearms violations; gaming violations] are identified in statute as children in need of care, as are children who have been abused or neglected. The term non-abuse and neglect "NAN" is not a statutory term but a term of convenience used by the Department of Social and Rehabilitation Services to distinguish between these basically dissimilar (albeit sometimes overlapping) statutory categories of children. In Kansas statutes children who have been abused or neglected plus abandoned children, children illegally placed for adoption, or residing with other abused or neglected children are generally understood to have been harmed or placed at risk of harm by parents or other persons responsible for their care. The NANs on the other hand (referred to in the department's current initiative by the more descriptive label, "youth in need of community intervention"), are at risk because of their own behaviors.

Eleven states who deliver services to children and families for problem behavior by the child do not allow the transfer of custody and removal from the child's home for these behaviors. These states and the responsible agency or service delivery mode are:

Arkansas	Serves families in need of services through the juvenile justice agency.
Kentucky	Provides community based services granted to counties by the Cabinet for Families and Children [the Kentucky equivalent of SRS/CFP].
Massachusetts	Mandates the provision of services to at-risk youth which are overseen by the courts. Community Connections Coalition Boards specify the service plan and make recommendations to the district attorneys.
Minnesota	The Children's Initiative established community teams to provide services to non-abused/neglected families. A special population is identified for a children's mental health initiative for severely emotionally disturbed children.
New Jersey	Provides school-based services to troubled youth by the child welfare agency.
Ohio	Provides community services to high risk and severely emotionally disturbed youth through county Children's Service Boards.
Oklahoma	Provides services to families in need of support.
Pennsylvania	Mandates that status offenders be served by local social services agencies. The juvenile court has no jurisdiction, only the state child welfare agency.
Tennessee	Provides services through the Governor's Office Communities that Care. Family Crisis Intervention programs builds community resources for truants, runaways, and children beyond parental control through community collaborative partnerships (somewhat like Connect Kansas).

Vermont	Has a traditional agency based service delivery. Mandates the referral of status offenders to services but does not provide for state custody.
Washington	Provides family reconciliation services from a non-adversarial mediation process administered by the state child welfare agency

Five states allow for services and the transfer of custody of status offenders to the state juvenile justice agency: Georgia, Louisiana, South Carolina, Wisconsin and Wyoming.

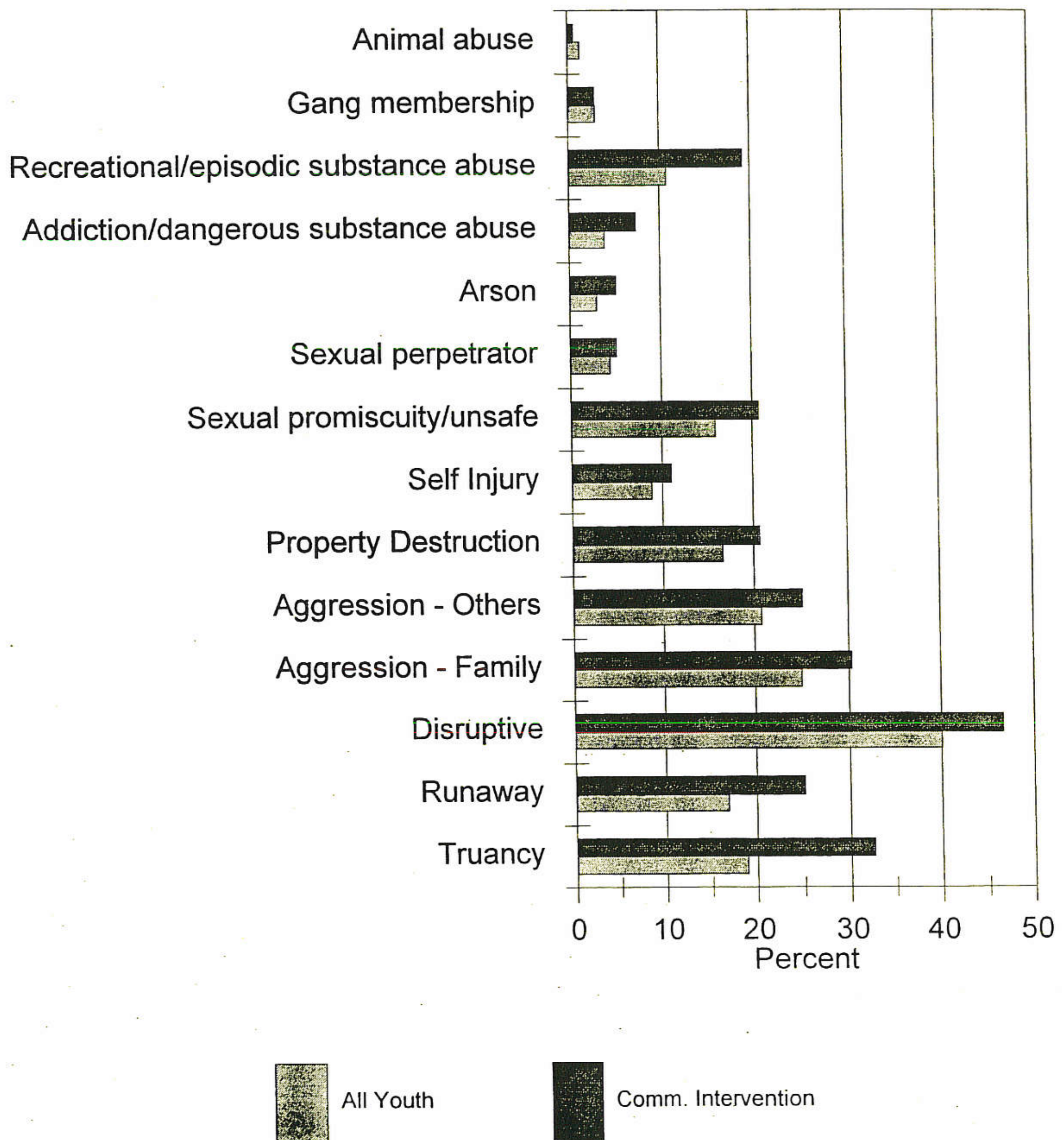
At the time of the review information was not obtained for Idaho, Mississippi, Virginia, and Washington, D.C.

The remaining thirty states allow for services and the transfer of custody of status offenders to the state child welfare agency.

Of the states surveyed, additional information will be sought from the following states: Massachusetts, Minnesota, New Jersey, Tennessee, and Vermont (all discussed above) which appear to have features (service or fiscal) which may be of interest in developing a Kansas strategy. Two states not discussed above include Iowa, which delivers services through community teams and has a long-standing "decategorization" project which blends funding sources including a county mill levy, and Wyoming which has community teams including the state child welfare agency and the juvenile justice agency, which oversees the programs.

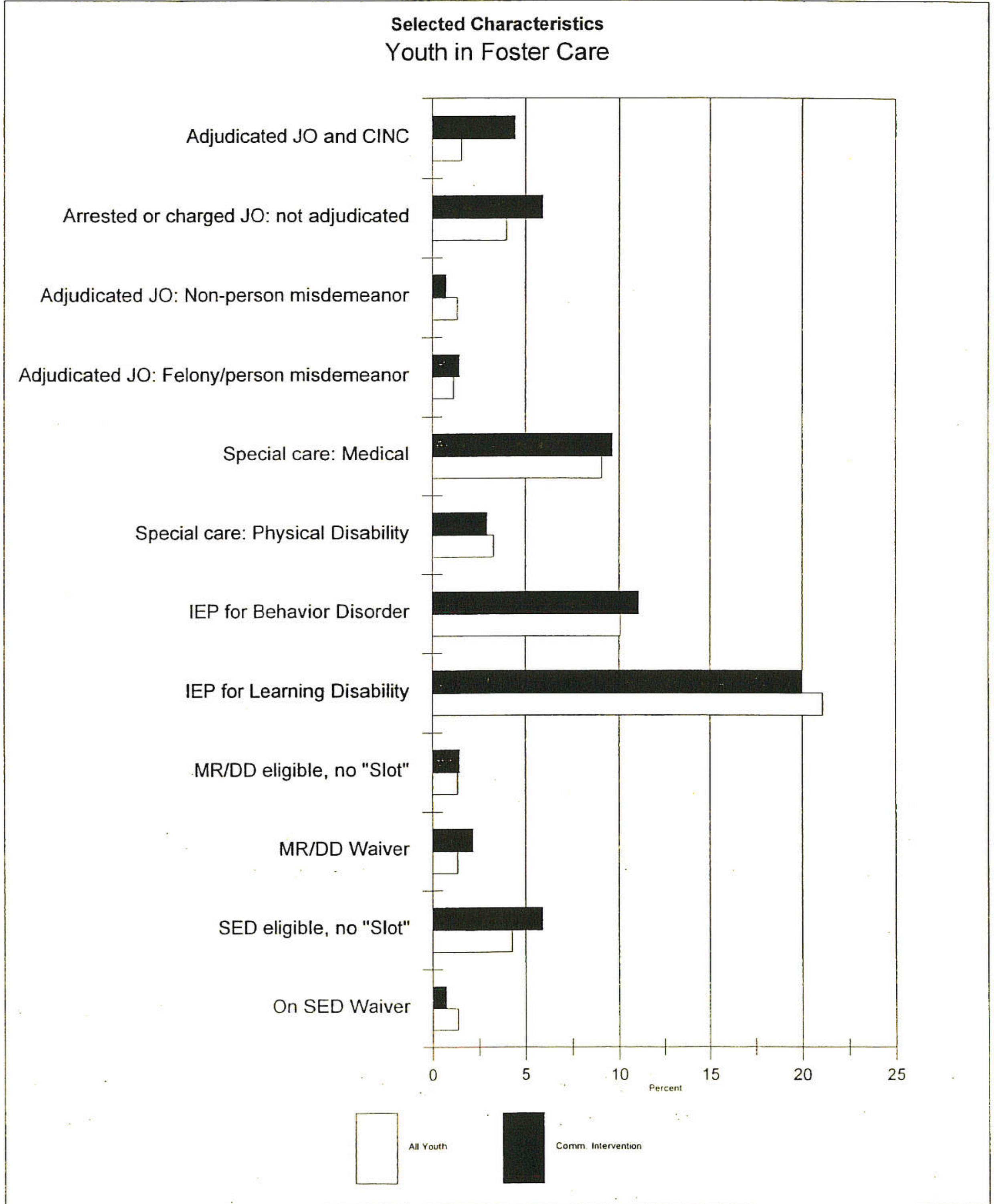
YOUTH BEHAVIORS

History of Behavior	All Youth	Comm. Intervention
Truancy	18.93	32.59
Runaway	16.94	25.19
Disruptive	40.09	46.67
Aggression - Family	25.06	30.37
Aggression - Others	20.84	25.19
Property Destruction	16.63	20.74
Self Injury	8.9	11.11
Sexual promiscuity/unsafe	15.97	20.74
Sexual perpetrator	4.39	5.19
Arson	3.02	5.19
Addiction/dangerous substance abuse	3.95	7.41
Recreational/episodic substance abuse	10.88	19.26
Gang membership	3.04	2.96
Animal abuse	1.39	0.74



COMPARISON: All youth in foster care with youth in need of community intervention

Characteristic	All Youth	Comm. Intervention
On SED Waiver	1.4	0.74
SED eligible, no "Slot"	4.3	5.93
MR/DD Waiver	1.4	2.22
MR/DD eligible, no "Slot"	1.4	1.48
IEP for Learning Disability	21.1	20
IEP for Behavior Disorder	10.1	11.11
Special care: Physical Disability	3.3	2.96
Special care: Medical	9.1	9.63
Adjudicated JO: Felony/person misdemeanor	1.2	1.48
Adjudicated JO: Non-person misdemeanor	1.4	0.74
Arrested or charged JO: not adjudicated	4	5.93
Adjudicated JO and CINC	1.6	4.44



SELECTED PRELIMINARY FINDINGS*
CHARACTERISTICS OF CHILDREN IN FOSTER CARE, NOVEMBER, 1999

GENDER, RACE/ETHNICITY

All youth	55% are female	45% are male
Community intervention	52% are female	48% are male
All youth	69% are White	31% are Non white
Community intervention	73% are White	27% are Nonwhite
All youth	19% are African American	
Community intervention	15% are African American	
All youth	38% are White females	
Community intervention	38% are White females	

AGE

All youth	34% are pre-first grade age (0-6)
	29% are grade school age (7-12)
	21% are middle school age (13-15)
	15% are high school age (15-18)
	0.7% are over 18
Community intervention	33% are pre-first grade age (0-6)
	24% are grade school age (7-12)
	24% are middle school age (13-15)
	18% are high school age (15-18)
	0% are over 18

The greatest "bulge" in both populations occurs in the ages 14, 15, and 16. However the proportion of the youth is different:

All youth age 14-16	22%
Community intervention	30%

1/20/00

* These data and statistics are preliminary calculations. The final numbers may vary from these but we believe they will not vary much and are presented for the purpose of generating discussion about this population of children and youth.

Why Collaborate for Youth in Need of Community Services?

February 10, 2000

- It is the right action to take for children, youth and families–everyone needs to recognize the negative impact of out-of-home placement on children and families.

- Any time a child is removed from his/her home, the child:
  - loses a sense of belonging and identity
  - suffers loss of individual and family memories/rituals
  - loses the security and familiarity of their home, neighborhood, school and friends
  - often blame themselves
  - may experience induced anxiety behavior regression, rebellious behavior, and/or new or existing negative behaviors can intensify
  - may experience denial and fantasy, delayed expression of feelings and a persistent attachment to rejecting or unreliable parents
  - may struggle with the feelings this disruption caused them, impacting their relationship with new families with whom they are placed, or their own families as they age out of the system.

- Parents of the youth may also experience:
  - loss of control over their own life and family
  - be overwhelmed with multiple intervention strategies
  - suffer financial hardship, thus causing financial as well as emotional crisis and making reintegration difficult

- Costs to the community:
  - court involvement and out-of-home care is very expensive
  - criminal activity, property damage, and problems with their ability to parent their own children in the future

- Removal of children from their community through out-of-home placement only serves to impose the problems on another community. "Problem swapping" is often the result.
- Supports state and federal requirement for "reasonable efforts" to avoid removal of child from home – necessary to collect federal IV-E dollars.
- Children in need of care system designed for children who have been abused and/or neglected.
- Youth are best assessed for appropriate services within their family and community.

- Children with behavioral problems require the involvement of the family and community to help them deal with those behaviors. Separation from home and/or community enables all to avoid responsibility and may also serve to reinforce the child's behavior.
- Community collaborations provide judges and schools with solutions for their concerns about services for youth and families.
- Juveniles who commit minor offenses need some kind of consequences– balance and restorative justice.
- Out-of-home placement/services are not the most effective for youth and families, while it is the most costly for taxpayers.
- 11 states have community service options for youth who are not being abused or neglected. Some serve through juvenile justice, some through social services.
- Out-of-home placement should be reserved to address significant safety issues.

Kansas Department of Social and Rehabilitation Services
Children and Family Policy Division

February 29, 2000

Youth In Need of Community Services (YINCS)
Service Framework

Decisions to Date:

- Community Intervention dollars will be administered at SRS area office level
- Maximum flexibility for dollars and decisions at area office level
- Targeted implementation by county
- Common data collection and documentation will be required
- Statewide outcomes and measurements

Tentative Decisions:

- Intake will be by judicial district or whatever combination they might decide
- Sign off by at least SRS, JJA, judge, community mental health center and school districts responsible for each county to trigger flow of dollars to that county.

Common Themes from Work Groups:

- Central Intake and Assessment
- Standard Data Collection
- Standard Documentation
- Statewide Outcomes and Measures
- 24/7 Crisis Intervention Access (Access to services—not necessarily a facility)
- Common Assessment Tools
- Implemented in Targeted Counties First
- Family Service Coordination decided at local level
- Rapid Eligibility Determination
- Dollars Administered by Area SRS
- Pool Resources First
    - *Parents*
        - Insurance
        - Child Support
    - *Federal Eligibility*
        - SSI
        - TANF
        - Medicare
        - *Waivers*

State Eligibility
Health Wave
Community-Based Services
CMCH Sliding Scale
Waivers
Substance Abuse

- Coordinated Community Resources

SRS Integrated Services
CPS
Family Services/Family Preservation
Child Care / Early Head Start/Head Start
TAF
Economic and Employment Supports
Rehabilitation Services
Education
Special Ed IEP
Early Education
Parents As Teachers
Health
Local Health Department
Healthy Families
Mental Health
Substance Abuse
Court Services
Probation
County/District Attorney
Diversion
Private Providers
Family Resource Centers
Domestic Violence Shelters
Faith, Benevolent and Civic Organizations
YMCA
Big Brothers/Big Sisters
Mentoring programs
County Extension Offices
ETC.
ETC.
ETC.
ETC.

When these services have all been coordinated, fill gaps with "Community Intervention Dollars"

SB 633 SECTION BY SECTION SUMMARY (AS INTRODUCED)
Arranged by Topic

REQUIRED BY OR IN SUPPORT OF THE ADOPTION AND SAFE FAMILIES ACT (ASFA):

Section 2. Responds to the requirements of the federal Adoption and Safe Families Act of 1997 (ASFA) by adding requirements that safety is paramount and judicial determination of reasonable efforts and best interest of the child upon removal of a child subsequent to placement at home. Code of Federal Regulations (CFR) 45 CFR 1355, 1356, 1357.

Section 9. K.S.A. 38-1529. Requires that before a county or district attorney can file a petition, the petition must specify known efforts to prevent or eliminate the need for such petition or the basis for a filing due to an emergency which threatens the child's safety. 45 CFR, 1356.21 (b) 1

Section 10. K.S.A. 38-1531. The petition must specify known efforts to prevent or eliminate the need for such petition or the basis for a filing due to an emergency which threatens the child's safety.

Section 11. K.S.A. 38-1532. Requires a copy of the petition be provided to the secretary if custody to the secretary is requested or likely.

Section 12. K.S.A. 38-1542. An application for an ex parte order of protective custody must state efforts to prevent or eliminate the need for such petition or the basis for a filing due to an emergency which threatens the child's safety. *45 CFR, 1356.21 (b) 1*

If the court awards protective custody, the court must enter an order concerning the best interest of the child and reasonable efforts to avoid removal. The secretary shall consider the recommendations of a community intervention team, if any, and is to provide the court with written documentation of efforts made to prevent or eliminate the need for custody. The court is to provide the secretary with a written order. *45 CFR, 1356.21 (b) 1*

Section 13. K.S.A. 38-1543. If the court awards protective custody, the court must enter an order concerning the best interest of the child and reasonable efforts to avoid removal. The secretary shall consider the recommendations of a community intervention team, if any, and is to provide the court with written documentation of efforts made to prevent or eliminate the need for custody. The court is to provide the secretary with a written order. *45 CFR, 1356.21 (b) 1*

Section 16. K.S.A. 38-1563. If the court awards protective custody, the court must enter an order concerning the best interest of the child and reasonable efforts to avoid removal. The secretary shall consider the recommendations of a community intervention team, if any, and is to provide the court with written documentation of efforts made to prevent or eliminate the need for custody. The court is to provide the secretary with a written order. *45 CFR, 1356.21 (b) 2*

If the secretary provides the court with a plan to provide for the safety of a child at home which the court deems reasonable, the court shall permit the return of the child.

Section 17. K.S.A. 38-1565. Requires the court to make a written finding whether reasonable efforts have been made to achieve the goals of a permanency plan and whether continued out of home placement is in the best interest of the child. This review must occur not less than every 12 months. *45 CFR, 1356.21 (b) 2*

If the court determines that reintegration is a viable alternative, the court shall set a date for such return. *45 CFR, 1356.21 (b) 2*

Section 18. K.S.A. 38-1566. If a child in the custody of the secretary has been in placement with a parent for a period of 6 months or longer and then again needs to be placed in out of home care, this is considered a new removal and requires a court determination of best interests of the child and reasonable efforts to prevent or eliminate placement. *45 CFR, 1356.21 (e)*

Section 22. K.S.A. 38-1584. Replaces post-termination custody for long term foster care with custody for permanent guardianship. Permanent guardianship is not an accepted permanency goal in Kansas and is now discouraged in ASFA as well.

REQUIRED FOR IV-E ELIGIBILITY (NOT ASFA REQUIREMENT):

Section 28. K.S.A. 75-3329. Removes the term "not for profit" from the definition of private children's home. This is required for the state to remain eligible for Title IV-E funding.
45 CFR, 1355.20

REQUIRED TO IMPLEMENT THE YOUTH IN NEED OF COMMUNITY SERVICES INITIATIVE:

Section 1. Creates a special fund within the treasury into which the Secretary can deposit and from which the Secretary can expend funds to implement programs and services for youth in need of community services and their families. The department has begun an initiative to serve youth who are not abused or neglected in their own families and communities instead of the foster care system whenever safely possible. It is the department's intent to attract federal, local and private funds to enhance the state's ability to serve these youth.

Section 3. K.S.A. 38-1502. Creates within the definition of child in need of care, two subcategories, "Child in need of Protection," and "Youth in Need of Community Services." The categories highlight the differences between the needs of children who have been harmed or are in danger of harm from their parents or caregivers and youth who are placing themselves at risk because of their own behaviors but who are safe at home.

Section 8. K.S.A. 38-1524. Clarifies that the SRS response to non-abuse or neglect reports is to be a preliminary inquiry regarding the interests of the child.

Section 12. K.S.A. 38-1542. If the child is alleged to be a youth in need of community intervention (not in need of protection) the youth may come into the protective custody of the secretary if the secretary recommends custody.

Section 13. K.S.A. 38-1543. If the child is alleged to be a youth in need of community intervention (not in need of protection) the youth may come into the temporary custody of the secretary if the secretary recommends custody.

Section 16. K.S.A. 38-1563. If the child is alleged to be a youth in need of community intervention (not in need of protection) the youth may come into the custody of the secretary if the secretary recommends custody.

CLARIFICATIONS AND GOOD CHILD WELFARE PRACTICE

Section 3. K.S.A. 38-1502. The term "multidiciplinary team" is changed to "multidisciplinary child protection team" and a description of the membership, and role is included.

The subsection regarding permanent guardians removes the requirement that the CINC case be dismissed upon appointment of the guardian. [Legal Guardianship defined in 45 CFR 45, 1355.20]

A definition of neglect is added to guide the department and the courts.

Section 4. K.S.A. 38-1503. Clarifies that changes to the code are applicable to children already subject to the code.

Section 6. K.S.A. 38-1513. Amends the section to clarify that a medical examination to determine maltreatment may be held without parental consent. Current law appears to give such permission to sexual abuse but not other forms of abuse or neglect.

Clarifies when a person having custody may consent to medical care for a child. The current statute is ambiguous as to consents between adjudication and disposition when both do not occur in the same hearing.

Section 7. K.S.A. 38-1523a. The term "multidiciplinary team" is changed to "multidisciplinary child protection team" and a description of the membership, and role is included.

Section 14. K.S.A. 38-1544. When the court takes a child under informal supervision, the court may issue a restraining order to protect the child from harm, harassment or intimidation.

Section 21. K.S.A. 38-1583. Continues court jurisdiction following appointment of a permanent guardian and allows the court to appoint a successor guardian.

Section 24. K.S.A. 38-1587. Continues court jurisdiction following appointment of a permanent guardian and allows the court to appoint a successor guardian. When a child in the custody of the secretary is appointed a permanent guardian, custody to the secretary is discharged.

Section 25. K.S.A. 38-1591. When parental rights have been terminated, the parent(s) must acknowledge their wish to continue appeal at every level of appeal or the appeal shall be dismissed. Currently, attorneys are bound to proceed with appeals even if the parent is disinterested or cannot be located.

TECHNICAL CHANGES:

Section 5. K.S.A. 38-1507. Corrects a technical error which prevented the free exchange of information with the Kansas Department of Health in Environment in their responsibility for child care licensing and regulation.

Section 15. K.S.A. 38-1562. Technical change. The county or district attorney enters a motion to establish permanent guardianship not establish permanent guardianship.

Section 19. K.S.A. 38-1568. Technical change to reference the correct subsections of K.S.A. 38-1502.

Section 20. K.S.A. 38-1581. Technical change that a filing for termination of parental rights shall occur unless the court has found compelling reasons why adoption or permanent guardianship is not in the child's best interest.

Section 23. K.S.A. 38-1585. Technical change to reference the correct subsections of K.S.A. 38-1502.

Section 26. K.S.A. 38-1608. Technical change to insert consistent use of term: mulitidisciplinary child protection team.

Section 27. K.S.A. 38-1610. Technical change to reference the correct subsections of K.S.A. 38-1502.

Section 29. Repeals amended sections.

Section 30. Effective date.

Clarification and Explanations from the Final Rules to the Adoption and Safe Families Act of 1997 Department of Health and Human Services Administration for Children and Families

Selected pages. The sections highlighted by a vertical bar in the margin are especially recommended for review. The full text of the final rule and comments may be found in the Federal Register for Tuesday, January 25, 2000. Part II, 45 CFR Parts 1355, 1356, and 1357. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews; Final Rule

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.

SUPPLEMENTARY INFORMATION:

I. Background
II. Approach
  A. Consultation With the Field
  B. Analysis and Decision-Making
  C. Regulation in Context
III. Discussion of Major Changes and Provisions of the Final Rule
  A. Definitions
  B. Child and Family Service Reviews
  C. Enforcement of Section 471(a)(18) of the Act
  D. Reasonable Efforts and Contrary to the Welfare Determinations and Documentation
  E. Case Plans and Case Review Requirements
  F. Title IV–E Reviews
  G. Special Populations
IV. Section-by-Section Discussion of Comments
V. Impact Analysis
Final Rule

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 agencie' 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

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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.

Documentation

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:

Outcomes

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

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.

Penalties

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

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

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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

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.

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

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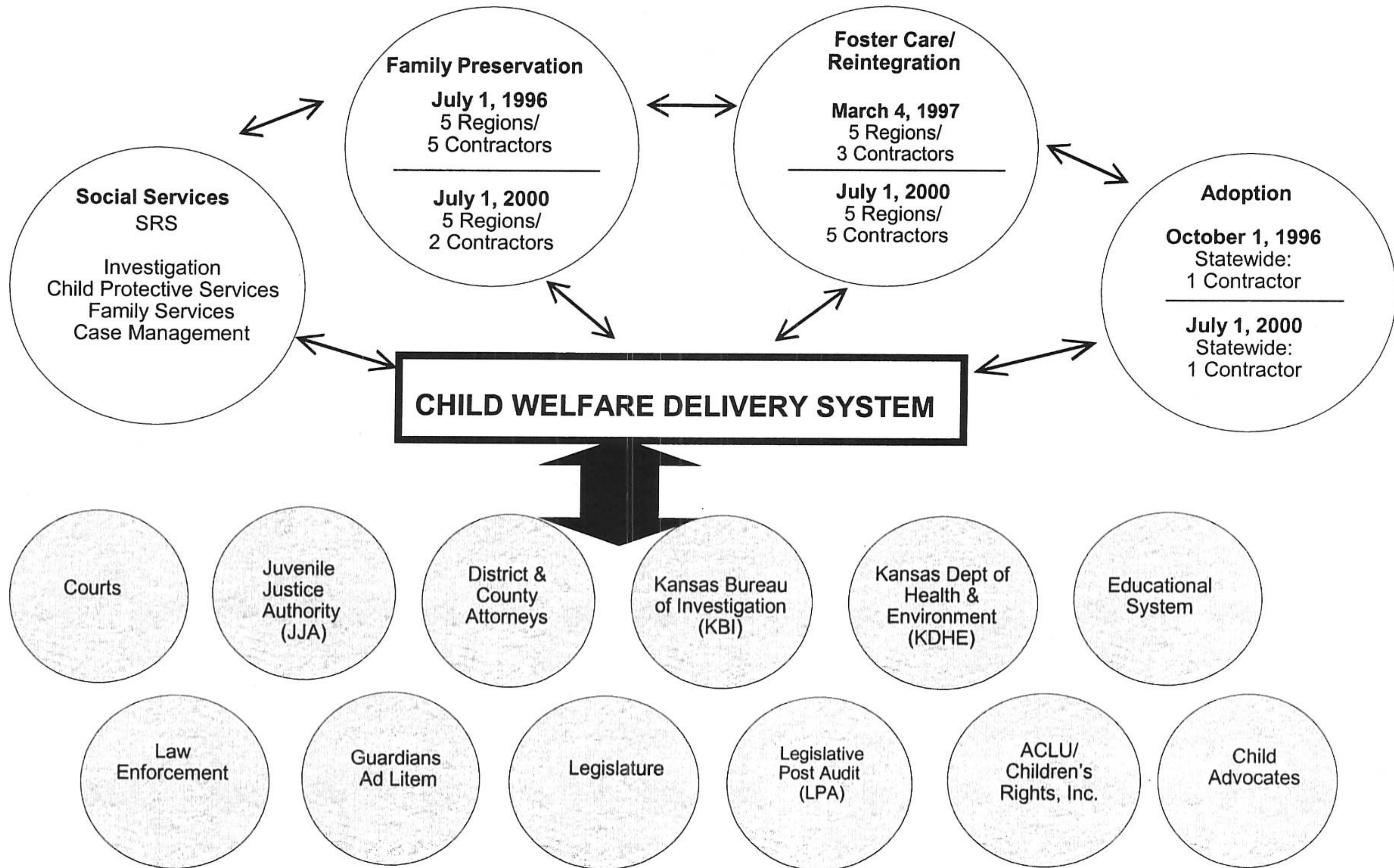
KANSAS CHILD WELFARE

February 29, 2000



Children and Family Policy
Evaluation and Program Improvement Unit
Youth in Need of Community Intervention – Conduct Disorder

Who are Conduct Disorder Children?

Some children present annoying and disruptive behaviors while others present more serious anti-social and delinquent behavior. Most troublesome behavior runs along a continuum from irritating to a problem in daily functioning. When a child is older and the behaviors have persisted long enough, they may be considered to be a Conduct Disordered child. The causes of such behavioral and emotional problems are complex; each child is unique with his/her own strengths and needs. To one degree or another, such children may manifest the following behaviors;

- They may have difficulty following rules, or behaving in socially acceptable ways.
- They are disruptive.
- They may be aggressive to family and others.
- They may be truant from school and engage in runaway behaviors.
- They may have a learning disability or behavior disorders which require an IEP.
- They may have depression or be diagnosed with ADD.
- They, most often, have an uncooperative attitude and a fear and mistrust of adults.

How are they identified?

The behavioral and emotional problems usually begin in preschool and elementary years with behavior problems peaking in late adolescents/early adulthood.

Such children may be:

- impulsive, do not grasp future consequences of behavior;
- cannot delay gratification or self-regulate emotions (temper);
- need stimulation and excitement;
- have a low frustration tolerance;
- have aggressive behavior;
- frequently have been exposed to violence and abuse;
- may exhibit rebelliousness;
- experience peer rejection;
- usually associate with negative peers and have favorable attitudes toward deviant behavior.

They frequently come from families with:

- parental history of and favorable attitudes toward deviant behavior;
- harsh/inconsistent discipline;
- poor parental and community monitoring of their behavior;
- low parental (mother) education;
- family conflict, disruption in care giving; substance abuse,
- poor attachment between child and family and community and family.

In school they have:

- academic failure, beginning in elementary school;
- poor academic aptitude test scores; poor reading scores by the 3rd and 4th grade;
- lack of commitment to school, or attachment to teachers, experience peer rejection and social alienation,
- exhibit early aggressive behavior (grades K-3);
- have low aspirations and goals;
- frequently special education services are needed.

What is effective intervention?
The mental, emotional, family issues leading to such behaviors will not suddenly go away. Intervention needs to be concentrated in the child's natural setting: with the family, school, community. It needs to identify and maximize the child and family's strengths while detecting and modifying weaknesses.

Interventions which might "turn the tide" in the life of a child or family, are not announced with "bells and whistles." Attachment to even one caring, responsible adult; teacher, custodian, bus driver, administrator, relative, community member, social worker, case manager, can help children become prosocial.

A comprehensive assessment and individualized education program (IEP) can help identify and maximize children's strengths while detecting and accommodating weaknesses, which multiply risk. To maximize opportunities for prosocial interaction, assign personal coaches or mentors for students with IEP's or reoccurring discipline referrals.

To succeed in school, these children need to learn strategies for improving social performance and controlling emotions. Early intervention programs to improve social competence and meet physical and emotional needs have been shown to increase academic achievement and reduce later behavior problems.

Programs to teach coping strategies, academic, social and life skills to these children have been shown to improve behavior and reduce criminal recidivism rates. The teaching of "emotional literacy" can help children learn to control impulses and emotions, especially anger and aggression.

A study of the effects of remediation on delinquency showed that the child's bond with the tutor affected school attitude and behavior more than improved grades.

To boost a child's self esteem, provide:

- support in opportunities to develop responsibility;
- to contribute to school, family, community life;
- make decisions and choices;
- develop self-discipline;
- deal with failure and mistakes;
- the acceptance and support of one prosocial adult.

Children seek to imitate and gain approval from their role models, be they good or bad.

Students who belonged to social, sports, hobby, or other kinds of groups while in school, missed less school and failed fewer courses than those who did not belong to such groups.

What would be "early intervention?"
Programs for early intervention focus upon; good prenatal care, programs for teenage parents and premature infants, early intervention for at-risk children, home visiting or Parents as Teachers programs, kindergarten readiness programs, stressing the importance of parent involvement, treatment for abusing parents.

Sources: Facts for Families, The American Academy of Child and Adolescent Psychiatry, 1997
Preventing Antisocial Behavior in Disabled and At-Risk Students, Journal of Learning Disabilities, 1997

Mary Hillin, 2/2/2000

Children and Family Policy
Evaluation and Program Improvement Unit
Reactive Attachment Disorder

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Concerns have been raised regarding the availability of treatment resources for children who have been diagnosed with Reactive Attachment Disorder. Such resources are needed to keep children from coming into SRS custody or to utilize when children must be placed outside their own home. The following is a discussion of this disorder relying heavily on the work of Reber (1996) published by the Phillips Graduate Institute, other writings, case readings and discussion with professionals.

Many childhood disorders in the DSM IV (1994) have similar presenting symptoms to Reactive Attachment Disorder. Attention Deficit Hyperactive Disorder, Oppositional Defiant Disorder, Separation Anxiety, Adjustment Disorder, Posttraumatic Stress Disorder may present many of the same symptoms and behaviors. Reactive Attachment Disorder distinguishes itself by being an outgrowth of environmental/familial deprivation. The single factor which differentiates RAD from other disorders is the history of attachment disruptions. Because of this fact, the child welfare system may be a gathering point for children with such a disorder.

No matter what disorder a child with mental or emotional difficulties presents there are some underlying principles which guide practice; the entire family needs to be involved in treatment, sifting out the real issues generating the difficulty is not easy, treatment will not be quick or easy to accomplish. Treatment for such children is a long difficult process. Hospitalization is appropriate for crisis stabilization or medication adjustment but it doesn't cure or, many times, even help the child get better. It does not make mental, emotional or family issues go away. Intervention needs to be concentrated in the child's natural setting; with the family, school, community.

Definition

Attachment is defined as the "lasting psychological connectedness between human beings" which begins in-utero between mother and child. After birth, there are several specific child behaviors and maternal responses which must take place in order for the child to develop normal attachment (bonding). Attachment runs along a continuum between secure and unattached, with the normal child falling somewhere in the middle. Children who have secure attachments can internalize safety and security and have full access to emotions through which they can face adversity and develop normally. If a young child's needs are not met often enough, trust in others will not develop and problems in adjustment and coping appear. Normal attachment is necessary to gain a sense of security and mastery of one's environment.

Attachment is the most critical milestone during the first year of life. It occurs during the same time as rapid brain development. Studies of the effects of trauma on brain development and later behavior have changed the way the treatment of psychiatric disorders is viewed (Pickle 1997). "When an infant or toddler experiences trauma they lack a stable base, a secure sense of attachment, a repertoire of defenses and ego strength." Instead of developing skills to cope with the trauma, the child develops entrenched

defensive strategies which affect the ability to think, feel, relate to others and behave in a socially acceptable manner.

Children with attachment disorder will exhibit a history of significant trauma prior to age five, most usually in the first 18 months of life. Some common trauma events are;

- premature birth,
- physical or psychological abandonment by the mother,
- physical abuse or neglect,
- painful illness or injury (chronic ear infection),
- sudden separation from primary caregiver,
- prenatal alcohol and drug abuse,
- frequent foster placements or failed adoption,
- pathological or inadequate child care.

Many times there are rapid, multiple changes in the child's life leading to unsatisfactory caretaking and relocations.

It is very important when planning treatment for a child experiencing disturbed behavior to distinguish between Reactive Attachment Disorder, Post Traumatic Stress or other Disorders as such a diagnosis has implications for effective treatment. The DSM IV (1994) defines Reactive Attachment Disorder as markedly disturbed and developmentally inappropriate social relatedness in most contexts, beginning before age five. Fraiberg (1980) found that children with attachment disorders have problems in three areas:

1. *Impairment in the capacity to attach:* Relationships are formed only on the basis of need, with little regard for one caregiver over another. The child who asks to be taken home by a stranger with no selective attachment to primary caregivers. The mother figure trying to parent such a child feels rejected, criticized by self and others and to experience an overall sense of inadequacy as a parent. She is the most traumatized by the child's rejection (Cline, 1998).

2. *Developmental retardation:* Conceptual thinking remains low, even after favorable environments are provided. Children who have been traumatized have affective and emotional memories indelibly burned into their brainstem and midbrain, alterations in basic physiological functioning, persisting emotional memories related to the original trauma. (Baylor College of Medicine, 1994) The child doesn't develop emotionally or develop abstract thinking.

3. *Poor impulse control, particularly aggression.* Adolescents who haven't developed empathy or concern for others see others as objects to be used, eg. sexual acting out where the other becomes the victim. Many of these children, as adolescents, wind up in the Juvenile Justice System or eventually in adult prisons.

Children with Reactive Attachment Disorder usually have been severely emotionally abused or neglected. Eighty percent of children abused or neglected in the first year of life demonstrate symptoms of the disorganized/disoriented type of Reactive Attachment Disorder. The National Adoption Center reports that 52% of adoptable children have attachment disorder symptoms. It has been suggested that adoption after six months of age increases the chances of becoming attachment disordered. Minskew and Hooper (1990) report that 86% of special needs adoptions involve sexually abused children. It has been estimated that perhaps half of the incarcerated adult population suffers from some form of attachment breaks in childhood.

An underlying feature of the child with Attachment Disorder is the lack of basic trust. This lack of trust seems to generate feelings of aloneness, being different, pervasive feelings of anger and excessive need to be in control of everything (Odenthal, no date).

Identifying Behaviors

(Common Symptoms of Reactive Attachment Disorder)

Social	Emotional	Behavioral	Developmental
Superficially engaging and charming child	Indiscriminately affectionate with strangers	Destructive of self, others, things	Developmental lags experienced
Will not make eye contact	Not cuddly or affectionate with parents	Cruelty to animals, siblings, other children	Lacks cause and effect thinking
Has poor peer relationships	Is inappropriately demanding or clingy	Engages in stealing, lying even about unimportant things	Lacks a conscience
Engages in persistent nonsense questions or incessant chatter		Has poor impulse control	Has abnormal speech patterns
Fights for control over everything		Hoarding or gorging of food	
		Preoccupation with fire	

Treatment Approach

The underlying issues generating emotional and behavioral problems for the Attachment Disordered child have to do with loss and grief. There is grief over the loss of the previous family, difficulty trusting the new adoptive or foster family and yet fear of separation from the new family. Such children struggle to believe the adoptive family will truly keep them and not reject them for their bad behavior. Separation from the family through hospitalization, foster or group home placement only makes treatment more difficult as it strengthens the child's fear of rejection and makes it more difficult for him or her to trust caretakers (Alger, 1999).

Mental Health treatment efforts should not only focus on the attachment issues, but also focus on preventing the need for hospitalization or other out of home placement. Parents and/or caretakers must be included as active participants in the treatment process. Any efforts in treatment need to emphasize assessing and treating the family as a unit, and understand that the best way to provide services to a child is to strengthen and empower the family (Alger, 1998). In less severe situations traditional treatment approaches such as individual therapy (with caretaker involvement), family therapy, and/or psychiatric services (ie., medication management) may be effective. In more severe situations, other treatment options are indicated. For any child experiencing severe emotional disturbance, there is an array of additional mental health services available. Such services often include supportive services for the family

as well, and are offered in the family home or community (ie., school) rather than the providing agency. (Alger, 1999).

Treatment efforts and resources need to be directed at preserving the existing family through providing the supportive services necessary to maintain the child in the home. Hospitalization or other out-of-home placement is a last resort treatment option and should be considered only when the safety of the child, family, and /or community are at risk. Such a placement can contribute to more acute psychological problems, and exacerbate the already existing attachment issues.

The treatment of any child believed to be attachment disordered begins with a comprehensive assessment which addresses all aspects of the child's life and history;

1. History- Was there significant trauma in the child's life? When did it occur, how did it occur and for how long? Was it in-utero, during birth, after birth, before age three, before age five, much later? Is the child attachment disordered or suffering from Post Traumatic Stress or another disorder as a result of abuse and neglect? Do symptoms of PTSD mask the more basic Reactive Attachment Disorder?

   What strengths might/or might not have been present to mitigate the trauma. What strengths are currently present for the child and family?

2. How does the child relate to the world? How does his/her interaction with the world mirror how he/she perceives the world as a result of the trauma? Adopted attachment disordered children are convinced their parents do not want them and are going to send them away. They behave in such a way as to try to confirm what they believe.

3. What are the child's presenting behaviors? Children with RAD will either have behaviors that protect them from others or control others. Most of these behaviors are not socially acceptable.

4. **What level of health, functionality and bonding does the family possess?** How prepared are they to work with the child, treatment resources, the school system, the community to help the child. If a foster or adoptive family, what level of commitment do they have to the child in working on the problems the RAD child presents? If not available, can such a resource be developed for the child? Any effective treatment is going to involve work with both the child and the family.

5. **Are there professionals available to work with the family**? Such work is draining for both the family and the professionals involved. **Attachment/bonding is a cycle that takes more then one person to make it whole.**

6. What is the child's physical make-up. What is their nutritional status. Are other disabilities, difficulties present which must be addressed? Do they need other therapies; speech, physical therapy, etc. Will medication and medication monitoring help? Is it available?

"It is impossible to erase the devastating consequences of years of abuse easily. The rise in juvenile crime proves that fact." (Pickel)

Helping the child to overcome the destructive early experiences which have led to the Attachment Disorder involves;

- helping them to build basic trust,

- to bond and attach with others (parent figures),
- helping them to build healthy relationships with peers,
- to express needs and feelings appropriately,
- to think rationally,
- and to behave in response to reasonable expectations.

For the foster and adoptive parents trying to parent such a child it means setting small step-by-step goals toward achieving peaceful co-existence rather than a loving relationship, especially if the appropriate therapy is not available. Successful parenting of the RAD child involves high structure, effective environmental control, helping the child develop appropriate responses to authority, as well as, internal controls on behavior, use of logical and natural consequence, reenforcement of natural consequences and nurturing and reparenting (Cline, 1998).

Delaney (1991) has found four areas on which to focus treatment for Reactive Attachment Disorder:

- Containing the child's acting out sabotaging behaviors which place caregivers in an unwanted negative role and jeopardize continued placement in the home.
- Increasing the child's ability to verbalize his negative expectations about caregivers and his/her belief that they will mistreat and/or reject him/her.
- Developing the child's ability to express a wide range of feelings and express his needs to caregivers directly.
- Promoting positive encounters between the child and foster, adoptive or natural parents. Use of humor, surprise, teasing, parents to become more animated, playful and more forceful in loving interactions.

For traumatized children, symptoms and problems become submerged, altered or may even disappear during certain stages of development. Frequently the submerged set of symptoms will re-emerge when a new developmental phase begins. This is very frequently seen during adolescence. Many children traumatized as young children seem to make good progress until they become 12 or 13 years old. At this time, symptoms of hyper sexuality, aggressive or assaultive behaviors, impulse control and anxiety problems re-emerge. "Children who have been abused or experienced traumatic losses during childhood will likely have re-emergence of profound anxiety and impulsivity during adolescents" (Baylor College of Medicine,1997).

Randolph (1998) has developed an assessment instrument to determine the severity of Reactive Attachment Disorder through parent report of behavioral symptoms. The child is classified as mild, moderate or severe on the basis of their score on the instrument.

<u>Attachment Therapy</u>

There are many different treatment approaches a clinician may take in the therapeutic process. Each approach is based on underlying principles within the theory driving the approach. During therapy, a clinician utilizes the approach that fits the client's personality, fit the therapists style and applied to the treatment issues at hand. The Holding/Attachment approaches of therapeutic intervention are but one of many approaches in the therapeutic field(Alger, 1999).

Attachment Therapy has been around since the 1970's and has been called by many different names; holding therapy, holding/attachment therapy, rage reduction, dynamic therapy, Z-process. The Attachment Center at Evergreen, Colorado and the Bonding Center of Ohio list a wide range of treatment modalities which are utilized depending on the outcome of the assessment of the child and family. These

may include; reparenting, inner child work, cognitive restructuring, psychodrama, holding therapy, EMDR, sensory integration work, auditory reprocessing, offender treatment, therapeutic foster parenting while the child is in the program, grief and loss work and redecision therapy. All designed to meet the four goals of treatment listed above.

Attachment (holding) therapy has the goal of changing the child's paradigm of being in control by recreating the bonding cycle that is experienced between the infant and mother. The goal is to create a "crisis of intimacy" between parents and child from which a more loving relationship can grow. Holding Therapy is one modality used in more severe cases of Reactive Attachment Disorder.

Critics of holding/attachment therapy see it as abusive as it could traumatize an already traumatized child (James 1989). It is especially damaging to children who suffer from Postturmatic Stress Disorder.

Myeroff and Mertlich (1999) assessed the effects of holding therapy on children who have a history of aggressive and delinquent behaviors. The subjects were adopted children between the ages of 5-14 recruited through the Attachment Center at Evergreen, Colo. The authors found a significant decrease in aggressive and delinquent behaviors in a pre-post quasi-experimental study. Solter has suggested that holding therapy is effective due to the release of strong emotions through the holding process.

Every effort should be made to treat the attachment disordered child in the local community with resources which can be utilized to work with that child and family over a long period of time. Holding or Attachment Therapy may be sought by those who do not know about or have not utilized other resources to meet their child's needs.

Children in SRS Custody

To prevent children from coming into SRS custody for out of home placement services must be directed at strengthening and empowering the family. In more severe situations, the community based wrap-around concept offers the best opportunity for service delivery. Many private insurances, as well as, Medicaid and Health Wave will cover the cost of traditional mental health services. Traditional mental health services are provided by private practitioners, as well as, the local community mental health center and typically include individual, family and group therapy and/or psychiatric services. The non-traditional mental health services recommended for children experiencing severe emotional disturbance are also covered by Medicaid and Health Wave, but are not typically covered by private insurance. The non-traditional mental health services are offered through the local community mental health centers as part of their Community Based Services for severely emotionally disturbed children. These services typically include intensive mental health case management, attendant care, psychosocial groups, wraparound facilitation, and parent support services. Other services may also be available depending on the service array within each mental health center. Any child meeting the criteria for severe emotional disturbance is eligible for community based services through the mental health center.

For very severe situations, when a child is at risk of hospitalization or other out-of-home placement, the child may be eligible for The Home and Community Based Services Waiver for S.E.D. children. The waiver makes additional services available to the child and family which are not routinely offered to all S.E.D. children. The additional services are available in addition to those mentioned above. The waiver provides a different financial eligibility determination process from that of Medicaid or Health Wave. Therefore, it assists families by covering the cost of all the mental health services recommended for the child in the S. E. D. Waiver plan of care. It is important to remember that the S.E.D. Waiver is a diversion program to prevent psychiatric hospitalization and/or other intensive impatient treatment. Eligibility

determination for the S.E.D. Waiver is a two fold process. The first step includes a clinical assessment through the local community mental health center to determine if the child meets clinical eligibility. The second step determines whether the child meets the financial eligibility requirements, which are applied for through the CMHC, but determined by the local SRS office.

Research both within Kansas and nationally indicates mental health case management is the service which best meets the needs of the child and family experiencing severe emotional disturbance (Alger, 1999). Thus it is important to ensure that any child experiencing attachment issues severe enough to warrant the need for more intensive services than might traditionally be offered, be able to obtain them. Anyone involved with such a child needs to keep in mind that the treatment process can be lengthy. Recovery is determined by many factors including the severity of the trauma, the child's readiness and response to treatment, the level of familial involvement, whether the child is in a permanent placement or moves frequently, etc. It is known, however, that children improve more readily in a safe, stable environment, among people they know and trust and who support them through even their most difficult moments. Everyone benefits when such an approach can be successfully implemented: a child's stability is obtained in the least restrictive setting possible, preferably in a home setting; support is given to the child's caretakers which allows them to more adequately meet the needs of the child; the family learns new and strengthens existing coping skills; and the family is linked with appropriate community agencies and social resources which creates an extended, natural support system (Snyder, 1990); and ultimately, the need for the child to be placed in a more intensive setting away from family and community is prevented.

TA-NON-KA

For children who have come into SRS custody, questions arise as to the available resources for treatment. The child welfare/foster care system is not a mental health treatment system. It is a child welfare system containing children with mental health treatment needs. ASFA time lines and requirements for permanency planning place unique pressures on the system with regard to the core issues of Reactive Attachment Disordered children; treatment and permanency. The ASFA requirements may work to the benefit of younger children if they serve to make assessments/decisions sooner. Are/can parents ever meet the needs of their children? Can they relate to the treatment issues just described? Making decisions on the basis of that information can enable permanency and stability become a reality in the child's life sooner rather than later. Recognition must be given to the fact that any adoptive or foster family resources developed for the child may need help and assistance throughout the growing-up years of that child.

Severely Emotionally Disturbed children in the child welfare system are the ones with numerous hospitalizations and out-of-home placements. From information gained in case reading, there may be a tendency to do "too little too late" when it comes to focused treatment for the child and family. Focus should be on early intervention techniques when the child first comes to the attention of the system.

Implications and Recommendations:

Early Crisis Intervention

1) One key to minimizing the sensitizing and damaging potential of an experience is early intervention. Early interventions should be focused on providing stability, predictability and information to the child about what is happening to them and what is going to happen to them. Children in the midst of a crisis are confused and have little idea about what is going to happen next. It is critically important that professionals and caretakers, working with a child in the midst of an acute crisis, provide information for the child which is age appropriate but, at the same time, helps the child develop some sort of understanding of what is going on and what is happening to them. At the point a child comes into SRS

custody, every effort should be made to help them to manage the crisis and anxiety in their life. Children are very sensitive to non verbal cues. Providing simple clear and factual information to the child which helps them to understand what has happened will help to minimize the effects of the crisis. Providing adults to whom they can attach and stay connected and who will listen to them will help mitigate the effects of the trauma.

2) A key to minimizing stress and trauma for the child is to provide a stable, predictable and nurturing environment. The child needs to have a predictable schedule which includes a variety of activities, some of which are quiet and contained and others which involve free play and large muscle movement.

3) Children need to have factual information about what they have experienced and the way the mind and body respond to trauma. Adults working with the child need to be able to tolerate the intense emotional nature of the acute traumatic situation so they can help the child to deal with the situation.

The optimum treatment situation for such children is in a **family; natural, foster or adoptive** with knowledgeable professionals who can work with the child and family over time. Such resource may be in the form of services (wrap-around) through the local mental health center, other professionals in the community or other resources who provide support and treat children and families.

Indicators at Intake (Incident Based Report vs. Assessment)

A review of intake and assessment protocols should be completed with regard to whether these children are being identified at intake in such a way that early assessment and intervention can occur, if needed. Special attention should be paid to child behaviors of; cruelty to animals, fire setting, physical aggression toward other children, inappropriate sexual behaviors and generalized danger to self and others. Such behaviors should receive special consideration in relation to the child's age as they are indicators of the child's degree of attachment and concern for others. Prematurity, low birth weight, developmental delay and parents with histories of severe problems are also indicators of potential problems for the child. While many of these situations do not reach the level of severity to warrant SRS intervention, referral to other community resources for help and assistance may be in order.

Clinical Consultation for Area Office Staff

What kind of resources do workers in the local office need to assess the needs of children and families coming into custody? What kind of resources do contractor staff need? Can we get beyond the tendency for "to little treatment/intervention to late" for children in SRS custody?

Prevention Programs

With the reorganization of the Division and new emphasis within SRS, greater efforts should be placed on prevention of the development of Reactive Attachment Disorder and other child mental health problems through working with other Divisions and the Department of Health and Environment in the following areas:

- Prenatal Care
- Programs for Premature Infants
- Early Intervention for At-risk Children
- Home Visiting Programs
- Programs addressing teenage pregnancy
- Preventing Childhood traumas in the first three years of life

- Stressing the importance of parent involvement
- Treatment for substance abusing parents
- Identification of parents at high risk for neglect
- Minimal disruption for young children coming into custody

mrh, 1/4/2000

TA-NON-KA

STATE OF KANSAS

SRS Areas

Topeka Area

Kansas City Area

Manhattan Area

Hays Area

Garden City Area

Hutchinson Area

Emporia Area

Olathe Area

Chanute Area

Lawrence Area

Wichita Area

Region 1

Region 2

Region 3

Region 4

Region 5

CHEYENNE RAWLINS DECATUR NORTON PHILLIPS SMITH JEWELL REPUBLIC WASHINGTON MARSHALL NEMAHA BROWN DONIPHAN

SHERMAN THOMAS SHERIDAN GRAHAM ROOKS OSBORNE MITCHELL CLOUD CLAY RILEY POTTAWATOMIE JACKSON ATCHISON LEAVENWORTH WYANDOTTE JEFFERSON

WALLACE LOGAN GOVE TREGO ELLIS RUSSELL LINCOLN OTTAWA SALINE DICKINSON GEARY WABAUNSEE SHAWNEE DOUGLAS JOHNSON

GREELEY WICHITA SCOTT LANE NESS RUSH BARTON ELLSWORTH MCPHERSON MORRIS OSAGE FRANKLIN MIAMI

HAMILTON KEARNY FINNEY HODGEMAN PAWNEE RICE MARION CHASE LYON COFFEY ANDERSON LINN

STAFFORD EDWARDS HARVEY RENO

STANTON GRANT HASKELL GRAY FORD KIOWA PRATT KINGMAN SEDGWICK BUTLER GREENWOOD WOODSON ALLEN BOURBON

MORTON STEVENS SEWARD MEADE CLARK COMANCHE BARBER HARPER SUMNER COWLEY CHATAUQUA ELK WILSON NEOSHO CRAWFORD LABETTE CHEROKEE MONTGOMERY

Region 1 = Olathe, Chanute, Emporia
Region 2 = Kansas City, Lawrence
Region 3 = Topeka, Manhattan
Region 4 = Hutchinson, Hays, Garden City
Region 5 = Wichita

○ SRS Area Office

SENATE BILL No. 633

By Committee on Ways and Means

2-14

9 AN ACT concerning children in need of care; amending K.S.A. 38-1503,
10 38-1523a, 38-1524, 38-1529, 38-1531, 38-1566, 38-1568 and 75-3329
11 and K.S.A. 1999 Supp. 38-1502, 38-1507, 38-1513, 38-1532, 38-1542,
12 38-1543, 38-1544, 38-1562, 38-1563, 38-1565, 38-1581, 38-1583, 38-
13 1584, 38-1585, 38-1587, 38-1591, 38-1608 and 60-1610 and repealing
14 the existing sections.
15
16 *Be it enacted by the Legislature of the State of Kansas:*
17 New Section 1. There is hereby established in the state treasury the
18 family services and community intervention fund which shall be admin-
19 istered by the secretary of social and rehabilitation services. The secretary
20 of social and rehabilitation services may accept money from any source
21 for the purposes for which money in the family services and community
22 intervention fund may be expended. Upon receipt of such money, the
23 secretary shall remit the entire amount at least monthly to the state trea-
24 surer, who shall deposit it in the state treasury and credit it to the family
25 services and community intervention fund. All moneys in the special fund
26 for family services and community intervention shall be used for the pur-
27 pose of assisting state, county, or local governments or political subdivi-
28 sions thereof; or community agencies; to provide services, intervention
29 and support services to children alleged or adjudged to be a youth in need
30 of community services as defined by K.S.A. 38-1502, and amendments
31 thereto, especially those youth at risk because of their own actions or
32 behaviors and not due to abuse or neglect by a parent, guardian or other
33 person responsible for their care. The purpose of the family services and
34 community intervention fund shall be to enhance the ability of families
35 and children to resolve problems within the family and community that
36 might otherwise result in a child becoming a ward of the court, by the
37 collaboration of governmental and local service providers. All expendi-
38 tures from the family services and community intervention fund shall be
39 made in accordance with appropriation acts upon warrants of the director
40 of accounts and reports issued pursuant to vouchers approved by the
41 secretary or by a person or persons designated by the secretary.
42 New Sec. 2. (a) When determining whether reasonable efforts
43 have been made to prevent or eliminate the necessity for removal of a

Senate Ways and Means Committee
Date February 29, 2000
Attachment # 3

child from the child's home, safety of the child is paramount. In determining the safety of the child the court shall consider the likelihood of immediate serious physical, mental or emotional harm which may result from leaving the child in the child's current situation, and shall balance that concern with the mental and emotional harm that will result from removing the child from familiar care and relationships, place and possessions.

(b) Before ordering a child removed from the custody of a parent the court shall find from evidence provided that allowing the child to remain in the custody of a parent is not in the best interests of the child. The determination of best interests shall be made at the first hearing at which the court considers removal of a child from the child's home, even temporarily.

(c) If the court is presented a plan to provide a child or family services which is reasonably designed to address safety concerns regarding the child who is the subject of the proceeding, the court shall not order or authorize removal of the child from the child's home.

(d) If the child is in the custody of the secretary with authority for the secretary to make a suitable placement and the secretary removes the child from the child's home, the secretary shall request a ruling of the court whether the removal was in the best interests of the child. In making the finding, the court may rely on documentation submitted by the secretary or may set the date for a hearing on the matter. If the secretary requests a ruling whether removal was in the best interests of the child, the court shall enter a finding not less than 45 days from the date of the request and shall provide the secretary with a written answer not more than 10 days from the date the decision was rendered.

Sec. 3. K.S.A. 1999 Supp. 38-1502 is hereby amended to read as follows: 38-1502. As used in this code, unless the context otherwise indicates:

(a) "Child in need of care" means a person less than 18 years of age who~~:~~ *is a child in need of protection or a youth in need of community services as defined by this code.*

~~(1) Is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;~~

~~(2) is without the care or control necessary for the child's physical, mental or emotional health;~~

~~(3) has been physically, mentally or emotionally abused or neglected or sexually abused;~~

~~(4) has been placed for care or adoption in violation of law;~~

~~(5) has been abandoned or does not have a known living parent;~~

~~(6) is not attending school as required by K.S.A. 72-977 or 72-1111,~~

New Sec. 2. (a) When determining whether reasonable efforts have been made to prevent or eliminate the necessity for removal of a child from the child's home, safety of the child is paramount. In determining the safety of the child the court shall consider the likelihood of immediate serious physical, mental or emotional harm which may result from leaving the child in the child's ***home.***

(b) Before ordering a child removed from the custody of a parent the court shall find that allowing the child to remain in the custody of a parent is not in the best interests of the child. The determination of best interests shall be made at the first ~~hearing~~ ruling at which the court considers removal of the child from the child's home, even temporarily.

(c) ***When the secretary provides the court with a plan to provide services to a child which the court finds is reasonably designed to address safety concerns regarding the child,*** the court shall not order or authorize the removal of the child from the child's home, even temporarily. ***The court shall have the authority to require any person or entity agreeing to participate in the plan to perform as set out in the plan.***

1 ~~and amendments thereto;~~
2 ~~(7) except in the case of a violation of K.S.A. 41-727, subsection (j)~~
3 ~~of K.S.A. 74-8810 or subsection (m) or (n) of K.S.A. 79-3321, and amend-~~
4 ~~ments thereto, or, except as provided in subsection (a)(12) of K.S.A. 21-~~
5 ~~4204a and amendments thereto, does an act which, when committed by~~
6 ~~a person under 18 years of age, is prohibited by state law, city ordinance~~
7 ~~or county resolution but which is not prohibited when done by an adult;~~
8 ~~(8) while less than 10 years of age, commits any act which if done by~~
9 ~~an adult would constitute the commission of a felony or misdemeanor as~~
10 ~~defined by K.S.A. 21-3105 and amendments thereto;~~
11 ~~(9) is willfully and voluntarily absent from the child's home without~~
12 ~~the consent of the child's parent or other custodian;~~
13 ~~(10) is willfully and voluntarily absent at least a second time from a~~
14 ~~court ordered or designated placement, or a placement pursuant to court~~
15 ~~order, if the absence is without the consent of the person with whom the~~
16 ~~child is placed or, if the child is placed in a facility, without the consent~~
17 ~~of the person in charge of such facility or such person's designee;~~
18 ~~(11) has been residing in the same residence with a sibling or another~~
19 ~~person under 18 years of age, who has been physically, mentally or emo-~~
20 ~~tionally abused or neglected, or sexually abused; or~~
21 ~~(12) while less than 10 years of age commits the offense defined in~~
22 ~~K.S.A. 21-4204a and amendments thereto.~~
23 *(b) "Child in need of protection" means a person less than 18 years*
24 *of age who:*
25 *(1) Has been physically, mentally or emotionally abused or neglected*
26 *or sexually abused;*
27 *(2) has been placed for care or adoption in violation of law;*
28 *(3) has been abandoned or does not have a known living parent; or*
29 *(4) has been residing in the same residence with a sibling or another*
30 *person under 18 years of age, who has been physically, mentally or emo-*
31 *tionally abused or neglected, or sexually abused.*
32 *(c) "Youth in need of community services" means a person less than*
33 *18 years of age who:*
34 *(1) Is without the care or control necessary for the youth's physical,*
35 *mental or emotional health;*
36 *(2) is not attending school as required by K.S.A. 72-977 or 72-1111,*
37 *and amendments thereto;*
38 *(3) except in the case of a violation of K.S.A. 41-727, subsection (j) of*
39 *K.S.A. 74-8810 or subsection (m) or (n) of K.S.A. 79-3321, and amend-*
40 *ments thereto, or, except as provided in subsection (a)(12) of K.S.A. 21-*
41 *4204a, and amendments thereto, does an act which, when committed by*
42 *a person under 18 years of age, is prohibited by state law, city ordinance*
43 *or county resolution but which is not prohibited when done by an adult;*

1 *(4) while less than 10 years of age, commits any act which if done by*
2 *an adult would constitute the commission of a felony or misdemeanor as*
3 *defined by K.S.A. 21-3105, and amendments thereto;*
4 *(5) is willfully and voluntarily absent from the child's home without*
5 *the consent of the child's parent or other custodian;*
6 *(6) is willfully and voluntarily absent from a court ordered or desig-*
7 *nated placement, or a placement pursuant to a court order, if the absence*
8 *is without the consent of the person with whom the child is placed or, if*
9 *the child is placed in a facility, without the consent of the person in charge*
10 *of such facility or such person's designee; or*
11 *(7) while less than 10 years of age commits the offense defined in*
12 *K.S.A. 21-4204a, and amendments thereto.*
13 ~~(b)~~ *(d)* "Physical, mental or emotional abuse ~~or neglect~~" means the
14 infliction of physical, mental or emotional injury or the causing of a de-
15 terioration of a child and may include, but shall not be limited to, ~~failing~~
16 ~~to maintain reasonable care and treatment, negligent treatment or~~ mal-
17 treatment or exploiting a child to the extent that the child's health or
18 emotional well-being is endangered. ~~A parent legitimately practicing re-~~
19 ~~ligious beliefs who does not provide specified medical treatment for a~~
20 ~~child because of religious beliefs shall not for that reason be considered~~
21 ~~a negligent parent; however, this exception shall not preclude a court from~~
22 ~~entering an order pursuant to subsection (a)(2) of K.S.A. 38-1513 and~~
23 ~~amendments thereto.~~
24 ~~(c)~~ *(e)* "Sexual abuse" means any act committed with a child which
25 is described in article 35, chapter 21 of the Kansas Statutes Annotated
26 and those acts described in K.S.A. 21-3602 or 21-3603, and amendments
27 thereto, regardless of the age of the child.
28 ~~(d)~~ *(f)* "Parent," when used in relation to a child or children, includes
29 a guardian, conservator and every person who is by law liable to maintain,
30 care for or support the child.
31 ~~(e)~~ *(g)* "Interested party" means the state, the petitioner, the child,
32 any parent and any person found to be an interested party pursuant to
33 K.S.A. 38-1541 and amendments thereto.
34 ~~(f)~~ *(h)* "Law enforcement officer" means any person who by virtue
35 of office or public employment is vested by law with a duty to maintain
36 public order or to make arrests for crimes, whether that duty extends to
37 all crimes or is limited to specific crimes.
38 ~~(g)~~ *(i)* "Youth residential facility" means any home, foster home or
39 structure which provides 24-hour-a-day care for children and which is
40 licensed pursuant to article 5 of chapter 65 of the Kansas Statutes
41 Annotated.
42 ~~(h)~~ *(j)* "Shelter facility" means any public or private facility or home
43 other than a juvenile detention facility that may be used in accordance

with this code for the purpose of providing either temporary placement for the care of children in need of care prior to the issuance of a dispositional order or longer term care under a dispositional order.

~~(i)~~ *(k)* "Juvenile detention facility" means any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders which must not be a jail.

~~(j)~~ *(l)* "Adult correction facility" means any public or private facility, secure or nonsecure, which is used for the lawful custody of accused or convicted adult criminal offenders.

~~(k)~~ *(m)* "Secure facility" means a facility which is operated or structured so as to ensure that all entrances and exits from the facility are under the exclusive control of the staff of the facility, whether or not the person being detained has freedom of movement within the perimeters of the facility, or which relies on locked rooms and buildings, fences or physical restraint in order to control behavior of its residents. No secure facility shall be in a city or county jail.

~~(l)~~ *(n)* "Ward of the court" means a child over whom the court has acquired jurisdiction by the filing of a petition pursuant to this code and who continues subject to that jurisdiction until the petition is dismissed or the child is discharged as provided in K.S.A. 38-1503 and amendments thereto.

~~(m)~~ *(o)* "Custody," whether temporary, protective or legal, means the status created by court order or statute which vests in a custodian, whether an individual or an agency, the right to physical possession of the child and the right to determine placement of the child, subject to restrictions placed by the court.

~~(n)~~ *(p)* "Placement" means the designation by the individual or agency having custody of where and with whom the child will live.

~~(o)~~ *(q)* "Secretary" means the secretary of social and rehabilitation services.

~~(p)~~ *(r)* "Relative" means a person related by blood, marriage or adoption but, when referring to a relative of a child's parent, does not include the child's other parent.

~~(q)~~ *(s)* "Court-appointed special advocate" means a responsible adult other than an attorney guardian *ad litem* who is appointed by the court to represent the best interests of a child, as provided in K.S.A. 38-1505a and amendments thereto, in a proceeding pursuant to this code.

~~(r)~~ *(t)* "Multidisciplinary *child protection* team" means a group of persons, appointed by the court or by the state department of social and rehabilitation services under K.S.A. 38-1523a and amendments thereto, ~~which has knowledge of the circumstances of a child in need of care~~ *for the purpose of advising or assisting the department of social and rehabilitation services and law enforcement agencies in the investigation, as-*

(~~r~~*t*) "Multidisciplinary team" means a group of persons, appointed by the court or by the state department of social and rehabilitation services under K.S.A. 38-1523a and amendments thereto, ***for the purpose of advising or assisting the department of social and rehabilitation services and law enforcement agencies in the investigation, assessment or safety planning for a child who is the subject of a report as a child in need of care.***

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sessment or safety planning for a child who is the subject of a report as a child in need of care by reason of physical, mental or emotional abuse or neglect or sexual abuse.

~~(s)~~ *(u)* "Jail" means:

(1) An adult jail or lockup; or

(2) a facility in the same building or on the same grounds as an adult jail or lockup, unless the facility meets all applicable standards and licensure requirements under law and there is (A) total separation of the juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents in the respective facilities; (B) total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, health care, dining, sleeping, and general living activities; and (C) separate juvenile and adult staff, including management, security staff and direct care staff such as recreational, educational and counseling.

~~(t)~~ *(v)* "Kinship care" means the placement of a child in the home of the child's relative or in the home of another adult with whom the child or the child's parent already has a close emotional attachment.

~~(u)~~ *(w)* "Juvenile intake and assessment worker" means a responsible adult authorized to perform intake and assessment services as part of the intake and assessment system established pursuant to K.S.A. 75-7023, and amendments thereto.

~~(v)~~ *(x)* "Abandon" means to forsake, desert or cease providing care for the child without making appropriate provisions for substitute care.

~~(w)~~ *(y)* "Permanent guardianship" means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining without ongoing state oversight or intervention. The permanent guardian stands in loco parentis and exercises all the rights and responsibilities of a parent. ~~Upon appointment of a permanent guardian, the child in need of care proceedings shall be dismissed.~~ A permanent guardian may be appointed after termination of parental rights *or without termination of parental rights, if the parent consents and agrees to the appointment of a permanent guardian.*

~~(x)~~ *(z)* "Aggravated circumstances" means the abandonment, torture, chronic abuse, sexual abuse or chronic, life threatening neglect of a child.

~~(y)~~ *(aa)* "Permanency hearing" means a notice and opportunity to be heard is provided to interested parties, foster parents, preadoptive parents or relatives providing care for the child. The court, after consideration of the evidence, shall determine whether progress toward the case plan goal is adequate or reintegration is a viable alternative, or if the case should be referred to the county or district attorney for filing of a petition to terminate parental rights or to appoint a permanent guardian.

~~(z)~~ *(bb)* "Extended out of home placement" means a child has been

(~~w~~*y*) "Permanent guardianship" means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining without ongoing state oversight or intervention ***by the secretary***. The permanent guardian stands in loco parentis and exercises all the rights and responsibilities of a parent. A permanent guardian may be appointed after termination of parental rights ***or without termination of parental rights, if the parents consent and agree to the appointment of a permanent guardian. Upon appointment of a permanent guardian, the court shall continue to have jurisdiction to review the placement and appoint successor or replacement guardian or guardians.***

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in the custody of the secretary and placed with neither parent for 15 of the most recent 22 months beginning 60 days after the date at which a child in the custody of the secretary was removed from the home.

~~(aa)~~ *(cc)* "Educational institution" means all schools at the elementary and secondary levels.

~~(bb)~~ *(dd)* "Educator" means any administrator, teacher or other professional or paraprofessional employee of an educational institution who has exposure to a pupil specified in subsection (a) of K.S.A. 1999 Supp. 72-89b03 and amendments thereto.

(ee) "Neglect" means acts or omissions by a parent, guardian or person responsible for the care of a child resulting in harm to a child or presenting a likelihood of harm and the acts or omissions are not due solely to the lack of financial means of the child's parents or other custodian. Neglect may include but shall not be limited to:

(1) Failure to provide the child with food, clothing or shelter necessary to sustain the life or health of the child;

(2) failure to provide adequate supervision of a child or to remove a child from a situation which requires judgment or actions beyond the child's level of maturity, physical condition or mental abilities and that results in bodily injury or a likelihood of harm to the child; or

(3) failure to use resources available to treat a diagnosed medical condition if such treatment will make a child substantially more comfortable, reduce pain and suffering, correct or substantially diminish a crippling condition from worsening. A parent legitimately practicing religious beliefs who does not provide specified medical treatment for a child because of religious beliefs shall not for that reason be considered a negligent parent; however, this exception shall not preclude a court from entering an order pursuant to subsection (a)(2) of K.S.A. 38-1513, and amendments thereto.

(ff) "Community intervention team" means a group of persons, appointed by the court or by the state department of social and rehabilitation services for the purpose of assessing the needs of a child who is alleged to be a youth in need of community services.

(ff) "Community ***services*** team" means a group of persons, appointed by the court or by the state department of social and rehabilitation services for the purpose of assessing the needs of a ***youth or accessing or coordinating services to a youth*** who is alleged to be a youth in need of community services.

Sec. 4. K.S.A. 38-1503 is hereby amended to read as follows: 38-1503. (a) Proceedings concerning any child who appears to be a child in need of care shall be governed by this code, except in those instances when the Indian child welfare act of 1978 (25 U.S.C. §§ 1901 *et seq.*) applies.

(b) Subject to the uniform child custody jurisdiction act, K.S.A. 38-1301 *et seq.* and amendments thereto, the district court shall have original jurisdiction to receive and determine proceedings under this code.

(c) When jurisdiction has been acquired by the court over the person of a child in need of care it may continue until the child: (1) Has attained

1 the age of 21 years; (2) has been adopted; or (3) has been discharged by
2 the court. Any child 18 years of age or over may request, by motion to
3 the court, that the jurisdiction of the court cease. Subsequently, the court
4 shall enter an order discharging the person from any further jurisdiction
5 of the court.
6 (d) When it is no longer appropriate for the court to exercise juris-
7 diction over a child the court, upon its own motion or the motion of an
8 interested party, shall enter an order discharging the child. Except upon
9 request of the child, the court shall not enter an order discharging a child
10 which reaches 18 years of age before completing the child's high school
11 education until June 1 of the school year during which the child became
12 18 years of age as long as the child is still attending high school.
13 (e) Unless the court finds that substantial injustice would result, the
14 provisions of this code shall govern with respect to acts or omissions oc-
15 curring prior to the effective date of this code, *and amendments thereto,*
16 and with respect to children alleged or adjudicated to have done or to
17 have been affected by the acts or omissions, to the same extent as if the
18 acts or omissions had occurred on or after the effective date *of this code,*
19 *and amendments thereto,* and the children had been alleged or adjudi-
20 cated to be children in need of care.
21 Sec. 5. K.S.A. 1999 Supp. 38-1507 is hereby amended to read as
22 follows: 38-1507. (a) Except as otherwise provided, in order to protect
23 the privacy of children who are the subject of a child in need of care
24 record or report, all records and reports concerning children in need of
25 care, including the juvenile intake and assessment report, received by the
26 department of social and rehabilitation services, a law enforcement
27 agency or any juvenile intake and assessment worker shall be kept con-
28 fidential except: (1) To those persons or entities with a need for infor-
29 mation that is directly related to achieving the purposes of this code, or
30 (2) upon an order of a court of competent jurisdiction pursuant to a
31 determination by the court that disclosure of the reports and records is
32 in the best interests of the child or are necessary for the proceedings
33 before the court, or both, and are otherwise admissible in evidence. Such
34 access shall be limited to in camera inspection unless the court otherwise
35 issues an order specifying the terms of disclosure.
36 (b) The provisions of subsection (a) shall not prevent disclosure of
37 information to an educational institution or to individual educators about
38 a pupil specified in subsection (a) of K.S.A. 1999 Supp. 72-89b03 and
39 amendments thereto.
40 (c) When a report is received by the department of social and reha-
41 bilitation services, a law enforcement agency or any juvenile intake and
42 assessment worker which indicates a child may be in need of care, the
43 following persons and entities shall have a free exchange of information

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1 between and among them:
2 (1) The department of social and rehabilitation services;
3 (2) the commissioner of juvenile justice;
4 (3) the law enforcement agency receiving such report;
5 (4) members of a court appointed multidisciplinary *child protection*
6 team;
7 (5) an entity mandated by federal law or an agency of any state au-
8 thorized to receive and investigate reports of a child known or suspected
9 to be in need of care;
10 (6) a military enclave or Indian tribal organization authorized to re-
11 ceive and investigate reports of a child known or suspected to be in need
12 of care;
13 (7) a county or district attorney;
14 (8) a court services officer who has taken a child into custody pursuant
15 to K.S.A. 38-1527, and amendments thereto;
16 (9) a guardian ad litem appointed for a child alleged to be in need of
17 care;
18 (10) an intake and assessment worker; ~~and~~
19 (11) any community corrections program which has the child under
20 court ordered supervision*;*
21 *(12) the department of health and environment or persons authorized*
22 *by the department of health and environment pursuant to K.S.A. 59-512,*
23 *and amendments thereto, for the purpose of carrying out responsibilities*
24 *relating to licensure or registration of child care providers as required by*
25 *chapter 65 of article 5 of the Kansas Statutes Annotated, and amendments*
26 *thereto; and*
27 *(13) members of a duly appointed community intervention team.*
28 (d) The following persons or entities *are authorized to provide and*
29 shall have access to information, records or reports *created,* received ~~by~~
30 ~~the department of social and rehabilitation services, a law enforcement~~
31 ~~agency or any juvenile intake and assessment worker. Access shall be~~
32 ~~limited to information~~ *or maintained by such persons or entities but only*
33 *to the extent* reasonably necessary to carry out their lawful responsibilities
34 to maintain their personal safety and the personal safety of individuals in
35 their care or to diagnose, treat, care for or protect a child alleged to be
36 in need of care.
37 (1) A child named in the report or records.
38 (2) A parent or other person responsible for the welfare of a child,
39 or such person's legal representative.
40 (3) A court-appointed special advocate for a child, a citizen review
41 board or other advocate which reports to the court.
42 (4) A person licensed to practice the healing arts or mental health
43 profession in order to diagnose, care for, treat or supervise: (A) A child

(d) The following persons or entities ***are authorized to provide and*** shall have access to information, records or reports ***created,*** received ***or maintained among them but only to the extent otherwise permitted by state or federal law and*** reasonably necessary to carry out their lawful responsibilities to maintain their personal safety and the personal safety of individuals in their care or to diagnose, treat, care for or protect a child alleged to be in need of care. ***The person or entity requesting the information shall, upon request, articulate the basis for the request. If refused access to the requested information the person or entity requesting the information may proceed pursuant to K.S.A. 38-1523a(d),(e) and (f).***

whom such service provider reasonably suspects may be in need of care; (B) a member of the child's family; or (C) a person who allegedly abused or neglected the child.

(5) A person or entity licensed or registered by the secretary of health and environment or approved by the secretary of social and rehabilitation services to care for, treat or supervise a child in need of care. In order to assist a child placed for care by the secretary of social and rehabilitation services in a foster home or child care facility, the secretary shall provide relevant information to the foster parents or child care facility prior to placement and as such information becomes available to the secretary.

(6) A coroner or medical examiner when such person is determining the cause of death of a child.

(7) The state child death review board established under K.S.A. 22a-243, and amendments thereto.

(8) A prospective adoptive parent prior to placing a child in their care.

(9) ~~The department of health and environment or person authorized by the department of health and environment pursuant to K.S.A. 59-512, and amendments thereto, for the purpose of carrying out responsibilities relating to licensure or registration of child care providers as required by chapter 65 of article 5 of the Kansas Statutes Annotated, and amendments thereto.~~

(9) The department of health and environment or person authorized by the department of health and environment pursuant to K.S.A. 59-512, and amendments thereto, for the purpose of carrying out responsibilities relating to licensure or registration of child care providers as required by chapter 65 of article 5 of the Kansas Statutes Annotated, and amendments thereto.

~~(10)~~ The state protection and advocacy agency as provided by subsection (a)(10) of K.S.A. 65-5603 or subsection (a)(2)(A) and (B) of K.S.A. 74-5515, and amendments thereto.

~~(11)~~ *(10)* Any educational institution to the extent necessary to enable the educational institution to provide the safest possible environment for its pupils and employees.

~~(12)~~ *(11)* Any educator to the extent necessary to enable the educator to protect the personal safety of the educator and the educator's pupils.

(12) The secretary of social and rehabilitation services.

(13) A law enforcement agency.

(14) A juvenile intake and assessment worker.

(15) the commissioner of juvenile justice

(e) Information from a record or report of a child in need of care shall be available to members of the standing house or senate committee on judiciary, house committee on appropriations, senate committee on ways and means, legislative post audit committee and joint committee on children and families, carrying out such member's or committee's official functions in accordance with K.S.A. 75-4319 and amendments thereto, in a closed or executive meeting. Except in limited conditions established by ⅔ of the members of such committee, records and reports received by the committee shall not be further disclosed. Unauthorized disclosure may subject such member to discipline or censure from the house of representatives or senate.

1 (f) Nothing in this section shall be interpreted to prohibit the secre-
2 tary of social and rehabilitation services from summarizing the outcome
3 of department actions regarding a child alleged to be a child in need of
4 care to a person having made such report.
5 (g) Disclosure of information from reports or records of a child in
6 need of care to the public shall be limited to confirmation of factual details
7 with respect to how the case was handled that do not violate the privacy
8 of the child, if living, or the child's siblings, parents or guardians. Further,
9 confidential information may be released to the public only with the ex-
10 press written permission of the individuals involved or their representa-
11 tives or upon order of the court having jurisdiction upon a finding by the
12 court that public disclosure of information in the records or reports is
13 necessary for the resolution of an issue before the court.
14 (h) Nothing in this section shall be interpreted to prohibit a court of
15 competent jurisdiction from making an order disclosing the findings or
16 information pursuant to a report of alleged or suspected child abuse or
17 neglect which has resulted in a child fatality or near fatality if the court
18 determines such disclosure is necessary to a legitimate state purpose. In
19 making such order, the court shall give due consideration to the privacy
20 of the child, if, living, or the child's siblings, parents or guardians.
21 (i) Information authorized to be disclosed in subsections (d) through
22 (g) shall not contain information which identifies a reporter of a child in
23 need of care.
24 (j) Records or reports authorized to be disclosed in this section shall
25 not be further disclosed, except that the provisions of this subsection shall
26 not prevent disclosure of information to an educational institution or to
27 individual educators about a pupil specified in subsection (a) of K.S.A.
28 1999 Supp. 72-89b03 and amendments thereto.
29 (k) Anyone who participates in providing or receiving information
30 without malice under the provisions of this section shall have immunity
31 from any civil liability that might otherwise be incurred or imposed. Any
32 such participant shall have the same immunity with respect to participa-
33 tion in any judicial proceedings resulting from providing or receiving
34 information.
35 (l) No individual, association, partnership, corporation or other entity
36 shall willfully or knowingly disclose, permit or encourage disclosure of
37 the contents of records or reports concerning a child in need of care
38 received by the department of social and rehabilitation services, a law
39 enforcement agency or a juvenile intake and assessment worker except
40 as provided by this code. Violation of this subsection is a class B
misdemeanor.
Sec. 6. K.S.A. 1999 Supp. 38-1513 is hereby amended to read as
43 follows: 38-1513. (a) *Physical or mental care and treatment.* (1) When a

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1 child less than 18 years of age is alleged to have been *physically, mentally*
2 *or emotionally abused or neglected or* sexually abused, no consent shall
3 be required to medically examine the child to determine whether ~~there~~
4 ~~has been sexual abuse~~ *the child has been maltreated.*
5 (2) When the health or condition of a child who is a ward of the court
6 requires it, the court may consent to the performing and furnishing of
7 hospital, medical, surgical or dental treatment or procedures, including
8 the release and inspection of medical or dental records. A child, or parent
9 of any child, who is opposed to certain medical procedures authorized by
10 this subsection may request an opportunity for a hearing thereon before
11 the court. Subsequent to the hearing, the court may limit the performance
12 of matters provided for in this subsection or may authorize the perform-
13 ance of those matters subject to terms and conditions the court considers
14 proper.
15 (3) Prior to ~~adjudication~~ *disposition* the person having custody of the
16 child may give consent to the following:
17 (A) Dental treatment for the child by a licensed dentist;
18 (B) diagnostic examinations of the child, including but not limited to
19 the withdrawal of blood or other body fluids, x-rays and other laboratory
20 examinations;
21 (C) releases and inspections of the child's medical history records;
22 (D) immunizations for the child;
23 (E) administration of lawfully prescribed drugs to the child; and
24 (F) examinations of the child including, but not limited to, the with-
25 drawal of blood or other body fluids or tissues, for the purpose of deter-
26 mining the child's parentage.
27 (4) When the court has granted legal custody of a child in a disposi-
28 tional hearing to any agency, association or individual, the custodian or
29 an agent designated by the custodian shall have authority to consent to
30 the performance and furnishing of hospital, medical, surgical or dental
31 treatment or procedures or mental care or treatment other than inpatient
32 treatment at a state psychiatric hospital, including the release and in-
33 spection of medical or hospital records, subject to terms and conditions
34 the court considers proper.
35 (5) If a child is ~~already~~ in the custody of the secretary, the secretary
36 may consent to the mental care and treatment of the child, without court
37 approval, so long as such care and treatment do not include inpatient
38 treatment at a state psychiatric hospital.
39 (6) Any health care provider who in good faith renders hospital, med-
40 ical, surgical, mental or dental care or treatment to any child after a con-
41 sent has been obtained as authorized by this section shall not be liable in
42 any civil or criminal action for failure to obtain consent of a parent.
43 (7) Nothing in this section shall be construed to mean that any person

shall be relieved of legal responsibility to provide care and support for a child.

(b) *Mental care and treatment requiring court action.* If it is brought to the court's attention, while the court is exercising jurisdiction over the person of a child under this code, that the child may be a mentally ill person as defined in K.S.A. 1999 Supp. 59-2946 and amendments thereto, the court may:

(1) Direct or authorize the county or district attorney or the person supplying the information to file the petition provided for in K.S.A. 1999 Supp. 59-2957 and amendments thereto and proceed to hear and determine the issues raised by the application as provided in the care and treatment act for mentally ill persons; or

(2) authorize that the child seek voluntary admission to a treatment facility as provided in K.S.A. 1999 Supp. 59-2949 and amendments thereto.

The application to determine whether the child is a mentally ill person may be filed in the same proceedings as the petition alleging the child to be a child in need of care, or may be brought in separate proceedings. In either event the court may enter an order staying any further proceedings under this code until all proceedings have been concluded under the care and treatment act for mentally ill persons.

Sec. 7. K.S.A. 38-1523a is hereby amended to read as follows: 38-1523a. (a) Upon recommendation of the state department of social and rehabilitation services or the county or district attorney, the court may appoint a multidisciplinary *child protection* team to *advise or* assist ~~in gathering information~~ *the department of social and rehabilitation services and law enforcement agencies in the investigation, assessment or safety planning* regarding a child alleged to be a child in need of care by reason of physical, mental or emotional abuse or neglect or sexual abuse. The team may be a standing multidisciplinary *child protection* team or may be appointed for a specific child. *Members comprising a multidisciplinary child protection team shall include the department of social and rehabilitation services and appropriate law enforcement agencies and may include other persons having specialized knowledge concerning the investigation, assessment or safety planning concerning maltreated children.*

(b) Any person appointed as a member of a multidisciplinary *child protection* team may decline to serve and shall incur no civil liability as the result of declining to serve.

(c) This section shall be part of and supplemental to the Kansas code for care of children.

(d) The multidisciplinary *child protection* team may request disclosure of information in regard to a child alleged to be a child in need of care, or a child who has been adjudged to be a child in need of care, by

38-1523a. Same; multidisciplinary team; appointment; disclosure of information upon application withdrawal. (a) Upon recommendation of the state department of social and rehabilitation services or the county or district attorney, the court may appoint a multidisciplinary team to ***advise or*** assist ***the department of social and rehabilitation services and law enforcement agencies in the investigation, assessment or safety planning*** regarding a child alleged ***or adjudged*** to be a child in need of care. The team may be a standing multidisciplinary team or may be appointed for a specific child. ***Members comprising a multidisciplinary team shall include the department of social and rehabilitation services and appropriate law enforcement agencies and may include other persons having necessary or useful knowledge concerning the investigation, assessement, or safety planning concerning maltreated children.***

(b) Any person appointed as a member of a multidisciplinary team may decline to serve and shall incur no civil liability as the result of declining to serve.

(c) This section shall be part of and supplemental to the Kansas code for care of children.

(d) The multidisciplinary team, ***or any person or entity set out in K.S.A. 38-1507(d),*** may request disclosure of information in regard to a child alleged to be a child in need of care, or a child who has been adjudged to be a child in need of care, by making a written verified

1 making a written verified application to the district court. Upon a finding
2 by the court there is probable cause to believe the information sought
3 may assist in determining if a child is a child in need of care as defined
4 in K.S.A. 38-1502 and amendments thereto, or in assisting a child who
5 has been adjudicated a child in need of care, then the court may issue a
6 subpoena, subpoena duces tecum or enter an order for the production of
7 the requested documents, reports or information and directing the doc-
8 ument, reports or information to be delivered to the applicant at a spec-
9 ified time, date and place. The time and date of delivery shall not be
10 sooner than five days after the service of the subpoena or order, excluding
11 Saturdays, Sundays or holidays. The court issuing the subpoena or order
12 shall keep all applications filed pursuant to this subsection and a copy of
13 the subpoena or order in a special file maintained for such purpose or in
14 the official court file for the child. Upon receiving service of a subpoena,
15 subpoena duces tecum or an order for production pursuant to this sub-
16 section, the party served shall give oral or written notice of service to any
17 person known to have a right to assert a privilege or assert a right of
18 confidentiality in regard to the documents, reports or information sought
19 at least three days before the specified date of delivery.

application to the district court. Upon a finding by the court there is probable cause to believe the information sought may assist in determining if a child is a child in need of care as defined in K.S.A. 38-1502 and amendments thereto, or in assisting a child who has been adjudicated a child in need of care, then the court may issue a subpoena, subpoena duces tecum or enter an order for the production of the requested documents, reports or information and directing the ***child,*** document, reports or information to be delivered to the applicant at a specified time, date and place. The time and date of delivery shall not be sooner than five days after the service of the subpoena or order, excluding Saturdays, Sundays or holidays. The court issuing the subpoena or order shall keep all applications filed pursuant to this subsection and a copy of the subpoena or order in a special file maintained for such purpose or in the official court file for the child. Upon receiving service of a subpoena, subpoena duces tecum or an order for production pursuant to this subsection, the party served shall give oral or written notice of service to any ***other*** person known to have a right to assert a privilege or assert a right of confidentiality in regard to the documents, reports or information sought at least three days before the specified date of delivery.

20 (e) The written verified application shall be in substantially the fol-
21 lowing form:
22 Name of Court
23 In the Interest of ______________ Case No.
24 Name(s)
25 Date of birth: ______________
26 Each a child under 18 years of age.
27 WRITTEN APPLICATION FOR DISCLOSURE OF INFORMATION
28 County of ______________ ss
29 State of Kansas
30 The undersigned applicant being first duly sworn alleges and states as follows:
31 1. The applicant is ______________
32 2. There is an investigation being made into the report of alleged neglect or abuse in
33 regard to the above-named child or children.
34 A petition has been filed alleging the above-named child is a child in need of care
35 or the child has been adjudicated to be a child in need of care.
36 3. The following documents, reports and/or information are requested. (List specifi-
37 cally.)

3. The following ***persons,*** documents, reports and/or information are requested. (List specifically.)

38 4. The reasons for the request are:
39 Further applicant saith not.
40 ______________
41 Applicant
42 Subscribed and sworn to before me
43 this _____ day of ___________, ~~19~~_____ *(year)*.

Notary Public

My commission expires:

(f) Any parent, child, guardian ad litem, party subpoenaed or subject to an order of production or person who claims a privilege or right of confidentiality may request in writing that the court issuing the subpoena or order for production withdraw the subpoena, subpoena duces tecum or order for production issued pursuant to subsection (d). The request shall automatically stay the operation of the subpoena, subpoena duces tecum or order for production and the documents, reports or information requested shall not be delivered until the issuing court has held a hearing to determine if the documents, reports or information are subject to the claimed privilege or right of confidentiality, and whether it is in the best interests of the child for the subpoena or order to produce to be honored. The request to withdraw shall be filed with the district court issuing the subpoena or order at least 24 hours prior to the specified time and date of delivery, excluding Saturdays, Sundays or holidays, and a copy of the written request must be given to the person subpoenaed or subject to the order for production at least 24 hours prior to the specified time and date of delivery.

(g) Upon recommendation of the state department of social and rehabilitation services or the county or the county or district attorney, the court may appoint a community services team to advise or assist the the department of social and rehabilitation services and appropriate law enforcement agencies concerning the assessment of a child who is alleged to be a youth in need of community services.

(h) A multidisciplinary team may serve as a community services team.

Sec. 8. K.S.A. 38-1524 is hereby amended to read as follows: 38-1524. (a) When a report to a law enforcement agency indicates that a child may be harmed, the law enforcement agency shall promptly initiate an investigation. If the law enforcement officer reasonably believes the child will be harmed, the officer shall remove the child from the location where the child is found as authorized by K.S.A. 38-1527 and amendments thereto.

(b) Whenever any person furnishes information to the state department of social and rehabilitation services that a child appears to be a ~~child in need of care~~ *youth in need of community services*, the department shall make a preliminary inquiry to determine whether the interests of the child require further action be taken. Whenever practicable, the inquiry shall include a preliminary investigation of the circumstances which were the subject of the information, including the home and environmental situation and the previous history of the child. If reasonable grounds to believe abuse or neglect exist, immediate steps shall be taken to protect the health and welfare of the abused or neglected child as well as that of any other child under the same care who may be harmed by abuse or neglect. After the inquiry, if the department determines it is not possible to provide otherwise those services necessary to protect the interests of the child, the department shall recommend to the county or district attorney that a petition be filed.

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1 Sec. 9. K.S.A. 38-1529 is hereby amended to read as follows: 38-
2 1529. (a) Whenever the state department of social and rehabilitation serv-
3 ices or any other person refers a case to the county or district attorney
4 for the purpose of filing a petition alleging that a child is a child in need
5 of care, the county or district attorney shall review the facts and recom-
6 mendations of the department and any other evidence available and make
7 a determination whether or not the circumstances warrant the filing of
8 the petition. *The county or district attorney shall not file a petition alleg-*
9 *ing that a child is a child in need of care unless the petition specifies the*
10 *facts which are relied upon to support the petition, including specific*
11 *actions taken to prevent or eliminate the need for a petition alleging that*
12 *a child is a child in need of care, or the specific facts supporting that an*
13 *emergency exists which requires the court to protect the safety of each*
14 *child. If the petition requests custody to the secretary or custody to the*
15 *secretary is likely, the court shall cause a copy of the petition to be pro-*
16 *vided to the secretary upon filing.*
17 (b) Any individual may file a petition alleging a child is a child in need
18 of care and the individual may be represented by the individual's own
19 attorney in the presentation of the case.
20 Sec. 10. K.S.A. 38-1531 is hereby amended to read as follows: 38-
21 1531. (a) *Filing of petition.* An action pursuant to this code is commenced
22 by the filing of a petition with the clerk of the district court.
23 (b) *Contents of petition.* (1) The petition shall state, if known:
24 (A) The name, date of birth and residence address of the child;
25 (B) the name and residence address of the child's parents;
26 (C) the name and residence address of any persons having custody
27 or control of the child, or the nearest known relative if no parent can be
28 found; and
29 (D) plainly and concisely in the language of the statutory definition,
30 the basis for requesting that the court assume jurisdiction over the child.
31 (2) The petition shall also state the specific facts which are relied
32 upon to support the allegation referred to in the preceding paragraph
33 including any known dates, times and locations.
34 (3) The proceedings shall be entitled: "In the Interest of ________."
35 (4) The petition shall contain a request that the court find the child
36 to be a child in need of care.
37 (5) The petition shall contain a request that the parent or parents be
38 ordered to pay child support. The request for child support may be omit-
39 ted with respect to a parent already ordered to pay child support for the
40 child and shall be omitted with respect to one or both parents upon
41 written request of the secretary.
42 *(6) The petition shall specify the efforts made by the petitioner, or*
43 *any other efforts known to the petitioner, to prevent or eliminate the*

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necessity of filing a petition alleging the child to be a child in need of care.

(c) *Motions.* Motions may be made orally or in writing. The motion shall state with particularity the grounds for the motion and shall state the relief or order sought.

Sec. 11. K.S.A. 1999 Supp. 38-1532 is hereby amended to read as follows: 38-1532. Upon the filing of a petition under this code the court shall proceed by one of the following methods:

(a) Issue summons stating the place and time at which the parties are required to appear and answer the allegations of the petition, which shall be within 30 days of the date the petition is filed, and deliver the summons with copies of the petition attached to the sheriff or a person specially appointed to serve it.

(b) If the child has been taken into protective custody under the provisions of K.S.A. 38-1542 and a temporary custody hearing is held as required by K.S.A. 38-1543, a copy of the petition shall be served at the hearing on each interested party who is in attendance at the hearing and a record of service made a part of the proceedings. The court shall announce the time the parties will be required to next appear before the court. Process shall be served on any interested party not at the temporary custody hearing.

Upon the written request of the petitioner or the county or district attorney separate or additional summons shall be issued to any interested party.

The court shall attempt to notify both parents, if known.

(c) If the petition requests custody to the secretary or custody to the secretary is likely, the court shall cause a copy of the petition to be provided to the secretary upon filing.

Sec. 12. K.S.A. 1999 Supp. 38-1542 is hereby amended to read as follows: 38-1542. (a) The court upon verified application may issue *ex parte* an order directing that a child be held in protective custody and, if the child has not been taken into custody, an order directing that the child be taken into custody. The application shall state *for each child*:

(1) The applicant's belief that the child is a child in need of care and is likely to sustain harm if not immediately afforded protective custody; and

(2) the ~~specific~~ facts which are relied upon to support the ~~belief~~ *application, including specific actions taken to prevent or eliminate the need for an order of protective custody, or the specific facts supporting that an emergency exists.*

(2) the facts which are relied upon to support the belief.

(b) (1) The order of protective custody may be issued only after the court has determined there is probable cause to believe the allegations in the application are true. The order shall remain in effect until the temporary custody hearing provided for in K.S.A. 38-1543, and amend-

ments thereto, unless earlier rescinded by the court.

(2) No child shall be held in protective custody for more than 72 hours, excluding Saturdays, Sundays and legal holidays, unless within the 72-hour period a determination is made as to the necessity for temporary custody in a temporary custody hearing. Nothing in this subsection (b)(2) shall be construed to mean that the child must remain in protective custody for 72 hours.

(c) Whenever the court determines the necessity for an order of protective custody, the court may place the child in the protective custody of: (1) A parent or other person having custody of the child and may enter a restraining order pursuant to subsection ~~(d)~~ *(e)*; (2) a person, other than the parent or other person having custody, who shall not be required to be licensed under article 5 of chapter 65 of the Kansas Statutes Annotated; (3) a youth residential facility; ~~or~~ (4) the secretary *if the child is alleged to be a child in need of protection; or (5) the secretary, if recommended by the secretary and if the child is alleged to be a youth in need of community services. When making a recommendation regarding custody, the secretary shall consider the assessment of a community intervention team, if such team exists and has made an assessment.* When the child is placed in the protective custody of the secretary, the secretary shall have the discretionary authority to place the child with a parent or to make other suitable placement for the child. When circumstances require, a child in protective custody may be placed in a juvenile detention facility or other secure facility pursuant to an order of protective custody for not to exceed 24 hours, excluding Saturdays, Sundays and legal holidays.

(d) The order of protective custody shall be served on the child's parents and any other person having legal custody of the child. The order shall prohibit all parties from removing the child from the court's jurisdiction without the court's permission.

(e) If the court issues an order of protective custody, the court may also enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home; visiting, contacting, harassing or intimidating the child; or attempting to visit, contact, harass or intimidate the child. Such restraining order shall be served on any alleged perpetrator to whom the order is directed.

(e) If the court issues an order of protective custody, the court may also enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home; visiting, contacting, harassing or intimidating the child; or attempting to visit, contact, harass or intimidate the child, ***other family member or witness.*** Such restraining order shall be served on any alleged perpetrator to whom the order is directed.

(f) The court shall not enter an order removing a child from the custody of a parent pursuant to this section unless the court first finds from evidence presented by the petitioner that reasonable efforts have been made to prevent or eliminate the need for removal of the child or that an emergency exists which threatens the safety of the child and ~~requires the~~ *that* immediate removal *is in the best interest* of the child. Such findings shall be included in any order entered by the court. *If the child*

is placed in the custody of the secretary, the court shall provide the secretary with a written copy of any orders entered upon making the order.

Sec. 13. K.S.A. 1999 Supp. 38-1543 is hereby amended to read as follows: 38-1543. (a) Upon notice and hearing, the court may issue an order directing who shall have temporary custody and may modify the order during the pendency of the proceedings as will best serve the child's welfare.

(b) A hearing pursuant to this section shall be held within 72 hours, excluding Saturdays, Sundays and legal holidays, following a child having been taken into protective custody.

(c) Whenever it is determined that a temporary custody hearing is required, the court shall immediately set the time and place for the hearing. Notice of a temporary custody hearing shall be in substantially the following form:

(Name of Court)

(Caption of Case)

NOTICE OF TEMPORARY CUSTODY HEARING

TO:

(Names)	(Relationship)	(Addresses)
____________	____________	____________
____________	____________	____________
____________	____________	____________

On ____________, ____________, ~~19~~____ *(year)*, at ____ o'clock ____m. the court
(day) (date)
will conduct a hearing at ____________ to determine if the above named child or children should be in the temporary custody of some person or agency other than the parent or other person having legal custody prior to the hearing on the petition filed in the above captioned case. The court may order one or both parents to pay child support.

____________, an attorney, has been appointed as guardian *ad litem* for the child or children. Each parent or other legal custodian has the right to appear and be heard personally, either with or without an attorney. An attorney will be appointed for a parent who can show that the parent is not financially able to hire one.

Date ____________, ~~19~~____ *(year)*

Clerk of the District Court
by ____________
(Seal)

REPORT OF SERVICE

I certify that I have delivered a true copy of the above notice to the persons above named in the manner and at the times indicated below:

Name	Location of Service (other than above)	Manner of Service	Date	Time
________	________	________	________	________
________	________	________	________	________
________	________	________	________	________

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Date Returned ____________, ~~19~~____*(year)*

____

(Signature)

____

(Title)

(d) Notice of the temporary custody hearing shall be given at least 24 hours prior to the hearing. The court may continue the hearing to afford the 24 hours prior notice or, with the consent of the party, proceed with the hearing at the designated time. If an order of temporary custody is entered and the parent or other person having custody of the child has not been notified of the hearing, did not appear or waive appearance and requests a rehearing, the court shall rehear the matter without unnecessary delay.

(e) Oral notice may be used for giving notice of a temporary custody hearing where there is insufficient time to give written notice. Oral notice is completed upon filing a certificate of oral notice in substantially the following form:

(Name of Court)

(Caption of Case)

CERTIFICATE OF ORAL NOTICE OF TEMPORARY CUSTODY HEARING

I gave oral notice that the court will conduct a hearing at ________ o'clock ____m. on ____________, ~~19~~ ____ *(year)*, to the persons listed, in the manner and at the times indicated below:

Name	Relationship	Date	Time	Method of Communication (in person or telephone)
________	________	________	________	________
________	________	________	________	________
________	________	________	________	________

I advised each of the above persons that:

(1) The hearing is to determine if the above child or children should be in the temporary custody of a person or agency other than a parent;

(2) the court will appoint an attorney to serve as guardian *ad litem* for the child or children named above;

(3) each parent or legal custodian has the right to appear and be heard personally either with or without an attorney;

(4) an attorney will be appointed for a parent who can show that the parent is not financially able to hire an attorney; and

(5) the court may order one or both parents to pay child support.

____

(Signature)

____

(Name Printed)

____

1
(Title)
2 (f) The court may enter an order of temporary custody after deter-
3 mining that: (1) The child is dangerous to self or to others; (2) the child
4 is not likely to be available within the jurisdiction of the court for future
5 proceedings; or (3) the health or welfare of the child may be endangered
6 without further care.
7 (g) Whenever the court determines the necessity for an order of tem-
8 porary custody the court may place the child in the temporary custody
9 of: (1) A parent or other person having custody of the child and may enter
10 a restraining order pursuant to subsection (h); (2) a person, other than
11 the parent or other person having custody, who shall not be required to
12 be licensed under article 5 of chapter 65 of the Kansas Statutes Anno-
13 tated; (3) a youth residential facility; ~~or~~ (4) the secretary *if the child is*
14 *alleged to be a child in need of protection; or (5) the secretary, if recom-*
15 *mended by the secretary and if the child is alleged to be a youth in need*
16 *of community services. When making a recommendation regarding cus-*
17 *tody, the secretary shall consider the assessment of a community inter-*
18 *vention team, if such team exists and has made an assessment. The sec-*
19 *retary shall present to the court in writing the specific actions taken to*
20 *prevent or eliminate the need for custody to the secretary*. When the child
21 is placed in the temporary custody of the secretary, the secretary shall
22 have the discretionary authority to place the child with a parent or to
23 make other suitable placement for the child. When circumstances re-
24 quire, a child may be placed in a juvenile detention facility or other secure
25 facility, but the total amount of time that the child may be held in such
26 facility under this section and K.S.A. 38-1542 and amendments thereto
27 shall not exceed 24 hours, excluding Saturdays, Sundays and legal holi-
28 days. The order of temporary custody shall remain in effect until modified
29 or rescinded by the court or a disposition order is entered but not ex-
30 ceeding 60 days, unless good cause is shown and stated on the record.
31 (h) If the court issues an order of temporary custody, the court may
32 enter an order restraining any alleged perpetrator of physical, sexual,
33 mental or emotional abuse of the child from residing in the child's home;
34 visiting, contacting, harassing or intimidating the child; or attempting to
35 visit, contact, harass or intimidate the child.
36 (i) The court shall not enter an order removing a child from the cus-
37 tody of a parent pursuant to this section unless the court first finds from
38 evidence presented by the petitioner that reasonable efforts have been
39 made to prevent or eliminate the need for removal of the child or that
40 an emergency exists which threatens the safety of the child and ~~requires~~
41 ~~the~~ *that* immediate removal *is in the best interest* of the child. Such find-
ings shall be included in any order entered by the court. *If the child is*
placed in the custody of the secretary, the court shall provide the secretary

(h) If the court issues an order of temporary custody, the court may enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home; visiting, contacting, harassing or intimidating the child; or attempting to visit, contact, harass or intimidate the child, **other family member or witness**.

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1 *with a written copy of any orders entered upon making the order.*
2 Sec. 14. K.S.A. 1999 Supp. 38-1544 is hereby amended to read as
3 follows: 38-1544. (a) At any time after filing a petition, but prior to an
4 adjudication, the court may enter an order for continuance and informal
5 supervision without an adjudication if no interested party objects. Upon
6 granting the continuance, the court shall include in the order any con-
7 ditions with which the interested parties are expected to comply and
8 provide the parties with a copy of the order. The conditions may include
9 appropriate dispositional alternatives authorized by K.S.A. 38-1563 and
10 amendments thereto.
11 (b) An order for informal supervision may remain in force for a period
12 of up to six months and may be extended, upon hearing, for an additional
13 six-month period for a total of one year.
14 (c) The court after notice and hearing may revoke or modify the order
15 with respect to a party upon a showing that the party, being subject to
16 the order for informal supervision, has substantially failed to comply with
17 the terms of the order, or that modification would be in the best interests
18 of the child. Upon revocation, proceedings shall resume pursuant to this
19 code.
20 (d) Parties to the order for informal supervision who successfully
21 complete the terms and period of supervision shall not again be pro-
22 ceeded against in any court based solely upon the allegations in the orig-
23 inal petition and the proceedings shall be dismissed.
24 *(e) If the court issues an order for informal supervision pursuant to*
25 *this section, the court may enter an order restraining any alleged perpe-*
26 *trator of physical, sexual, mental or emotional abuse of the child from*
27 *residing in the child's home, visiting, contacting, harassing or intimidating*
28 *the child; or attempting to visit, contact, harass or intimidate the child.*

(e) If the court issues an order for informal supervision pursuant to this section, the court may enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home, visiting, contacting, harassing or intimidating the child; or attempting to visit, contact, harass or intimidate the child, ***other family member or witness.***

29 Sec. 15. K.S.A. 1999 Supp. 38-1562 is hereby amended to read as
30 follows: 38-1562. (a) At any time after a child has been adjudicated to be
31 a child in need of care and prior to disposition, the judge shall permit any
32 interested parties, and any persons required to be notified pursuant to
33 subsection (b), to be heard as to proposals for appropriate disposition of
34 the case.
35 (b) Before entering an order placing the child in the custody of a
36 person other than the child's parent, the court shall require notice of the
37 time and place of the hearing to be given to all the child's grandparents
38 at their last known addresses or, if no grandparent is living or if no living
39 grandparent's address is known, to the closest relative of each of the
40 child's parents whose address is known, and to the foster parent, prea-
41 doptive parent or relative providing care. Such notice shall be given by
42 restricted mail not less than 10 business days before the hearing and shall
43 state that the person receiving the notice shall have an opportunity to be

heard at the hearing. The provisions of this subsection shall not require additional notice to any person otherwise receiving notice of the hearing pursuant to K.S.A. 38-1536 and amendments thereto. Individuals receiving notice pursuant to this subsection shall not be made a party to the action solely on the basis of this notice and opportunity to be heard.

(c) Prior to entering an order of disposition, the court shall give consideration to the child's physical, mental and emotional condition; the child's need for assistance; the manner in which the parent participated in the abuse, neglect or abandonment of the child; any relevant information from the intake and assessment process; and the evidence received at the dispositional hearing. In determining when reunification is a viable alternative, the court shall specifically consider whether the parent has been found by a court to have: (1) Committed murder in the first degree, K.S.A. 21-3401 and amendments thereto, murder in the second degree, K.S.A. 21-3402 and amendments thereto, capital murder, K.S.A. 21-3439 and amendments thereto, voluntary manslaughter, K.S.A. 21-3403 and amendments thereto or violated a law of another state which prohibits such murder or manslaughter of a child; (2) aided or abetted, attempted, conspired or solicited to commit such murder or voluntary manslaughter of a child as provided in subsection (c)(1); (3) committed a felony battery that resulted in bodily injury to the child or another child; (4) subjected the child or another child to aggravated circumstances as defined in ~~subsection (x) of~~ K.S.A. 38-1502 and amendments thereto; (5) parental rights of the parent to another child have been terminated involuntarily; or (6) the child has been in extended out of home placement as defined in ~~subsection (z) of~~ K.S.A. 38-1502 and amendments thereto. If reintegration is not a viable alternative, the court shall consider whether a compelling reason has been documented in the case plan to find neither adoption nor permanent guardianship are in the best interests of the child, the child is in a stable placement with a relative, or services set out in the case plan necessary for the safe return of the child have been made available to the parent with whom reintegration is planned. If reintegration is not a viable alternative and either adoption or permanent guardianship might be in the best interests of the child, the county or district attorney or the county or district attorney's designee shall file a motion to terminate parental rights or *a motion to establish* permanent guardianship within 30 days and the court shall set a hearing on such motion within 90 days of the filing of such motion. No such hearing is required when the parents voluntarily relinquish parental rights or agree to appointment of a permanent guardian.

Sec. 16. K.S.A. 1999 Supp. 38-1563 is hereby amended to read as follows: 38-1563. (a) After consideration of any evidence offered relating to disposition, the court may retain jurisdiction and place the child in the

1 custody of the child's parent subject to terms and conditions which the
2 court prescribes to assure the proper care and protection of the child,
3 including supervision of the child and the parent by a court services of-
4 ficer, or may order the child and the parent to participate in programs
5 operated by the secretary or another appropriate individual or agency.
6 The terms and conditions may require any special treatment or care which
7 the child needs for the child's physical, mental or emotional health.
8 (b) The duration of any period of supervision or other terms or con-
9 ditions shall be for an initial period of no more than ~~18~~ *12* months. The
10 court, at the expiration of that period, upon a hearing and for good cause
11 shown, may make successive extensions of the supervision or other terms
12 or conditions for up to 12 months at a time.
13 (c) The court may order the child and the parents of any child who
14 has been adjudged a child in need of care to attend counseling sessions
15 as the court directs. The expense of the counseling may be assessed as
16 an expense in the case. No mental health center shall charge a greater
17 fee for court-ordered counseling than the center would have charged to
18 the person receiving counseling if the person had requested counseling
19 on the person's own initiative.
20 (d) If the court finds that placing the child in the custody of a parent
21 will not assure protection from physical, mental or emotional abuse or
22 neglect or sexual abuse or will not be in the best interests of the child,
23 the court shall enter an order awarding custody of the child, until the
24 further order of the court, to one of the following:
25 (1) A relative of the child or a person with whom the child has close
26 emotional ties;
27 (2) any other suitable person;
28 (3) a shelter facility; ~~or~~
29 (4) the secretary~~.~~, *if the child is adjudged to be a child in need of care*
30 *by reason of a finding by the court that the child is a child in need of*
31 *protection; or*
32 *(5) the secretary, if recommended by the secretary and if the child is*
33 *adjudged to be a child in need of care by reason of a finding by the court*
34 *that the child is a youth in need of community services. When making a*
35 *recommendation regarding custody, the secretary shall consider the as-*
36 *sessment of a community intervention team, if such team exists and has*
37 *made an assessment. The secretary shall present to the court in writing*
38 *the specific actions taken to prevent or eliminate the need for custody to*
39 *the secretary.*
40 In making such a custody order, the court shall give preference, to the
41 extent that the court finds it is in the best interests of the child, first to
42 granting custody to a relative of the child and second to granting custody
43 of the child to a person with whom the child has close emotional ties. If

1 the court has awarded legal custody based on the finding specified by this
2 subsection, the legal custodian shall not return the child to the home of
3 that parent without the written consent of the court.
4 (e) When the custody of the child is awarded to the secretary:
5 (1) The court may recommend to the secretary where the child
6 should be placed.
7 (2) The secretary shall notify the court in writing of any placement
8 of the child or, within 10 days of the order awarding the custody of the
9 child to the secretary, any proposed placement of the child, whichever
10 occurs first.
11 (3) The court may determine if such placement is in the best interests
12 of the child, and if the court determines that such placement is not in the
13 best interests of the child, the court shall notify the secretary who shall
14 then make an alternative placement subject to the procedures established
15 in this paragraph. In determining if such placement is in the best interests
16 of the child, the court, after providing the parties with an opportunity to
17 be heard, shall consider the health and safety needs of the child and the
18 resources available to meet the needs of children in the custody of the
19 secretary.
20 *(4) When the secretary provides the court with a plan to provide*
21 *services to a child or family which the court finds is reasonably designed*
22 *to address safety concerns regarding the child, the court shall approve the*
23 *return of the child to the child's home.*
24 (f) If custody of a child is awarded under this section to a person
25 other than the child's parent, the court may grant any individual reason-
26 able rights to visit the child upon motion of the individual and a finding
27 that the visitation rights would be in the best interests of the child.
28 (g) If the court issues an order of custody pursuant to this section,
29 the court may enter an order restraining any alleged perpetrator of phys-
30 ical, sexual, mental or emotional abuse of the child from residing in the
31 child's home; visiting, contacting, harassing or intimidating the child; or
32 attempting to visit, contact, harass or intimidate the child.
33 (h) The court shall not enter an order removing a child from the
34 custody of a parent pursuant to this section unless the court first finds
35 from evidence presented by the petitioner that reasonable efforts have
36 been made to prevent or eliminate the need for removal of the child~~;~~ *or*
37 *reasonable efforts are not necessary because* reintegration is not a viable
38 alternative; or that an emergency exists which threatens the safety of the
39 child and ~~requires the~~ *that* immediate removal *is in the best interest* of
40 the child. *If the child is placed in the custody of the secretary, the court*
41 *shall provide the secretary with a copy of any orders entered as soon as*
42 *practicable but within 10 days of making the order.* Reintegration may
43 not be a viable alternative when the: (1) Parent has been found by a court

(4) When the secretary provides the court with a plan to provide services to a child or family which the court finds is reasonably designed to address safety concerns regarding the child, the court shall approve the return of the child to the child's home. The court shall have the authority to require any person or entity agreeing to participate in the plan to perform as set out in the plan.

(g) If the court issues an order of custody pursuant to this section, the court may enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home; visiting, contacting, harassing or intimidating the child; or attempting to visit, contact, harass or intimidate the child, ***other family member or witness.***

(h) The court shall not enter an order removing a child from the custody of a parent pursuant to this section unless the court first finds from evidence presented by the petitioner that reasonable efforts have been made to prevent or eliminate the need for removal of the child~~;~~ ***or reasonable efforts are not necessary because*** reintegration is not a viable alternative; or that an emergency exists which threatens the safety of the child and ~~requires the~~ ***that*** immediate removal ***is in the best interest*** of the child. ***If the child is placed in the custody of the secretary, the court shall provide the secretary with a copy of any orders entered within 10 days of making the order.*** Reintegration may not be a viable alternative when the: (1) Parent has been found by a

to have committed murder in the first degree, K.S.A. 21-3401, and amendments thereto, murder in the second degree, K.S.A. 21-3402, and amendments thereto, capital murder, K.S.A. 21-3439, and amendments thereto, voluntary manslaughter, K.S.A. 21-3403, and amendments thereto, or violated a law of another state which prohibits such murder or manslaughter of a child; (2) parent aided or abetted, attempted, conspired or solicited to commit such murder or voluntary manslaughter of a child as provided in subsection (h)(1); (3) parent committed a felony battery that resulted in bodily injury to the child or another child; (4) parent has subjected the child or another child to aggravated circumstances as defined in ~~subsection (x) of~~ K.S.A. 38-1502, and amendments thereto; (5) parental rights of the parent to another child have been terminated involuntarily or (6) the child has been in extended out of home placement as defined in ~~subsection (z) of~~ K.S.A. 38-1502, and amendments thereto. Such findings shall be included in any order entered by the court.

(i) In addition to or in lieu of any other order authorized by this section, if a child is adjudged to be a child in need of care by reason of a violation of the uniform controlled substances act (K.S.A. 65-4101 *et seq.*, and amendments thereto), or K.S.A. 41-719, 41-804, 41-2719, 65-4152, 65-4153, 65-4154 or 65-4155, and amendments thereto, the court shall order the child to submit to and complete an alcohol and drug evaluation by a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008, and amendments thereto, and to pay a fee not to exceed the fee established by that statute for such evaluation. If the court finds that the child and those legally liable for the child's support are indigent, the fee may be waived. In no event shall the fee be assessed against the secretary or the department of social and rehabilitation services.

(j) In addition to any other order authorized by this section, if child support has been requested and the parent or parents have a duty to support the child, the court may order one or both parents to pay child support and, when custody is awarded to the secretary, the court shall order one or both parents to pay child support. The court shall determine, for each parent separately, whether the parent is already subject to an order to pay support for the child. If the parent is not presently ordered to pay support for any child who is a ward of the court and the court has personal jurisdiction over the parent, the court shall order the parent to pay child support in an amount determined under K.S.A. 38-1595, and amendments thereto. Except for good cause shown, the court shall issue an immediate income withholding order pursuant to K.S.A. 23-4,105 *et seq.*, and amendments thereto, for each parent ordered to pay support under this subsection, regardless of whether a payor has been identified

court to have committed murder in the first degree, K.S.A. 21-3401 and amendments thereto, murder in the second degree, K.S.A. 21-3402 and amendments thereto, capital murder, K.S.A. 21-3439 and amendments thereto, voluntary manslaughter, K.S.A. 21-3403 and amendments thereto or violated a law of another state which prohibits such murder or manslaughter of a child; (2) parent aided or abetted, attempted, conspired or solicited to commit such murder or voluntary manslaughter of a child as provided in subsection (h)(1); (3) parent committed a felony battery that resulted in bodily injury to the child or another child; (4) parent has subjected the child or another child to aggravated circumstances as defined in subsection (x) of K.S.A. 38-1502, and amendments thereto; (5) parental rights of the parent to another child have been terminated involuntarily or (6) the child has been in extended out of home placement as defined in subsection (z) of K.S.A. 38-1502 and amendments thereto. Such findings shall be included in any order entered by the court.

for the parent. A parent ordered to pay child support under this subsection shall be notified, at the hearing or otherwise, that the child support order may be registered pursuant to K.S.A. 38-1597, and amendments thereto. The parent shall also be informed that, after registration, the income withholding order may be served on the parent's employer without further notice to the parent and the child support order may be enforced by any method allowed by law. Failure to provide this notice shall not affect the validity of the child support order.

Sec. 17. K.S.A. 1999 Supp. 38-1565 is hereby amended to read as follows: 38-1565. (a) If a child is placed outside the child's home and no *permanency* plan is made a part of the record of the dispositional hearing, a written *permanency* plan shall be prepared which provides for reintegration of the child into the child's family or, if reintegration is not a viable alternative, for other *permanent* placement of the child. Reintegration may not be a viable alternative when the: (1) Parent has been found by a court to have committed murder in the first degree, K.S.A. 21-3401 and amendments thereto, murder in the second degree, K.S.A. 21-3402 and amendments thereto, capital murder, K.S.A. 21-3439 and amendments thereto, voluntary manslaughter, K.S.A. 21-3403 and amendments thereto or violated a law of another state which prohibits such murder or manslaughter of a child; (2) parent aided or abetted, attempted, conspired or solicited to commit such murder or voluntary manslaughter of a child as provided in subsection (a)(1); (3) parent committed a felony battery that resulted in bodily injury to the child or another child; (4) parent has subjected the child or another child to aggravated circumstances as defined in ~~subsection (x) of~~ K.S.A. 38-1502, and amendments thereto; (5) parental rights of the parent to another child have been terminated involuntarily; or (6) the child has been in extended out of home placement as defined in ~~subsection (z) of~~ K.S.A. 38-1502 and amendments thereto. If the *permanency* goal is reintegration into the family, the *permanency* plan shall include measurable objectives and time schedules for reintegration. The plan shall be submitted to the court not later than 30 days after the dispositional order is entered. If the child is placed in the custody of the secretary, the plan shall be prepared and submitted by the secretary. If the child is placed in the custody of a facility or person other than the secretary, the plan shall be prepared and submitted by a court services officer.

(b) A court services officer or, if the child is in the secretary's custody, the secretary shall submit to the court, at least every six months, a written report of the progress being made toward the goals of the *permanency* plan submitted pursuant to subsection (a). If the child is placed in foster care, the foster parent or parents shall submit to the court, at least every six months, a report in regard to the child's adjustment, progress and

(b) A court services officer or, if the child is in the secretary's custody, the secretary shall submit to the court, at least every six months, a written report of the progress being made toward the goals of the ***permanency*** plan submitted pursuant to subsection (a) ***and the specific actions taken to achieve the goals of the permanency plan.*** If the child is placed in foster care, the foster parent or parents shall submit to the court, at least every six months, a report in regard to the child's adjustment, progress and condition. The department of social

condition. The department of social and rehabilitation services shall notify the foster parent or parents of the foster parent's or parent's duty to submit such report, on a form provided by the department of social and rehabilitation services, at least two weeks prior to the date when the report is due, and the name of the judge and the address of the court to which the report is to be submitted. Such report shall be confidential and shall only be reviewed by the court and the child's guardian ad litem. The court shall review ~~the progress being made toward~~ *whether reasonable efforts have been made to achieve* the goals of the *permanency* plan ~~and the foster parent report~~ and, if the court determines that progress is inadequate or that the *permanency* plan is no longer viable, the court shall hold a hearing pursuant to subsection (c). If the secretary has custody of the child, such hearing shall be held no more than 12 months after the child is placed outside the child's home and at least every 12 months thereafter. ~~For children in the custody of the secretary prior to July 1, 1998, within 30 days of receiving a request from the secretary, a permanency hearing shall be held.~~ *At each hearing, the court shall make a written finding whether reasonable efforts have been made to accomplish the permanency goal and whether continued out of home placement is necessary for the child's safety.* If the goal of the *permanency* plan submitted pursuant to subsection (a) is reintegration into the family and the court determines after 12 months from the time such plan is first submitted that progress is inadequate, the court shall hold a hearing pursuant to subsection (c). Nothing in this subsection shall be interpreted to prohibit termination of parental rights prior to the expiration of 12 months.

(c) Whenever a hearing is required under subsection (b), the court shall notify all interested parties and the foster parents, preadoptive parents or relatives providing care for the child and hold a hearing. Individuals receiving notice pursuant to this subsection shall not be made a party to the action solely on the basis of this notice and opportunity to be heard. After providing the interested parties, foster parents, preadoptive parents or relatives providing care for the child an opportunity to be heard, the court shall determine whether the child's needs are being adequately met and whether reintegration continues to be a viable alternative. If the court finds reintegration is no longer a viable alternative, the court shall consider whether the child is in a stable placement with a relative, services set out in the case plan necessary for the safe return of the child have been made available to the parent with whom reintegration is planned or compelling reasons are documented in the case plan to support a finding that neither adoption nor permanent guardianship are in the child's best interest. If reintegration is not a viable alternative and either adoption or permanent guardianship might be in the best interests of the child, the county or district attorney or the county or district attorney's designee

and rehabilitation services shall notify the foster parent or parents of the foster parent's or parent's duty to submit such report, on a form provided by the department of social and rehabilitation services, at least two weeks prior to the date when the report is due, and the name of the judge and the address of the court to which the report is to be submitted. Such report shall be confidential and shall only be reviewed by the court and the child's guardian ad litem. The court shall review ***the plan submitted by the secretary, the reports submitted by the foster parents, and determine whether reasonable efforts have been made to achieve*** the goals of the ***permanency*** plan. If the court determines that progress is inadequate or that the plan is no longer viable, the court shall hold a hearing pursuant to subsection (c). If the secretary has custody of the child, such hearing shall be held no more than 12 months after the child is placed outside the child's home and at least every 12 months thereafter. ***At each hearing the court shall make a written finding whether reasonable efforts have been made to accomplish the permanency goal and whether continued out of home placement is necessary for the child's safety.*** If the goal of the plan submitted pursuant to subsection (a) is reintegration into the family and the court determines after 12 months from the time such plan is first submitted that progress is inadequate, the court shall hold a hearing pursuant to subsection (c). Nothing in this subsection shall be interpreted to prohibit termination of parental rights prior to the expiration of 12 months.

(c) Whenever a hearing is required under subsection (b), the court shall notify all interested parties and the foster parents, preadoptive parents or relatives providing care for the child and hold a hearing. Individuals receiving notice pursuant to this subsection shall not be made a party to the action solely on the basis of this notice and opportunity to be heard. After providing the interested parties, foster parents, preadoptive parents or relatives providing care for the child an opportunity to be heard, the court shall determine whether the child's needs are being adequately met and whether reintegration continues to be a viable alternative. If the court finds reintegration is no longer a viable alternative, the court shall consider whether the child is in a stable placement with a relative, services set out in the case plan necessary for the safe return of the child have been made available to the parent with whom reintegration is planned or compelling reasons are documented in the case plan to support a finding that neither adoption nor permanent guardianship are in the child's best interest. If reintegration is not a viable alternative and either adoption or permanent guardianship might be in the best interests of the child, the

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1 shall file a motion to terminate parental rights or ~~for~~ *a motion to establish*
2 *a* permanent guardianship within 30 days and the court shall set a hearing
3 on such motion within 90 days of the filing of such motion. When the
4 court finds reintegration continues to be a viable alternative, the court
5 *shall set a date for the child to be returned home;* may rescind any of its
6 prior dispositional orders and enter any dispositional order authorized by
7 this code or may order that a new plan for the reintegration be prepared
8 and submitted to the court. No such hearing is required when the parents
9 voluntarily relinquish parental rights or agree to appointment of a per-
10 manent guardian.
11 Sec. 18. K.S.A. 38-1566 is hereby amended to read as follows: 38-
12 1566. *(a)* Except as provided in K.S.A. 38-1567, *and amendments*
13 *thereto,* if a child has been in the same foster home or shelter facility for
14 six months or longer, or has been placed by the secretary in the home of
15 a parent or relative, the secretary shall give written notice of any plan to
16 move the child to a different placement. The notice shall be given to ~~(a)~~
17 *(1)* the court having jurisdiction over the child; ~~(b)~~ *(2)* each parent whose
18 address is available; ~~(c)~~ *(3)* the foster parent or custodian from whose
19 home or shelter facility it is proposed to remove the child; ~~(d)~~ *(4)* the
20 child, if 12 or more years of age; and ~~(e)~~ *(5)* the child's guardian *ad litem*.
21 The notice shall state the home or shelter facility to which the secretary
22 plans to transfer the child and the reason for the proposed action. The
23 notice shall be delivered or mailed 30 days in advance of the planned
24 transfer, except that the secretary shall not be required to wait 30 days
25 to transfer the child if all persons enumerated in clauses ~~(b)~~ *(2)* through
26 ~~(e)~~ *(5)* consent in writing to the transfer. Within 10 days after receipt of
27 the notice any person receiving notice as provided above may request,
28 either orally or in writing, that the court conduct a hearing to determine
29 whether or not the change in placement is in the best interests of the
30 child concerned. When the request has been received, the court shall
31 schedule a hearing and immediately notify the secretary of the request
32 and the time and date the matter will be heard. The court shall give notice
33 of the hearing to persons enumerated in clauses ~~(b)~~ *(2)* through ~~(e)~~ *(5)*.
34 The secretary shall not change the placement of the child unless the
35 change is approved by the court.
36 *(b) When a child in the custody of the secretary is removed from the*
37 *home of a parent after having been placed in the home of a parent for a*
38 *period of six months or longer, the secretary shall request a finding by*
39 *the court whether reasonable efforts were made to prevent the necessity*
40 *for removal and whether the removal was in the best interests of the child.*
41 *In making the finding, the court may rely on documentation submitted*
42 *by the secretary or may set the date for a hearing on the matter. If the*
43 *secretary requests such finding, the court shall provide the secretary with*

county or district attorney or the county or district attorney's designee shall file a motion to terminate parental rights or ~~for~~ ***a motion to establish a*** permanent guardianship within 30 days and the court shall set a hearing on such motion within 90 days of the filing of such motion. When the court finds reintegration continues to be a viable alternative, the court ***shall set a date for the child to be ~~either~~ returned home unless a motion has been filed alleging that the conditions of the home are unsafe for the child;*** may rescind any of its prior dispositional orders and enter any dispositional order authorized by this code or may order that a new plan for the reintegration be prepared and submitted to the court. No such hearing is required when the parents voluntarily relinquish parental rights or agree to appointment of a permanent guardian.

(b) When, after the notice set out above, a child in the custody of the secretary is removed from the home of a parent after having been placed in home of a parent for a period of 6 months or longer, the secretary shall request a finding by the court whether reasonable efforts were made to prevent the necessity for removal and whether the removal was in the best interests of the child. The secretary shall present to the court in writing the specific actions taken to prevent or eliminate the need for removal of the child. In making the finding, the court may rely on documentation submitted by the secretary or may set the date for a hearing on the matter. If the secretary requests such finding, the court shall provide the secretary with a written copy of the finding by the court not more than 45 days from the date of the request.

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1 *a written copy of the finding by the court not more than 45 days from*
2 *the date of the request.*
3 Sec. 19. K.S.A. 38-1568 is hereby amended to read as follows: 38-
4 1568. (a) *Valid court order.* During proceedings under this code, the court
5 to remain in a present or future placement if:
6 (1) The court makes a finding that the child has been adjudicated to
7 be a child in need of care pursuant to: (A) Subsection ~~(a)(10)~~ *(c)(6)* of
8 K.S.A. 38-1502, and amendments thereto; or (B) any of the subsections
9 ~~(a)(1) through (a)(9) or (a)(11)~~ *(b), (c)(1) through (c)(5) or (c)(7)* of K.S.A.
10 38-1502, and amendments thereto, and the court determines that the
11 child is not likely to be available within the jurisdiction of the court for
12 future proceedings;
13 (2) the child and the child's guardian *ad litem* are present before the
14 court at the time the order is entered; and
15 (3) the child and the child's guardian *ad litem* are given adequate and
16 fair warning, both orally and in writing, of the consequences of violation
17 of the order and a copy of such warning is recorded in the official file of
18 the case.
19 (b) *Application.* Any person may file with the court a verified appli-
20 cation for a determination that a child has violated an order entered pur-
21 suant to subsection (a) and for an order authorizing the holding of such
22 child in a secure facility as provided by this section. Such application shall
23 state the applicant's belief that the child has violated a valid court order
24 entered pursuant to subsection (a) and the specific facts which are relied
25 upon to support the belief.
26 (c) *Ex parte order.* Upon the filing of an application in accordance
27 with subsection (b), the court may enter *ex parte* an order directing that
28 the child be taken into custody and held in a secure facility designated
29 by the court if the court determines that there is probable cause to believe
30 the allegations in the application. The order shall remain in effect for not
31 more than 24 hours following the child's being taken into custody. The
32 order shall be served on the child's parents, any legal custodian of the
33 child and the child's guardian *ad litem.*
34 (d) *Preliminary hearing.* Within 24 hours following a child's being
35 taken into custody pursuant to an order issued under subsection (c), the
36 court shall hold a hearing to determine whether the child admits or denies
37 the allegations of the application and, if the child denies such allegations,
38 whether there is probable cause to hold the child in a secure facility
39 pending a hearing on the application pursuant to subsection (e). Notice
40 of the time and place of the preliminary hearing shall be given orally or
41 in writing to the child's parents, any legal custodian of the child and the
42 child's guardian *ad litem.* At the hearing, the child shall have the right to:
43 (1) Have in writing the alleged violation and the facts relied upon in the

1 application; (2) a guardian *ad litem* pursuant to K.S.A. 38-1505, and
2 amendments thereto; and (3) the right to confront and present witnesses.
3 If, upon the hearing, the court finds that the child admits the allegations
4 of the application, the court shall proceed without delay to hold a hearing
5 on the application pursuant to subsection (e). If, upon the hearing, the
6 court finds that the child denies the allegations of the application, the
7 court may enter an order directing that the child be held in a secure
8 facility pending a hearing pursuant to subsection (e) if the court finds
9 that there is probable cause to believe that the child has violated a valid
10 court order entered pursuant to subsection (a) and that secure detention
11 of the child is necessary for the protection of the child or to assure the
12 appearance of the child at the hearing on the application pursuant to
13 subsection (e).
14 (e) *Hearing on violation of order; authorization*. The court shall hold
15 a hearing on an application filed pursuant to subsection (b) within 24
16 hours following the child's being taken into custody, if the child admits
17 the allegations of the application, or within 72 hours following the child's
18 being taken into custody, if secure detention of the child is ordered pur-
19 suant to subsection (d). Notice of the time and place of such hearing shall
20 be given orally or in writing to the child's parents, any legal custodian of
21 the child and the child's guardian *ad litem*. Upon such hearing, the court
22 may enter an order awarding custody of the child to the secretary, if the
23 secretary does not have legal custody of the child, and authorizing the
24 secretary to place the child in a secure facility if the court determines
25 that:
26 (1) The child has been adjudicated to be a child in need of care
27 pursuant to subsection (a)(10) of K.S.A. 38-1502, and amendments
28 thereto;

(1) The child has been adjudicated to be a child in need of care pursuant to subsection (c) (6) of K.S.A. 38-1502, and amendments thereto;

29 (2) the child has violated a valid court order entered pursuant to sub-
30 section (a);
31 (3) the child has been provided at the hearing with the right to: (A)
32 Have the alleged violation in writing and served upon the child a reason-
33 able time before the hearing; (B) a hearing before the court on the issue
34 of placement in a secure facility; (C) an explanation of the nature and
35 consequences of the proceeding; (D) a guardian *ad litem* pursuant to
36 K.S.A. 38-1505, and amendments thereto; (E) confront and present wit-
37 nesses; (F) have a transcript or record of the proceedings; and (G) appeal;
38 and
39 (4) there is no less restrictive alternative appropriate to the needs of
40 the juvenile and the community.
41 The authorization to place a child in a secure facility pursuant to this
42 subsection shall expire 60 days, including Saturdays, Sundays and legal
43 holidays, after it is issued. The court may grant extensions of such au-

thorization for two additional periods not exceeding 60 days, including Saturdays, Sundays and legal holidays, upon rehearing pursuant to K.S.A. 38-1564, and amendments thereto. Payment by the secretary to a secure facility for child care services provided pursuant to this subsection shall be paid only upon receipt by the secretary of a copy of a valid court order.

(f) *Limitations on facilities used.* Nothing in this section shall authorize placement of a child in a juvenile detention facility, except that a child may be held in any such facility which, if in an adult jail, is in quarters separated by sight and sound from adult prisoners:

(1) When ordered by a court pursuant to subsection (c) or (d), for not longer than the times permitted by those subsections; or

(2) when ordered by a court pursuant to subsection (e), for not more than 24 hours following the hearing provided for by that subsection, except that nothing in this subsection shall allow a child to be held in an adult jail for more than 24 hours.

(g) *Time limits, computation.* Except as otherwise specifically provided by subsection (e), Saturdays, Sundays and legal holidays shall not be counted in computing any time limit imposed by this section.

(h) This section shall be part of and supplemental to the Kansas code for care of children.

Sec. 20. K.S.A. 1999 Supp. 38-1581 is hereby amended to read as follows: 38-1581. (a) Either in the petition filed under this code or in a motion made in proceedings under this code, any interested party may request that either or both parents be found unfit and the parental rights of either or both parents be terminated or a permanent guardianship be appointed.

(b) Whenever a pleading is filed requesting termination of parental rights, the pleading shall contain a statement of specific facts which are relied upon to support the request, including dates, times and locations to the extent known.

(c) The county or district attorney or the county or district attorney's designee shall file pleadings alleging a parent is unfit and requesting termination of parental rights or *the establishment of a* permanent guardianship within 30 days after the court has determined reintegration is not a viable alternative ~~and~~ *unless the court* has ~~not~~ found a compelling reason why adoption or permanent guardianship may *not* be in the best interest of the child. The court shall set a hearing on such pleadings and matters within 90 days of the filing of such pleadings.

Sec. 21. K.S.A. 1999 Supp. 38-1583 is hereby amended to read as follows: 38-1583. (a) When the child has been adjudicated to be a child in need of care, the court may terminate parental rights when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly

1 for a child and the conduct or condition is unlikely to change in the
2 foreseeable future.
3 (b) In making a determination hereunder the court shall consider,
4 but is not limited to, the following, if applicable:
5 (1) Emotional illness, mental illness, mental deficiency or physical
6 disability of the parent, of such duration or nature as to render the parent
7 unlikely to care for the ongoing physical, mental and emotional needs of
8 the child;
9 (2) conduct toward a child of a physically, emotionally or sexually
10 cruel or abusive nature;
11 (3) excessive use of intoxicating liquors or narcotic or dangerous
12 drugs;
13 (4) physical, mental or emotional neglect of the child;
14 (5) conviction of a felony and imprisonment;
15 (6) unexplained injury or death of another child or stepchild of the
16 parent;
17 (7) reasonable efforts by appropriate public or private child caring
18 agencies have been unable to rehabilitate the family; and
19 (8) lack of effort on the part of the parent to adjust the parent's cir-
20 cumstances, conduct or conditions to meet the needs of the child.
21 (c) In addition to the foregoing, when a child is not in the physical
22 custody of a parent, the court, in proceedings concerning the termination
23 of parental rights, shall also consider, but is not limited to the following:
24 (1) Failure to assure care of the child in the parental home when able
25 to do so;
26 (2) failure to maintain regular visitation, contact or communication
27 with the child or with the custodian of the child;
28 (3) failure to carry out a reasonable plan approved by the court di-
29 rected toward the integration of the child into the parental home; and
30 (4) failure to pay a reasonable portion of the cost of substitute physical
31 care and maintenance based on ability to pay.
32 In making the above determination, the court may disregard incidental
33 visitations, contacts, communications or contributions.
34 (d) The rights of the parents may be terminated as provided in this
35 section if the court finds that the parents have abandoned the child or
36 the child was left under such circumstances that the identity of the par-
37 ents is unknown and cannot be ascertained, despite diligent searching,
38 and the parents have not come forward to claim the child within three
39 months after the child is found.
40 (e) The existence of any one of the above standing alone may, but
41 does not necessarily, establish grounds for termination of parental rights.
42 The determination shall be based on an evaluation of all factors which
43 are applicable. In considering any of the above factors for terminating the

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rights of a parent, the court shall give primary consideration to the physical, mental or emotional condition and needs of the child. If presented to the court and subject to the provisions of K.S.A. 60-419, and amendments thereto, the court shall consider as evidence testimony from a person licensed to practice medicine and surgery, a licensed psychologist or a licensed social worker expressing an opinion relating to the physical, mental or emotional condition and needs of the child. The court shall consider any such testimony only if the licensed professional providing such testimony is subject to cross-examination.

(f) A termination of parental rights under the Kansas code for care of children shall not terminate the right of the child to inherit from or through the parent. Upon such termination, all the rights of birth parents to such child, including their right to inherit from or through such child, shall cease.

(g) If, after finding the parent unfit, the court determines a compelling reason why it is not in the best interests of the child to terminate parental rights or upon agreement of the parents, the court may award permanent guardianship to an individual providing care for the child, a relative or other person with whom the child has a close emotional attachment. Prior to awarding permanent guardianship, the court shall receive and consider an assessment as provided in K.S.A. 59-2132 and amendments thereto of any potential permanent guardian. Upon appointment of a permanent guardian, the court shall ~~enter an order discharging the child from the court's jurisdiction~~ *continue to have jurisdiction to review placement and appoint a successor guardian or guardians.*

(h) If a parent is convicted of an offense as provided in subsection (7) of K.S.A. 38-1585 and amendments thereto or is adjudicated a juvenile offender because of an act which if committed by an adult would be an offense as provided in subsection (7) of K.S.A. 38-1585 and amendments thereto, and if the victim was the other parent of a child, the court may disregard such convicted or adjudicated parent's opinions or wishes in regard to the placement of such child.

Sec. 22. K.S.A. 1999 Supp. 38-1584 is hereby amended to read as follows: 38-1584. (a) *Purpose of section.* The purpose of this section is to provide stability in the life of a child who must be removed from the home of a parent, to acknowledge that time perception of a child differs from that of an adult and to make the ongoing physical, mental and emotional needs of the child the decisive consideration in proceedings under this section. The primary goal for all children whose parents' parental rights have been terminated is placement in a permanent family setting.

(b) *Actions by the court.* (1) *Custody for adoption.* When parental rights have been terminated and it appears that adoption is a viable alternative, the court shall enter one of the following orders:

(g) If, after finding the parent unfit, the court determines a compelling reason why it is not in the best interests of the child to terminate parental rights or upon agreement of the parents, the court may award permanent guardianship to an individual providing care for the child, a relative, or other person with whom the child has a close emotional attachment. Prior to awarding permanent guardianship, the court shall receive and consider an assessment as provided in K.S.A. 59-2132 and amendments thereto of any potential permanent guardian. Upon appointment of a permanent guardian, the court shall ***continue to have jurisdiction to review the placement and appoint a successor guardian or guardians. If the child is in the custody of the secretary, the court shall enter an order discharging the child from the custody of the secretary.***

(b) *Actions by the court.* (1) *Custody for adoption.* When parental rights have been terminated ***and it appears that adoption is a viable alternative***, the court shall enter one of the following orders:

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1 (A) An order granting custody of the child, for adoption proceedings,
2 to a reputable person of good moral character, the secretary or a corpo-
3 ration organized under the laws of the state of Kansas authorized to care
4 for and surrender children for adoption as provided in K.S.A. 38-112 *et*
5 *seq*. and amendments thereto. The person, secretary or corporation shall
6 have authority to place the child in a family home, be a party to proceed-
7 ings and give consent for the legal adoption of the child which shall be
8 the only consent required to authorize the entry of an order or decree of
9 adoption.
10 (B) An order granting custody of the child to proposed adoptive par-
11 ents and consenting to the adoption of the child by the proposed adoptive
12 parents.
13 (2) *Custody for* ~~long-term foster care~~ *permanent guardianship*. When
14 parental rights have been terminated and it does not appear that adoption
15 is a viable alternative, the court ~~shall~~ *may* enter an order granting custody
16 of the child for ~~foster care~~ *permanent guardianship* to a reputable person
17 of good moral character~~, a youth residential facility, the secretary or a~~
18 ~~corporation or association willing to receive the child, embracing in its~~
19 ~~objectives the purpose of caring for or obtaining homes for children~~.
20 (3) *Preferences in custody for adoption or* ~~long-term foster care~~ *per-*
21 *manent guardianship*. In making an order under subsection (b)(1) or (2),
22 the court shall give preference, to the extent that the court finds it is in
23 the best interests of the child, first to granting such custody to a relative
24 of the child and second to granting such custody to a person with whom
25 the child has close emotional ties.
26 (c) *Guardian and conservator of child*. The secretary shall be guard-
27 ian and conservator of any child placed in the secretary's custody, subject
28 to any prior conservatorship.
29 (d) *Reports and review of* ~~progress~~ *reasonable efforts to implement a*
30 *permanency plan of adoption or permanent guardianship*. After parental
31 rights have been terminated and up to the time an adoption has been
32 accomplished, the person or agency awarded custody of the child shall
33 within 60 days submit a written plan for permanent placement which shall
34 include measurable objectives and time schedules and shall thereafter not
35 less frequently than each six months make a written report to the court
36 stating the progress having been made toward finding an adoptive or ~~long-~~
37 ~~term foster care~~ *permanent guardianship* placement for the child. Upon
38 the receipt of each report the court shall review the contents thereof and
39 determine whether or not a hearing should be held on the subject. In
40 any case, the court shall notify all interested parties and hear evidence
41 regarding progress toward finding an adoptive home or the acceptability
42 of the ~~long-term foster care~~ *permanent guardianship* plan within ~~18~~ *12*
43 months after parental rights have been terminated and every 12 months

(A) An order granting custody of the child, for adoption proceedings, to a reputable person of good moral character, the secretary or a corporation organized under the laws of the state of Kansas authorized to care for and surrender children for adoption as provided in K.S.A. 38-112 *et seq*. and amendments thereto. The person, secretary or corporation shall have authority to place the child in a family home, be a party to proceedings and give consent for the legal adoption of the child which shall be the only consent required to authorize the entry of an order or decree of adoption. ***Pending placement in an appropriate adoptive home, appropriate permanency planning shall include preparation for self sufficiency.***

(B) An order granting custody of the child to proposed adoptive parents and consenting to the adoption of the child by the proposed adoptive parents.

(2) ***Permanent Guardianship***. When it does not appear that adoption is a viable alternative, the court ***may*** enter an order granting ***permanent guardianship*** to a reputable person of good moral character.

(3) *Preferences in custody for adoption or* ***permanent guardianship***. In making an order under subsection (b)(1) or (2), the court shall give preference, to the extent that the court finds it is in the best interests of the child, first to granting such custody to a relative of the child and second to granting such custody to a person with whom the child has close emotional ties.

(d) *Reports and review* ***reasonable efforts to implement a permanency plan of adoption or permanent guardianship***. After parental rights have been terminated and up to the time an adoption has been accomplished, the person or agency awarded custody of the child shall within 60 days submit a written plan for permanent placement which shall include measurable objectives and time schedules and shall thereafter not less frequently than each six months make a written report to the court stating the progress having been made toward finding an adoptive or ***permanent guardianship*** placement for the child. Upon the receipt of each report the court shall review the contents thereof and determine whether or not a hearing should be held on the subject. In any case, the court shall notify all interested parties and hear evidence regarding progress toward finding an adoptive home or the acceptability of the plan ***for permanent guardianship*** within *12* months after parental rights have been terminated and every 12 months

thereafter. If the court determines that ~~inadequate progress is being~~ *reasonable efforts have not been* made toward finding an adoptive placement or establishing an acceptable ~~long-term foster care~~ plan *for permanent guardianship*, the court may rescind its prior orders and make other orders regarding custody and adoption that are appropriate under the circumstances. Reports of a proposed adoptive placement need not contain the identity of the proposed adoptive parents.

(e) *Discharge upon adoption.* When the adoption of a child has been accomplished, the court shall enter an order discharging the child from the court's jurisdiction in the pending proceedings.

Sec. 23. K.S.A. 1999 Supp. 38-1585 is hereby amended to read as follows: 38-1585. (a) It is presumed in the manner provided in K.S.A. 60-414 and amendments thereto that a parent is unfit by reason of conduct or condition which renders the parent unable to fully care for a child, if the state establishes by clear and convincing evidence that:

(1) A parent has previously been found to be an unfit parent in proceedings under K.S.A. 38-1581 *et seq.* and amendments thereto, or comparable proceedings under the laws of another state, or the federal government;

(2) a parent has twice before been convicted of a crime specified in article 34, 35, or 36 of chapter 21 of the Kansas Statutes Annotated, or comparable offenses under the laws of another state, the federal government or any foreign government, or an attempt or attempts to commit such crimes and the victim was under the age of 18 years;

(3) on two or more prior occasions a child in the physical custody of the parent has been adjudicated a child in need of care as defined by subsection ~~(a)(3)~~ *(b)(1)* of K.S.A. 38-1502 and amendments thereto;

(4) the parent has been convicted of causing the death of another child or stepchild of the parent;

(5) the child has been in an out-of-home placement, other than kinship care, under court order for a cumulative total period of one year or longer and the parent has substantially neglected or willfully refused to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home;

(6) (1) the child has been in an out-of-home placement, other than kinship care, under court order for a cumulative total period of two years or longer; (2) the parent has failed to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home; and (3) there is a substantial probability that the parent will not carry out such plan in the near future; or

(7) a parent has been convicted of capital murder, K.S.A. 21-3439 and amendments thereto, murder in the first degree, K.S.A. 21-3401 and amendments thereto, murder in the second degree, K.S.A. 21-3402 and

thereafter. If the court determines that ***reasonable efforts have not been*** made toward finding an adoptive placement or establishing an acceptable plan ***for permanent guardianship***, the court may rescind its prior orders and make other orders regarding custody and adoption that are appropriate under the circumstances. Reports of a proposed adoptive placement need not contain the identity of the proposed adoptive parents.

(4) If neither custody for adoption nor custody for permanent guardianship are a viable alternative, the court may order custody to remain with the secretary for continued permanency planning.

amendments thereto or voluntary manslaughter, K.S.A. 21-3403 and amendments thereto, or if a juvenile has been adjudicated a juvenile offender because of an act which if committed by an adult would be an offense as provided in this subsection, and the victim of such murder was the other parent of the child.

(b) The burden of proof is on the parent to rebut the presumption. If a parent has been convicted of capital murder, K.S.A. 21-3439 and amendments thereto or murder in the first degree, K.S.A. 21-3401 and amendments thereto as provided in subsection (a)(7), the burden of proof is on the parent to rebut the presumption by clear and convincing evidence. In the absence of proof that the parent is presently fit and able to care for the child or that the parent will be fit and able to care for the child in the foreseeable future, the court shall now terminate the parents parental rights in proceedings pursuant to K.S.A. 38-1581 *et seq.* and amendments thereto.

Sec. 24. K.S.A. 1999 Supp. 38-1587 is hereby amended to read as follows: 38-1587. (a) A permanent guardian may be appointed after a finding of unfitness pursuant to K.S.A. 38-1583 and amendments thereto or with the consent and agreement of the parents.

(b) Upon appointment of the permanent guardian, the ~~child in need of care proceeding shall be dismissed~~ *court shall continue to have jurisdiction to review placement and appoint a successor guardian or guardians. If the child is in the custody of the secretary, the court shall enter an order discharging the child from the custody of the secretary.*

Sec. 25. K.S.A. 1999 Supp. 38-1591 is hereby amended to read as follows: 38-1591. (a) An appeal may be taken by any interested party from any adjudication, disposition, termination of parental rights or order of temporary custody in any proceedings pursuant to this code.

(b) An appeal from an order entered by a district magistrate judge shall be to a district judge. The appeal shall be heard within 30 days from the date the notice of appeal is filed. If no record was made of the proceedings, the trial shall be de novo.

(c) Procedure on appeal shall be governed by article 21 of chapter 60 of the Kansas Statutes Annotated.

(d) Notwithstanding any other provision of law to the contrary, appeals under this section shall have priority over all other cases.

(e) Every notice of appeal, docketing statement and brief shall be verified by the interested party. Failure to have the required verification shall result in the dismissal of the appeal.

Sec. 26. K.S.A. 1999 Supp. 38-1608 is hereby amended to read as follows: ~~38-1608. (a)~~ All records of law enforcement officers and agencies and municipal courts concerning a ~~public offense~~ committed or alleged to have been committed by a juvenile under 14 years of age ~~shall be kept~~

(b) Upon appointment of a permanent guardian, the ***court shall continue to have jurisdiction to review the placement and appoint a successor guardian or guardians. If the child is in the custody of the secretary, the court shall enter an order discharging the child from the custody of the secretary.***

(e) Every notice of appeal, docketing statement and brief shall be verified by the interested party if the party has been personally served at any time during the proceedings. Failure to have the required verification shall result in the dismissal of the appeal.

1 readily distinguishable from criminal and other records and shall not be
2 disclosed to anyone except:
3 (1) The judge and members of the court staff designated by the judge
4 of a court having the juvenile before it in any proceedings;
5 (2) parties to the proceedings and their attorneys;
6 (3) the department of social and rehabilitation services;
7 (4) any individual, or any officer of a public or private agency or in-
8 stitution, having custody of the juvenile under court order or providing
9 educational, medical or mental health services to the juvenile or a court-
10 approved advocate for the juvenile;
11 (5) any educational institution to the extent necessary to enable the
12 educational institution to provide the safest possible environment for its
13 pupils and employees;
14 (6) any educator to the extent necessary to enable the educator to
15 protect the personal safety of the educator and the educator's pupils;
16 (7) law enforcement officers or county or district attorneys or their
17 staff when necessary for the discharge of their official duties;
18 (8) the central repository, as defined by K.S.A. 22-4701 and amend-
19 ments thereto, for use only as a part of the juvenile offender information
20 system established under K.S.A. 38-1618 and amendments thereto;
21 (9) juvenile intake and assessment workers;
22 (10) juvenile justice authority;
23 (11) any other person when authorized by a court order, subject to
24 any conditions imposed by the order; and
25 (12) as provided in subsection (c).
26 (b) The provisions of this section shall not apply to records concern-
27 ing:
28 (1) A violation, by a person 14 or more years of age, of any provision
29 of chapter 8 of the Kansas Statutes Annotated or of any city ordinance or
30 county resolution which relates to the regulation of traffic on the roads,
31 highways or streets or the operation of self-propelled or nonself-propelled
32 vehicles of any kind;
33 (2) a violation, by a person 16 or more years of age, of any provision
34 of chapter 32 of the Kansas Statutes Annotated; or
35 (3) an offense for which the juvenile is prosecuted as an adult.
36 (c) All records of law enforcement officers and agencies and munic-
37 ipal courts concerning a public offense committed or alleged to have been
38 committed by a juvenile 14 or more years of age shall be subject to the
39 same disclosure restrictions as the records of adults. Information identi-
40 fying victims and alleged victims of sex offenses, as defined in K.S.A.
41 chapter 21, article 35, shall not be disclosed or open to public inspection
42 under any circumstances. Nothing in this section shall prohibit the victim
43 or any alleged victim of any sex offense from voluntarily disclosing such

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1 victim's identity.
2 (d) Relevant information, reports and records shall be made available
3 to the department of corrections upon request and a showing that the
4 former juvenile has been convicted of a crime and placed in the custody
5 of the secretary of the department of corrections.
6 (e) All records, reports and information obtained as a part of the
7 juvenile intake and assessment process for juvenile offenders shall be
8 confidential and shall not be disclosed except as provided in this section
9 or by rules and regulations established by the commissioner of juvenile
10 justice.
11 (1) Any court of record may order the disclosure of such records,
12 reports and other information to any person or entity.
13 (2) The head of any juvenile intake and assessment program, certified
14 pursuant to the commissioner of juvenile justice, may authorize disclosure
15 of such records, reports and other information to:
16 (A) A person licensed to practice the healing arts who has before that
17 person a child whom the person reasonably suspects may be abused or
18 neglected;
19 (B) a court-appointed special advocate for a child, which advocate
20 reports to the court, or an agency having the legal responsibility or au-
21 thorization to care for, treat or supervise a child;
22 (C) a parent or other person responsible for the welfare of a child,
23 or such person's legal representative, with protection for the identity of
24 persons reporting and other appropriate persons;
25 (D) the child or the guardian ad litem for such child;
26 (E) the police or other law enforcement agency;
27 (F) an agency charged with the responsibility of preventing or treat-
28 ing physical, mental or emotional abuse or neglect or sexual abuse of
29 children, if the agency requesting the information has standards of con-
30 fidentiality as strict or stricter than the requirements of the Kansas code
31 for care of children or the Kansas juvenile justice code, whichever is
32 applicable;
33 (G) a person who is a member of a multidisciplinary *child protection*
34 team;
35 (H) an agency authorized by a properly constituted authority to di-
36 agnose, care for, treat or supervise a child who is the subject of a report
37 or record of child abuse or neglect;
38 (I) any individual, or public or private agency authorized by a properly
39 constituted authority to diagnose, care for, treat or supervise a child who
40 is the subject of a report or record of child abuse or neglect and specif-
41 ically includes the following: Physicians, psychiatrists, nurses, nurse prac-
42 titioners, psychologists, licensed social workers, child development spe-
43 cialists, physicians' assistants, community mental health workers, alcohol

1 and drug abuse counselors and licensed or registered child care providers;
2 (J) a citizen review board;
3 (K) an educational institution if related to a juvenile offender that
4 attends such educational institution; and
5 (L) educators who have exposure to the juvenile offender or who are
6 responsible for pupils who have exposure to the juvenile offender.
7 (3) To any juvenile intake and assessment worker of another certified
8 juvenile intake and assessment program.
9 Sec. 27. K.S.A. 1999 Supp. 60-1610 is hereby amended to read as
10 follows: 60-1610. A decree in an action under this article may include
11 orders on the following matters:
12 (a) *Minor children.* (1) *Child support and education.* The court shall
13 make provisions for the support and education of the minor children. The
14 court may modify or change any prior order, including any order issued
15 in a title IV-D case, within three years of the date of the original order
16 or a modification order, when a material change in circumstances is
17 shown, irrespective of the present domicile of the child or the parents. If
18 more than three years has passed since the date of the original order or
19 modification order, a material change in circumstance need not be shown.
20 The court may make a modification of child support retroactive to a date
21 at least one month after the date that the motion to modify was filed with
22 the court. Any increase in support ordered effective prior to the date the
23 court's judgment is filed shall not become a lien on real property pursuant
24 to K.S.A. 60-2202 and amendments thereto. Regardless of the type of
25 custodial arrangement ordered by the court, the court may order the child
26 support and education expenses to be paid by either or both parents for
27 any child less than 18 years of age, at which age the support shall ter-
28 minate unless: (A) The parent or parents agree, by written agreement
29 approved by the court, to pay support beyond the time the child reaches
30 18 years of age; (B) the child reaches 18 years of age before completing
31 the child's high school education in which case the support shall not ter-
32 minate automatically, unless otherwise ordered by the court, until June
33 30 of the school year during which the child became 18 years of age if
34 the child is still attending high school; or (C) the child is still a bona fide
35 high school student after June 30 of the school year during which the
36 child became 18 years of age, in which case the court, on motion, may
37 order support to continue through the school year during which the child
38 becomes 19 years of age so long as the child is a bona fide high school
39 student and the parents jointly participated or knowingly acquiesced in
40 the decision which delayed the child's completion of high school. The
41 court, in extending support pursuant to subsection (a)(1)(C), may impose
42 such conditions as are appropriate and shall set the child support utilizing
43 the guideline table category for 16-year through 18-year old children.

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Provision for payment of support and educational expenses of a child after reaching 18 years of age if still attending high school shall apply to any child subject to the jurisdiction of the court, including those whose support was ordered prior to July 1, 1992. If an agreement approved by the court prior to July 1, 1988, provides for termination of support before the date provided by subsection (a)(1)(B), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(B). If an agreement approved by the court prior to July 1, 1992, provides for termination of support before the date provided by subsection (a)(1)(C), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(C). For purposes of this section, "bona fide high school student" means a student who is enrolled in full accordance with the policy of the accredited high school in which the student is pursuing a high school diploma or a graduate equivalency diploma (GED). In determining the amount to be paid for child support, the court shall consider all relevant factors, without regard to marital misconduct, including the financial resources and needs of both parents, the financial resources and needs of the child and the physical and emotional condition of the child. Until a child reaches 18 years of age, the court may set apart any portion of property of either the husband or wife, or both, that seems necessary and proper for the support of the child. Every order requiring payment of child support under this section shall require that the support be paid through the clerk of the district court or the court trustee except for good cause shown.

(2) *Child custody and residency.* (A) *Changes in custody.* Subject to the provisions of the uniform child custody jurisdiction act (K.S.A. 38-1301 *et seq.*, and amendments thereto), the court may change or modify any prior order of custody when a material change of circumstances is shown, but no ex parte order shall have the effect of changing the custody of a minor child from the parent who has had the sole de facto custody of the child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances. If an interlocutory order is issued ex parte, the court shall hear a motion to vacate or modify the order within 15 days of the date that a party requests a hearing whether to vacate or modify the order.

(B) *Examination of parties.* The court may order physical or mental examinations of the parties if requested pursuant to K.S.A. 60-235 and amendments thereto.

(3) *Child custody or residency criteria.* The court shall determine custody or residency of a child in accordance with the best interests of the child.

1 (A) If the parties have a written agreement concerning the custody
2 or residency of their minor child, it is presumed that the agreement is in
3 the best interests of the child. This presumption may be overcome and
4 the court may make a different order if the court makes specific findings
5 of fact stating why the agreement is not in the best interests of the child.
6 (B) In determining the issue of custody or residency of a child, the
7 court shall consider all relevant factors, including but not limited to:
8 (i) The length of time that the child has been under the actual care
9 and control of any person other than a parent and the circumstances
10 relating thereto;
11 (ii) the desires of the child's parents as to custody or residency;
12 (iii) the desires of the child as to the child's custody or residency;
13 (iv) the interaction and interrelationship of the child with parents,
14 siblings and any other person who may significantly affect the child's best
15 interests;
16 (v) the child's adjustment to the child's home, school and community;
17 (vi) the willingness and ability of each parent to respect and appre-
18 ciate the bond between the child and the other parent and to allow for a
19 continuing relationship between the child and the other parent; and
20 (vii) evidence of spousal abuse.
21 Neither parent shall be considered to have a vested interest in the
22 custody or residency of any child as against the other parent, regardless
23 of the age of the child, and there shall be no presumption that it is in the
24 best interests of any infant or young child to give custody or residency to
25 the mother.
26 (4) *Types of custodial arrangements.* Subject to the provisions of this
27 article, the court may make any order relating to custodial arrangements
28 which is in the best interests of the child. The order shall include, but
29 not be limited to, one of the following, in the order of preference:
30 (A) *Joint custody.* The court may place the custody of a child with
31 both parties on a shared or joint-custody basis. In that event, the parties
32 shall have equal rights to make decisions in the best interests of the child
33 under their custody. When a child is placed in the joint custody of the
34 child's parents, the court may further determine that the residency of the
35 child shall be divided either in an equal manner with regard to time of
36 residency or on the basis of a primary residency arrangement for the child.
37 The court, in its discretion, may require the parents to submit a plan for
38 implementation of a joint custody order upon finding that both parents
39 are suitable parents or the parents, acting individually or in concert, may
40 submit a custody implementation plan to the court prior to issuance of a
41 custody decree. If the court does not order joint custody, it shall include
42 in the record the specific findings of fact upon which the order for custody
43 other than joint custody is based.

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(B) *Sole custody.* The court may place the custody of a child with one parent, and the other parent shall be the noncustodial parent. The custodial parent shall have the right to make decisions in the best interests of the child, subject to the visitation rights of the noncustodial parent.

(C) *Divided custody.* In an exceptional case, the court may divide the custody of two or more children between the parties.

(D) *Nonparental custody.* If during the proceedings the court determines that there is probable cause to believe that: (i) The child is a child in need of care as defined by subsections ~~(a)(1), (2) or (3)~~ *(b)(1) or (c)(1)* of K.S.A. 38-1502 and amendments thereto; (ii) neither parent is fit to have custody; or (iii) the child is currently residing with such child's grandparent, grandparents, aunt or uncle and such relative has had actual physical custody of such child for a significant length of time, the court may award temporary custody of the child to such relative, another person or agency if the court finds the award of custody to such relative, another person or agency is in the best interests of the child. In making such a custody order, the court shall give preference, to the extent that the court finds it is in the best interests of the child, first to awarding such custody to a relative of the child by blood, marriage or adoption and second to awarding such custody to another person with whom the child has close emotional ties. The court may make temporary orders for care, support, education and visitation that it considers appropriate. Temporary custody orders are to be entered in lieu of temporary orders provided for in K.S.A. 38-1542 and 38-1543, and amendments thereto, and shall remain in effect until there is a final determination under the Kansas code for care of children. An award of temporary custody under this paragraph shall not terminate parental rights nor give the court the authority to consent to the adoption of the child. When the court enters orders awarding temporary custody of the child to an agency or a person other than the parent but not a relative as described in subpart (iii), the court shall refer a transcript of the proceedings to the county or district attorney. The county or district attorney shall file a petition as provided in K.S.A. 38-1531 and amendments thereto and may request termination of parental rights pursuant to K.S.A. 38-1581 and amendments thereto. The costs of the proceedings shall be paid from the general fund of the county. When a final determination is made that the child is not a child in need of care, the county or district attorney shall notify the court in writing and the court, after a hearing, shall enter appropriate custody orders pursuant to this section. If the same judge presides over both proceedings, the notice is not required. Any disposition pursuant to the Kansas code for care of children shall be binding and shall supersede any order under this section. When the court enters orders awarding temporary custody of the child to a relative as described in subpart (iii), the court shall annually review

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1 the temporary custody to evaluate whether such custody is still in the best
2 interests of the child. If the court finds such custody is in the best interests
3 of the child, such custody shall continue. If the court finds such custody
4 is not in the best interests of the child, the court shall determine the
5 custody pursuant to this section.
6 (b) *Financial matters.* (1) *Division of property.* The decree shall di-
7 vide the real and personal property of the parties, including any retire-
8 ment and pension plans, whether owned by either spouse prior to mar-
9 riage, acquired by either spouse in the spouse's own right after marriage
10 or acquired by the spouses' joint efforts, by: (A) a division of the property
11 in kind; (B) awarding the property or part of the property to one of the
12 spouses and requiring the other to pay a just and proper sum; or (C)
13 ordering a sale of the property, under conditions prescribed by the court,
14 and dividing the proceeds of the sale. Upon request, the trial court shall
15 set a valuation date to be used for all assets at trial, which may be the
16 date of separation, filing or trial as the facts and circumstances of the case
17 may dictate. The trial court may consider evidence regarding changes in
18 value of various assets before and after the valuation date in making the
19 division of property. In dividing defined-contribution types of retirement
20 and pension plans, the court shall allocate profits and losses on the non-
21 participant's portion until date of distribution to that nonparticipant. In
22 making the division of property the court shall consider the age of the
23 parties; the duration of the marriage; the property owned by the parties;
24 their present and future earning capacities; the time, source and manner
25 of acquisition of property; family ties and obligations; the allowance of
26 maintenance or lack thereof; dissipation of assets; the tax consequences
27 of the property division upon the respective economic circumstances of
28 the parties; and such other factors as the court considers necessary to
29 make a just and reasonable division of property. The decree shall provide
30 for any changes in beneficiary designation on: (A) Any insurance or an-
31 nuity policy that is owned by the parties, or in the case of group life
32 insurance policies, under which either of the parties is a covered person;
33 (B) any trust instrument under which one party is the grantor or holds a
34 power of appointment over part or all of the trust assets, that may be
35 exercised in favor of either party; or (C) any transfer on death or payable
36 on death account under which one or both of the parties are owners or
37 beneficiaries. Nothing in this section shall relieve the parties of the ob-
38 ligation to effectuate any change in beneficiary designation by the filing
39 of such change with the insurer or issuer in accordance with the terms
40 of such policy.
41 (2) *Maintenance.* The decree may award to either party an allowance
42 for future support denominated as maintenance, in an amount the court
43 finds to be fair, just and equitable under all of the circumstances. The

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1 decree may make the future payments modifiable or terminable under
2 circumstances prescribed in the decree. The court may make a modifi-
3 cation of maintenance retroactive to a date at least one month after the
4 date that the motion to modify was filed with the court. In any event, the
5 court may not award maintenance for a period of time in excess of 121
6 months. If the original court decree reserves the power of the court to
7 hear subsequent motions for reinstatement of maintenance and such a
8 motion is filed prior to the expiration of the stated period of time for
9 maintenance payments, the court shall have jurisdiction to hear a motion
10 by the recipient of the maintenance to reinstate the maintenance pay-
11 ments. Upon motion and hearing, the court may reinstate the payments
12 in whole or in part for a period of time, conditioned upon any modifying
13 or terminating circumstances prescribed by the court, but the reinstate-
14 ment shall be limited to a period of time not exceeding 121 months. The
15 recipient may file subsequent motions for reinstatement of maintenance
16 prior to the expiration of subsequent periods of time for maintenance
17 payments to be made, but no single period of reinstatement ordered by
18 the court may exceed 121 months. Maintenance may be in a lump sum,
19 in periodic payments, on a percentage of earnings or on any other basis.
20 At any time, on a hearing with reasonable notice to the party affected,
21 the court may modify the amounts or other conditions for the payment
22 of any portion of the maintenance originally awarded that has not already
23 become due, but no modification shall be made without the consent of
24 the party liable for the maintenance, if it has the effect of increasing or
25 accelerating the liability for the unpaid maintenance beyond what was
26 prescribed in the original decree. Every order requiring payment of main-
27 tenance under this section shall require that the maintenance be paid
28 through the clerk of the district court or the court trustee except for good
29 cause shown.
30 (3) *Separation agreement.* If the parties have entered into a separa-
31 tion agreement which the court finds to be valid, just and equitable, the
32 agreement shall be incorporated in the decree. The provisions of the
33 agreement on all matters settled by it shall be confirmed in the decree
34 except that any provisions for the custody, support or education of the
35 minor children shall be subject to the control of the court in accordance
36 with all other provisions of this article. Matters settled by an agreement
37 incorporated in the decree, other than matters pertaining to the custody,
38 support or education of the minor children, shall not be subject to sub-
39 sequent modification by the court except: (A) As prescribed by the agree-
40 ment or (B) as subsequently consented to by the parties.
41 (4) *Costs and fees.* Costs and attorney fees may be awarded to either
2 party as justice and equity require. The court may order that the amount
43 be paid directly to the attorney, who may enforce the order in the attor-

ney's name in the same case.

(c) *Miscellaneous matters.* (1) *Restoration of name.* Upon the request of a spouse, the court shall order the restoration of that spouse's maiden or former name.

(2) *Effective date as to remarriage.* Any marriage contracted by a party, within or outside this state, with any other person before a judgment of divorce becomes final shall be voidable until the decree of divorce becomes final. An agreement which waives the right of appeal from the granting of the divorce and which is incorporated into the decree or signed by the parties and filed in the case shall be effective to shorten the period of time during which the remarriage is voidable.

Sec. 28. K.S.A. 75-3329 is hereby amended to read as follows: 75-3329. As used in this act:

(a) "Board" means the secretary of social and rehabilitation services.

(b) "State institution" means institution as defined in K.S.A. 76-12a01, *and amendments thereto*.

(c) "Child" or "children" means a person or persons under the age of ~~eighteen (18)~~ *18*.

(d) "Private children's home" means any licensed home, institution or charitable organization which is operated by a corporation organized ~~not for profit~~ under the laws of this state which the secretary finds has and maintains adequate facilities and is properly staffed to provide adequate care, custody, education, training and treatment for any child which the secretary may place therein under the authority of this act, or a licensed foster care home, boarding home, personal care home or nursing home.

Sec. 29. K.S.A. 38-1503, 38-1523a, 38-1524, 38-1529, 38-1531, 38-1566, 38-1568 and 75-3329 and K.S.A. 1999 Supp. 38-1502, 38-1507, 38-1513, 38-1532, 38-1542, 38-1543, 38-1544, 38-1562, 38-1563, 38-1565, 38-1581, 38-1583, 38-1584, 38-1585 38-1587, 38-1591, 38-1608 and 60-1610 are hereby repealed.

Sec. 30. This act shall take effect and be in force from and after its publication in the statute book.

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Federal Register

Tuesday,

January 25, 2000

Part II

Department of Health and Human Services

Administration for Children and Families

45 CFR Parts 1355, 1356 and 1357

Title IV–E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews; Final Rule

Senate Ways and Means Committee

Date February 29, 2000

Attachment # 4

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.

SUPPLEMENTARY INFORMATION:

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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 agencie' 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

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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

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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

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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' 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' 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

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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

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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.

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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

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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

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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

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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' 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

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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:

sbull; 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' 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

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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' 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,

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• 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 CFSR 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' 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' 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

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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' 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' 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

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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' 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' 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.

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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

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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 of 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' 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.

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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' 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 judgements 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.

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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.

4-41

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 couple 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' 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

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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.

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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.

Section1356.50 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.

4-55

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

4-56

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' 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

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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

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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

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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

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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
*	* * * *
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.

* * * * *

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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

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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

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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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Senate Ways and Means Committee
Senate Bill 633
Tuesday, February 29, 2000

I appreciate the opportunity to appear before this committee this morning. My name is Bruce Linhos and I am the director of the Children's Alliance of Kansas. The Children's Alliance is the association of non-profit child welfare agencies in Kansas. Our members provide an array of services to the families and children they serve including; foster and residential care, emergency services, adoption, family preservation, juvenile intake and assessment, day treatment, drug and alcohol services, educational services, family counseling and many more.

Currently the association has 22 member agencies representing better than 80% of the not-for-profit child welfare services provided in Kansas. With privatization, members of the association represent both contractors and subcontracting agencies. Members of our association are also providing services to youth that are being served through Juvenile Justice.

I appear here this morning in support of S.B. 633. We believe that the best permanency for children is with there families. The cornerstone of S.B. 633, as we understand it, is that we will work to insure that every effort is made to serve a child in context of his/her family or community before placing the child outside of the home. This is also consistent with the requirement of the federal adoption and safe families act that we prove all reasonable efforts have been made to keep families together before a child is placed outside the home.

Our agencies are the service providers of the child welfare system. As such, for years we have heard the concerns of families that their children had to be placed in custody before they could receive services. We have also seen the reality that once a child is removed from their home it becomes increasing difficult to reunite that family. We wholeheartedly support doing all that can be done to provide appropriate services to families in their communities before making the very serious decision that a child must be removed.

Senate Ways and Means Committee
Date February 29, 2000
Attachment # 5

The safety of the child is obviously paramount. If the safety of the child can not be insured in the family home, then the child would be found to be a child in need of care and placed in a safe environment.

While we support the intent of S.B. 633 to coordinate and in some cases develop community based alternatives to meet the need of these children, we appreciate that this is both the correct and a very difficult thing to do. In the spirit of working to help this legislation realize the promise of first trying to meet the service needs of the family in the community, we have identified some issues and suggestions surrounding implementation that we feel need to be addressed.

Issues

- The original target date for implementation was July. While we believe that many of the services are available, in many communities coordination of both services and funding streams will be a major undertaking.
- We note that the Governor has recommended a significant decrease in foster care funding in FY 2001, in anticipation of funding many of these services from funding available in other service areas like education, juvenile justice and mental health. Blending multiple agency funding streams while desirable will likely prove difficult.
- Because child welfare is a system, we wonder about the impact of S.B. 633 on the foster care. How will the anticipated shift in numbers of children being diverted from foster care impact the contracts?
- Related to the question above, the services that communities develop are dependent on a clear picture of the needs and numbers of children that would be served as youth in need of community services. We question whether we have a clear enough picture at this time.
- Proper and timely services for these families would seem to depend on a statewide system that could quickly assess the needs of these children and families to get them plugged in to the appropriate array of services. Is the juvenile intake and assessment network appropriate, if retooled, to service as front door of the child welfare and juvenile justice systems?
- While many services for children and families exist in our communities already, how do we help service providers to revamp their service delivery systems from program driven to family specific services?
- It seems that it will be difficult to bring the various service providing entities together and to evaluate their efforts if we don't first develop a compatibility of outcomes across various provider systems.

Suggestions

- While we understand that SRS is an agency that doesn't engender trust in all circles, we feel that SRS should be the lead agency in the implementation of this initiative. Our reasons are as follows:

- As the statewide welfare agency SRS is ultimately responsible for the welfare of these children as well as having fiscal responsibility.
- If the various agencies of government are being expected to share responsibility and funding to serve children identified as youth in need of community services, it will require a cabinet level agency to insure that this happens.
- SRS already has a presence in every county in Kansas.
- All community providers should be accountable for the same identified outcomes. SRS seems in the best position to insure such accountability.
- Finally, SRS is the state agency responsible for the implementation of the federal regulation governing the adoption and safe families act. Because of the serious financial implications that can result from improper implementation, we feel SRS should have direct oversight of this initiative.

- Before implementation we must be clear on how these services will be funded so community providers are encouraged to be creative in the services they develop and networks they will need to form.
- The July implementation date should be a target for those communities that have relatively sophisticated services systems already in place. Other communities would work to coordinate and develop service networks and come on-line later in the year.
- Because we are concerned that we may not at this time have a clear understanding on the numbers of children that can be served in their communities, we suggest that foster care again be included in the states system of caseload estimating.
- It makes sense to us that statewide intake and assessment be developed to provide screening for youth in need of community services.
- We have learned that we shouldn't indulge in initiatives unless we plan to evaluate our programmatic results. Statewide outcomes and expectation should be established. There should also be a compatibility of these outcomes across service providers.

We believe that this legislation drives the child welfare system toward further refinement. We understand that being able to provide each child with the services they need in their home community is a tall order. Serving children and families in this way is the right thing to do, and we should do what we must to struggle with the implementation of this initiative for that reason. Whether it's a less expensive way to provide services remains to be seen.

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SCOTT CITY
ULYSSES
WICHITA

Testimony before Ways and Means Committee

February 29, 2000

Kansas Children's Service League (KCSL) is a statewide not-for-profit agency providing over a century of service to families and children in Kansas. We provide a broad range of services throughout the state driven by needs in a given community. Directed by a strong mission, our services and advocacy efforts are aimed at ***keeping children safe, families strong, and communities involved.***

KCSL also has a long and rich tradition of advocating for the needs of Kansas Children and their families. Our obligation to take what we know about the children and families we serve and place it in the hearts and minds of policy makers is evident in our tradition of advocacy. Our efforts are not driven by what is good for KCSL but rather what is good for Kansas children and their families.

KCSL has been a good partner with other agencies, advocacy groups, and the state to improve the outcomes for children and their families. As we have witnessed and been a part of major system reform, in adoption, family preservation and foster care, we understand the need for ongoing oversight and modification of a system designed to keep children safe, and given them permanency all in child time. System reform is never complete. When one piece of the system is changed or challenged, light is shed on another. To that end, we support the passage of SB 633 with the following considerations.

WHY SUPPORT THIS BILL?

As a member of the Children's Alliance of Kansas, KCSL has a commitment to participating in system design. Agencies like KCSL represent often times a first access point to children and families in their communities. The following sets out the basis of our support for SB 633.

SB 633 carries out the intent of system reform. Public Law 96-272 passed in 1980 set the federal framework for enabling children to remain **safely** at home before they were placed in foster care. This bill takes the system to the next level. Aimed at ensuring services are available to those families in need of support services but whose children are safe builds on the promise of a truly prevention-based system.

This bill brings us into closer compliance with the Adoption and Safe Families Act. As a precursor to the Adoption and Safe Families Act (ASFA), Public Law 96-272 required reasonable efforts but never defined them. SB 633 complies with some of the stringent reporting requirements in the new ASFA regulations that are effective March 27th.

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It creates a system for providing services to children who are safe but, none the less, need services. We have always been able to provide services to children who are safe. However, given the urgency of providing services to those children who are greatest risk, those who have been safe have not historically been given the level of priority that this bill affords

This bill assists in keeping the child welfare system contemporary. We threw the curtains back on this system four years ago in a way we never had before. New policies, outcomes and new expectations are now becoming standard practice. The challenge lies in keeping the system contemporary. SB 633 attempts to do this.

What we would like you to keep in mind as you consider this legislation is 'system reform is truly an *expedition and not an inquisition.'* As we design this new segment we have to keep in mind that this is about managing change, something we now understand is an important staple in this system.

Not all change has been the same, especially in the last four years but there is one common element…<u>thinking</u>. Thinking requires action. There are seven different levels of thinking about the work we do. They include:

>Effectiveness: doing the right things
>Efficiency: doing things right
>Improving: doing the right things better
>Modifying: doing away with things
>Copying: doing things other people are doing
>Different: doing things NO ONE else is doing
>Impossible: doing things that can't be done.

ISSUES AND RECOMMENDATIONS

We must move from rhetoric and planning to action. Saying communities should and can do it better does nothing to help them get there. Only with tools, authority and resources can communities operationlize the requirements of SB 633. Only then will we be able to create the incentives needed to focus the efforts of the child welfare system on prevention.

Understanding who we serve: The profile of the youth will drive the service picture. In the absence of an understanding of who is a "Youth in Need of Community Service, we will compromise our ability to develop accountability measures, evaluative processes and effective services. Clearer understanding is also a critical component in determining the costs associated with services and the resources needed to grow this part of a service system.

Gatekeeper and Service Integrity: We recommend that SRS be the local community gatekeeper. They have an investment in their communities as well as keeping youth out of the child welfare system. This also brings structural stability to the local level.

The need for flexible program and funding opportunities: We need to be creative about funding mixes and program design. Typically funding streams fund only "what we know". We must ask "Are we doing what we can to foster innovation?

We must create a level playing field. The key in this system is access, not who provides the service. This system must provide opportunities to compete for the ability to demonstrate effective services. Are we allowing participation at the state and local level from experienced service providers? Are we providing opportunities for new and innovative service providers.

How to sustain the system in the long run must be considered. Without accountability systems, compatible outcome measures and service evaluation we jeopardize the stability of providing services in a way that meets our goals and the needs of the youth we are trying to serve. We must avoid creating an illusory system.

Integrating community services. Uniform intake procedures and process definition must also be modified to be responsive to this newly defined population. Current procedures do not necessarily reflect the policy and practice direction outlined in this bill. They do need to reflect a more contemporary approach.

Assessing current service choice, community leadership and capacity. Many services already exist in the community for the population we are talking about. All of us must take a look at what we can offer, how we can retool current and existing services and ensure the dollars for an as yet incomplete system are there.

We *all* have an important role to play. We need to ask ourselves every day "How am I contributing to the improvement of this system?" At KCSL and the Alliance, we will continue to look at reform from many angles, look for ways of builidng new partnerships and developing new services, ensure children and their families are safe, participate in community planning and implementation, participate in a network of services, and maintain our commitment to letting you know how the decisions in this room effect the people we serve in our communities.

Submitted by:

Melissa L. Ness, Director of Advocacy, Education and Legal

<u>**TESTIMONY IN REGARD TO SENATE BILL NO. 633**</u>

BY JUDGE THOMAS H. GRABER
SUMNER COUNTY DISTRICT COURT, 30TH JUDICIAL DISTRICT

February 29, 2000

I appear to testify in opposition to Senate Bill No. 633 in the form that it was original drafted. However, there are several sections that, by themselves, I do not oppose. Those sections are as follows: New Section 1; Section 4; Section 6; Section 15; Section 20; Section 23; and Section 27.

In regard to **New Section 2**, I oppose the language in (**a**) starting on page 1 at line 42 continuing through page 2, line 7. I particularly object to the second sentence, which provides:

> "In determining the safety of the child the court shall consider the likelihood of the immediate serious physical, mental or emotional harm which may result from leaving the child in the child's current situation and shall balance that concern with mental and emotional harm that will result from removing the child from familiar care and relationships, place and possessions."

The court is required to make reasonable efforts determinations when issuing an ex parte protective custody order, entering a temporary custody order, in a dispositional order, and

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in reviewing placements. As a practical matter, the mandatory language is impossible to comply with. The ex parte protective custody is entered based upon a verified application usually prepared by the district or county attorney's office. There is no one with the knowledge or expertise to inform the court on the mental and emotional harm that will result from removing the child from familiar care and relationships, place and possessions nor even to inform the court what the "familiar care and relationships, place and possessions" are. The provision creates an impossible mandate for the courts to follow in any practical way putting "at risk children" at even greater risk.

Paragraph (**b**) of New Section 2 beginning on page 2 at line 8 provides:

> (b) Before ordering a child removed from the custody of a parent the court shall find from evidence provided that allowing the child to remain in the custody of a parent is not in the best interests of the child. The determination of best interests shall be made at the first hearing at which the court considers removal of a child from the child's home, even temporarily."

Read literally, this provision would not allow the court to enter an ex parte protective custody order. The ex parte protective custody order is issued without a hearing. The court is required by this provision to make a best interest finding before ordering

removal of a child and the finding is required to be made at the first hearing at which the court considers removal. If these provisions are required to meet federal guidelines, the language needs to be changed so it fits with the code and actual practice.

Paragraph (**c**) of New Section 2 beginning on page 2, at line 14, in line 15 the phrase "reasonably designed to address safety concerns regarding the child" is used. A similar phrase is used in Section 16 on page 25, lines 21 and 22. The provisions should be the same in both locations and should be changed to read as follows:

> "(c) If the secretary presents the court with a plan to provide services to a child or family which the court finds will address safety concerns regarding the child who is the subject of the proceeding, the court shall only order or authorize the removal of the child from the child's home until the plan has been implemented to address the safety concerns." (Section 2, page 2, beginning line 14.)
>
> (4) If the secretary presents the court with a plan to provide services to a child or family, which the court finds will address safety concerns regarding the child who is the subject of the proceeding, the court shall approve the return of the child to the child's home when the plan has been implemented to address the

safety concerns. (Section 16, page 25, beginning line 20.)

Section 3 on Page 5 beginning at line 38 and Section 7, page 13, beginning at line 25, proposes changes to the existing multidisciplinary team provisions. The change should not be made as proposed. The multidisciplinary team definition now existing in K.S.A. 38-1502(r) should remain unchanged. Section 7, page 13, beginning at line 23 through line 35, should have the proposed language changed to read as follows:

> (a) Upon recommendation of the state department of social and rehabilitation services or the county or district attorney, *or on the court's own motion*, the court may appoint a multidisciplinary team to assist in gathering information *and coordinating the provision of services* regarding a child alleged *or found* to be a child in need of care ~~by reason of physical, mental or emotional abuse or neglect or sexual abuse~~. The team may be a standing multidisciplinary team or may be appointed for a specific child.

The phrase "child protection" should be deleted everywhere it is added in the draft of the bill.

Also in Section 3, on page 6 beginning at line 25, the language should be changed to include the language in Senate Bill No. 461 in regard to permanent guardianship and by adding the

proposed language "with or without termination of parental rights, if the parent consents and agrees to the appointment of a permanent guardian."

Section 5 which begins on page 8 at line 21 should have "child protection" deleted from line 3 on page 9 and all of the changes from line 28 on page 9 through line 29 on page 10, should be deleted; and the numbering should be changed appropriately. The proposed changes to K.S.A. 38-1507(d) would created serious confidentiality problems for education, educators, mental health centers, persons licensed to practice mental health, attorney client privilege. It would lay a trap for potential legal liability and risk of loss of funds.

Section 7 beginning on page 13 at line 22 should have all proposed changes from line 25 on deleted, and the following language added on page 15 after line 21:

> "(g) The membership of a multidisciplinary team shall include a representative of the department of social and rehabilitation services and may include appropriate law enforcement agencies. At the request of the secretary, a multidisciplinary team may advise and assist the department of social and rehabilitation services in the assessment or safety planning for a

child who is the subject of a report as a child in need of care."

The proposed changes drafted in the bill would destroy the uses presently being made of these teams in many jurisdictions and would severely limit the flexibility needed to help at risk children.

Section 8, which begins on page 15 at line 22, should have the changes stricken. The current provisions of K.S.A. 38-1524 to all child in need of care reports, and even if the code is amended to include to general categories of children in need of care, they both need to be similarly investigated; and this amendment would eliminate a child in need of protection.

Section 9, which begins on page 16 at line 1. The proposed changes should be stricken. The provisions of K.S.A. 38-1529 apply to who may file a petition and the proposed changes are in regard to what shall be included in a petition. K.S.A. 38-1531 is the statute dealing with what must be in a petition and should be dealt with in Section 10.

Section 10, which begins on page 16 at line 20, should not be amended as requested. The proposed language beginning on page 16 at line 42 should be replaced with the following

language:

> "(6) If the petition requests an out-of-home placement of the child in the custody of the secretary, the petition shall specify the efforts made by the petitioner or any other efforts known to the petitioner to prevent or eliminate the need for an out-of-home placement. A copy of any petition requesting an out-of-home placement of a child in the custody of the secretary shall be provided to the secretary upon filing."

Section 11, which begins on page 17 at line 5, is a proposed amendment which is not needed if Section 10 is amended as suggested above. However, if K.S.A. 38-1532 is amended, it should have the proposed language changed to provide as follows:

> "(c) If the petition requests custody in the secretary, a copy of the petition shall be provided to the secretary upon filing."

Section 12, which begins on page 17 at line 28, should have the proposed language beginning on line 36 changed to provide as follows:

> "..application, including specific actions taken to prevent or eliminate the need for an out-of-home

placement, or the specific facts supporting that an emergency exists."

The proposed language on page 18 beginning on line 14 should be changed to provide as follows:

"(4) the secretary. However, if the secretary presents the court with a plan to provide services to a child or family which the court finds will address safety concerns regarding the child who is the subject of the proceeding, and if the secretary recommends that the child not be placed in the secretary's custody, the court may only place the child in the protective custody of the secretary until the plan has been implemented to address the safety concerns. When making a recommendation regarding custody, the secretary shall consider the assessment of a community intervention team, if such team exists and has made an assessment."

The proposed amendment beginning on page 18 and continuing on lines 1 and 2 of page 19 should be changed to provide as follows:

"If the child is placed in the custody of the secretary, the secretary shall be provided a written copy of any orders entered upon the making of the order. However, the fact that the secretary does not have a written copy of the order does not relieve the

secretary of the duty of following the orders if a representative of the secretary is present when the order is orally made by the court."

Section 13, which begins on page 19 at line 3, should have the proposed language on page 21 beginning on line 14 stricken and the following language substituted:

"(4) the secretary. However, if the secretary presents the court with a plan to provide services to a child or family which the court finds will address safety concerns regarding the child who is the subject of the proceeding, and if the secretary recommends that the child not be placed in the secretary's custody, the court may only place the child in the temporary custody of the secretary until the plan has been implemented to address the safety concerns. When making a recommendation regarding custody, the secretary shall consider the assessment of a community intervention team, if such team exists and has made an assessment. The secretary shall present to the court in writing the specific actions taken to prevent or eliminate the need for custody in the secretary."

The proposed language on page 21 beginning on line 42 and continuing on page 22, line 1, should be changed to provide as

follows:

"If the child is placed in the custody of the secretary, the secretary shall be provided a written copy of any orders entered upon the making of the order. However, the fact that the secretary does not have a written copy of the order does not relieve the secretary of the duty of following the orders if a representative of the secretary is present when the order is orally made by the court."

The proposed language on page 22 beginning at line 24 should be changed to provide as follows:

"(e) If the court issues an order for informal supervision pursuant to this section, the court may enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home, visiting, contacting, harassing or intimidating the child or any other family member in the home or attempting to visit, contact, harass or intimidate the child or any other family member in the home."

Section 16, beginning on page 23 at line 41, should have the proposed language beginning on line 29 changed to provide as follows:

"(4) the secretary. However, if the secretary presents the court with a plan to provide services to a child or family which the court finds will address safety concerns regarding the child who is the subject of the proceeding, and if the secretary recommends that the child not be placed in the secretary's custody, the court may only place the child in the custody of the secretary until the plan has been implemented to address the safety concerns. When making a recommendation regarding custody, the secretary shall consider the assessment of a community intervention team, if such team exists and has made an assessment. The secretary shall present to the court in writing the specific actions taken to prevent or eliminate the need for custody in the secretary."

The proposed language on page 25 beginning on line 20 should be changed to provide as follows:

"(4) When the secretary provides the court with a plan to provide services to a child or family which the court finds will address safety concerns regarding the child who is the subject of the proceeding, the court shall approve the return of the child to the child's home when the plan has been implemented to address the safety concerns."

The proposed language on page 25 beginning on line 40 should be changed to provide as follows:

> "If the child is placed in the custody of the secretary, the secretary shall be provided a written copy of any orders entered as soon as practicable but within 10 days of the making of the order. However, the fact that the secretary does not have a written copy of the order does not relieve the secretary of the duty of following the orders if a representative of the secretary is present when the order is orally made by the court."

Section 17, which begins on page 27 at line 9, should have the proposed language on page 28 beginning at line 8 changed to provide as follows:

> "court shall review the progress being made to achieve the goals of reintegration, whether reasonable efforts have been made to achieve the goals of the permanency plan and the foster parent report and .."

The proposed language on page 28 beginning at line 17 should have the following language added following it in line 20:

> "Prior to each hearing the secretary shall provide the court with a written report that specifically states the actions taken to accomplish the permanency goals."

The proposed language on page 29 at line 5 should be changed to provide as follows:

> "shall set a target date for the reintegration goals to have been met and the child returned home. If reintegration has not been accomplished and the goals have not been met, the court shall hold a hearing pursuant to subsection (c)."

The proposed language on page 29 beginning on line 36 through line 40 should be changed to provide as follows:

> "(b) When a child in the custody of the secretary is removed from the home of a parent after having been placed in the home of a parent for a period of six months or longer, the secretary shall request a finding by the court whether reasonable efforts were made to prevent the necessity for removal and whether the removal was in the best interests of the child. When the secretary requests such a finding, the secretary shall provide the court a written report specifically stating the efforts and actions taken to prevent the removal and why it was in the best interest of the child."

Section 21, which begins on page 32 should have the proposed language on page 34 in lines 23 and 24 changed to be consistent

with the language in Senate Bill No. 461.

Section 22 beginning on page 34 should have all of the language in regard to long-term foster care returned to the statute as an alternative along with adoption and permanent guardianship.

Section 24, which begins on page 37 at line 16, should have the proposed language beginning on line 21 changed to conform with the language in Senate Bill No. 461

The proposed language on page 27 beginning on line 37 should be changed to provide as follows:

> "(e) Every notice of appeal, docketing statement and brief shall be signed by the interested party if they have been personally served in the proceeding. Failure to have the required signature shall result in the dismissal of the appeal."

Chairman Kerr and Members of the Senate Ways and Means Committee:

Re: Senate Bill No. 633; Hearing, 2-29-00

I am appearing today to speak in opposition to the above referenced bill; specifically to the amendment of current Child In Need of Care (CINC) definitions. Although not opposed to the concept of creating a fund to increase resources for family services and for community intervention for children at risk for becoming a child in need of care, our office is opposed to rushing into a complete overhaul of the current system and potentially creating more bureaucracy without first more fully exploring and debating whether or not such change is truly in the best interest of Kansas children and families.

We must ask ourselves, what has brought about the rather instant need to change the law? What data is being presented as a reason to change the law? Is there more than one source of the data, and is the data reliable? Are there benefits to changing the Child In Need of Care definitions? If there are benefits, who receives them, and is it truly in the best interest of the children of Kansas to change the law? These are some of the questions that need to be more fully explored. I am asking this committee to table the amending of the definitions until the legislature has had an opportunity to fully explore all aspects of what the amendments would mean. There needs to be a thorough and exhaustive study of the proposal before it is ever voted on. If privatization has taught us anything it is the value of initial study and planned implementation before passing legislation that effects the lives of children in Kansas..

It must be remembered that every Child In Need of Care definition represents a classification of a child; many children fit into more than one classification. A child who is a runaway today may be the child who was previously abused or neglected and who did not receive intervention when the abuse or neglect occurred; will the new definitions take this into account? The same for a truant. Many of the truancy cases filed in our jurisdiction has truancy as the symptom, but the cause may be due to many family issues that leave the child at risk. Will the new definitions take this into account? What happens to a runaway in protective custody whom the parent refuses to take back home because of various issues? There are no other relative placement options, and the Secretary does not recommend they be placed in custody, and there are no community resources yet available; will the new definitions take this into account?

What happens to the baby who is born drug affected whose mother is still actively using drugs; mother refuses to go to treatment; cannot take care of the child, and there are no relative placements available? Under the current definitions, this child would be filed on as a CINC because he/she is without proper care custody or control and/or is without the care custody and control necessary for the child's physical, mental or emotional health. Temporary custody would be given to SRS. In the proposed amendments, the first definition used is no longer a definition; the second definition would treat the child as a "youth in need of community intervention". What will the new definition mean to this baby or the many other drug affected babies we that are filed on each month? These and

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many other case examples need to be explored before the current law is changed. The current law already requires the court to make findings throughout a court case, where the child is placed in SRS custody, that either reasonable efforts have been made or that an emergency exists. Changing the law will not change the needs of certain Kansas children and families, it will only change for the worse their ability to access intervention which keeps them safe.

New statutory Child In Need of Care definitions are not required in order to create a fund for resources for communities to use in working toward increasing support services and intervention services to children and their families who are at risk for running away or being truant or being out of control . New statutory definitions are not required to establish community resource teams. SRS brought together numerous people from all over Kansas in January of this year to look for new ways to deal with the runaways and truants and out of control behavior children. This was a good thing. Many of us then returned to our respective communities and have continued the dialogues. Change in how we provide services to children can occur without having to change CINC definitions; changing the definitions only makes the process more complicated and leaves many Kansas children at risk.

Respectfully submitted,

Karen Langston, Assistant District Attorney,
18th Judicial District, Wichita, Kansas

TESTIMONY IN OPPOSITION TO SENATE BILL NO. 633

COMES NOW Assistant District Attorney, Donald W. Hymer, Jr., and submits to the Senate Committee on Ways and Means his opposition to Senate Bill No. 633, based upon the following:

Senate Bill No. 633 represents a sweeping and radical change to the existing Child In Need Of Care Code pursuant to K.S.A. 38-1502, et seq. This Bill is of great concern to the Johnson County District Attorney's Office, Johnson County District Attorney Paul Morrison, and myself. I am the assigned District Attorney who files all of the Child In Need Of Care cases in Johnson County, Kansas. That amounts to in excess of 500 cases per year.

I was invited to be on a work group discussing possible changes to the Child In Need Of Care Code, hosted by the State Department of SRS. I was informed by the State Department of SRS that the Foster Care Budget had already been cut for the upcoming year, and that there had to be fewer children in foster care as a result of that budget cut. Shortly thereafter I received and reviewed a copy of Senate Bill No. 633 which changes the definition of a child in need of care to limit the number of children that will be placed in out of home placement. It appears that the legislation is predicated not on what is best for children, but on what will allow the budget constraints to be met.

The child in need of care arena has seen many recent changes in the procedures, and the way we handle youth in foster care. We have recently undergone a privatization of foster care services. In our county privatization has not been a success. It is my belief that privatization was put in place to attempt to save money, and when it did not save money a more drastic measure was required. The more drastic measure has now taken the form of Senate Bill No. 633. Only months ago, State Department of SRS attempted to centralize the Child Abuse Hotline in an effort to have greater control over when children are taken into custody. The pilot program was attempted through our county. This pilot program only lasted 30 to 60 days, when it was learned that these decisions are better made at the local level. As a result of the experience with the pilot program, the entire program was discontinued.

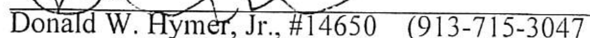
In reviewing Senate Bill No. 633 it breaks the current child in need of care definition into two categories. Under both of these categories greater control is sent to the State Department of SRS in Topeka to make decisions on when children should be taken out of the home. It is my belief that these decisions are better made at the local level, and through the local Courts. To centralize the power on when a "youth in need of community services" can be taken out of the home with the State Department of SRS, in essence makes the child in need of care decision into an administrative hearing, which then must be rubber stamped by the judiciary.

It has been stated that the purpose behind Senate Bill No. 633 is to comply with the Adoption and Safe Families Act. In reviewing the Adoption and Safe Families Act (45CFR, Parts 1355, 1356, and 1357) no where does that statute require that we construct a new definition of abuse and neglect and that we redefine our Child In Need Of Care Code. In reading the Adoption and Safe Families Act it appears that better record keeping and better factual basis on the record in Court regarding why a child is being taken out of the home is required. This can be accomplished under the current definitions we have.

Senate Bill No. 633 also does away with long term foster care. I have spoken with Johnson County District Court Judge, the Honorable Allen Slater, who hears all of the Child In Need Of Care cases in Johnson County. He is concerned with the centralization of power with the State Department of SRS as well as the concern that these changes are not necessary to comply with the Adoption and Safe Families Act. In addition, this proposed legislation does away with long term foster care. The Adoption and Safe Families Act specifically allows and approves long term foster care as an option under Section 1355.20(a) and (1)(b) and Section 1356.21 (h). I also believe that Senate Bill No. 633 will limit the timeliness and the ability to grant Ex Parte orders to take children out of abusive and harmful environments, due to the fact that SRS will now be required to provide background information to the Court. The purpose of an Ex Parte order is that the State, or petitioning party, has the ability to ask the Court to take emergency action that is necessary for the well-being of the child. Within 72 hours, a hearing must be held to determine whether that emergency custody will continue or not. It is during this 72 hours that the information is usually provided to the State and the Court by the State Department of SRS. To think that can be done prior to the granting of the Ex Parte order is unrealistic.

In conclusion, the Senate Bill proposes to centralize power with the State Department of SRS in an effort to allow SRS to control the number of children who enter into foster care. Unfortunately none of us can control the numbers of children who are being abused or who are in harmful environments and need to be protected by the State. The fact that the budget decision is now driving the definition of a child in need of care is not in the best interest of the children of the State of Kansas.

RESPECTFULLY SUBMITTED,



Donald W. Hymer, Jr., #14650 (913-715-3047

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Testimony for Senate Ways and Means Committee

Children described as Children in Need of Care – Non Abuse and Neglect (CINC-NAN) have been a concern for all of us who have been involved with child welfare for years. We want to know how best to serve these children and I certainly agree with Assistant Secretary Allegrucci that many could best be served out of the foster care system.

I appreciate SRS's efforts and yours to address this issue. My hope is that we all ask questions and look at all the ramifications as we work the legislative process.

Families need help in other ways besides removing children from their homes as long as the children can remain safe. The Adoption and Safe Families Act new regulations require we demonstrate all reasonable efforts have been expended before a child is placed outside the home. This proposed modification would assure compliance with ASFA. By utilizing local services at the community level, SRS may be able to draw more federal dollars.

All three reasons listed above support this proposal. However, there are some concerns:

- Have we identified the correct number of children in the new category of Youth In Need of Community Intervention (YINC)
- Is the funding adequate?
- What can we do to help communities retool existing services and develop new ones as needed?
- Can these programs be implemented by July 1?
- A front door is necessary to identify the children and what services they need. Who will do this assessment?

Recommendations:

- **How this system is structured is key**. There are several systems in place statewide such as Juvenile Intake and Emergency Shelters. There are Multi-Disciplinary Teams in some of our communities. Community mental health centers are located across the state. However, each of these players, while having an important role, does not have the breadth of knowledge of available resources as the local SRS office.
- JIACs do not operate uniformly throughout the state. Not every community has a well-functioning Multi-Disciplinary Team or an available emergency shelter. Almost every child about whom we are speaking will need mental health services and the CMHCs will need to be available to provide services.
- SRS has an office in every county. **SRS should be the gatekeeper for these children and families.**

The system needs to have **an evaluation component.** We all need to see how this works after six months or a year.

All participants working with these children and families need to have the **same outcome goals**. Other collaborative partners will need to share the same goals for these children.

Many existing services are already in place where many partners have come together to improve children's lives. Wyandotte County's truancy program model has drawn nation-wide attention with the school districts, the Regional Prevention Center, the mental health center, SRS and the district attorney's office all working to address truancy. This is only one example of many collaborative programs that can be built upon or used as models for other areas in the state.

Our children are the future and Senate Bill 633 offers a new way to protect them and their families without pulling them out of their homes. Thank you for considering such an important issue.

Submitted by:
Maureen Mahoney
General Counsel – Kaw Valley Center

UNITED COMMUNITY SERVICES OF JOHNSON COUNTY, INC.

Drug & Alcoholism Council of Johnson County
Johnson County Children's Coordinating Council

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United Way's
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Testimony
Senate Ways and Means Committee
February 29, 2000

Good morning. My name is Carol Smith, speaking on behalf of United Community Services of Johnson County (UCS). UCS has a 30-plus year history as a human service planning organization in Johnson County. Many of UCS's efforts over the years have involved collaborative responses to human need. From UCS's vantage point as a convenor of the community, I am here today to raise questions about SB 633 which proposes to create a new category within Kansas' Children in Need of Care law called "youth in need of community services."

It is important and laudable to find new ways to serve children within their family and community. At UCS, we value the role that collaboration can play in more effectively responding to the complex needs of today's children and their families. We are currently playing a facilitator role with the "family-centered system of care" – a mental health project designed to bring a broad range of community constituencies together to collaboratively design more effective responses to children and youth with mental health issues. Modeled after a successful project in southeast Kansas, projects using the family-centered system of care model are being implemented across Kansas for the first time this year.

Regarding the "youth in need of community services" initiative, we have several concerns that perhaps could more accurately be called questions.

1) Service needs of "youth in need of community services:" SRS's analysis of the characteristics of the current non-abused children and youth cases provides a new synthesis of information about Kansas' children within this category. As SRS has noted, many of us thought of them as troubled older adolescents. The fact that fully one out of three (34 percent) are age six and under raises a new question. Who are these children and what are their service needs? A thorough analysis is needed to identify what funding streams need to be brought to this initiative. It is also information that is needed to determine whether or not an appropriate range of

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services exist in the communities or whether new services are needed to meet the needs of this group of children?

2) Time frame: The time frame to implement this change is very short. The proposal is to start this change with FY 2001. Will adequate services and funding streams be in place to refer children by July 1, 2000? Do the court personnel such as judges feel that the appropriate resources are available in communities? Or does the lack of suitable services become a major reason that these non-abused children currently end up in foster care?

3) Funding: As with any new initiative, it is critical that adequate dollars be in place to provide effective services in the community. Diverse needs may require funding resources from diverse state agencies. Have other state agencies identified resources to dedicate to this initiative? SRS also stated that they expect to use some funds "to provide a match with local resources brought to the collaboration by other partners." What portion of the costs of this initiative is the state proposing to shift to local communities and when will local communities know? Again, the short time frame makes it very difficult for local communities to even consider a match in the near future. Allocations processes for a range of local community based funds are already completed for 2000 and underway for 2001. Will a feasible time-line for this initiative be considered, rather than July 1,2000?

In closing, UCS thanks you for your service to the state's children, youth and families. If UCS can be a resource to you in any way, please do not hesitate to ask.

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