

Child Welfare Policy Manual

Questions & Answers

9.2 TRIBES/INDIAN TRIBAL ORGANIZATIONS, Application of Title IV-E Eligibility Requirements for Title IV-E Tribal Agencies

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

Answer: This question has moved to [9.4; question 7](#).

- **Source/Date:** ACYF-PIQ-87-01 (3/25/87)
- **Legal and Related References:** Social Security Act - section 472 (a)

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

Answer: This question has moved to [9.4; question 8](#).

- **Source/Date:** ACYF-CB-PIQ-87-01 (3/25/87); Preamble to the Final Rule (65 FR 4020) (1/25/00)
- **Legal and Related References:** The Indian Child Welfare Act of 1978; 45 CFR 1355.20

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

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

After consideration, we believe that our earlier policy is an unduly narrow interpretation of the statute. Consequently, if a child can be adopted in accordance with State or Tribal law without a TPR or relinquishment, the requirement of section 473 (c)(1) of the Act will be satisfied, so long as the State or Tribe has documented the valid reason why the child cannot or should not be returned to the home of his or her parents.

- **Source/Date:** ACYF-CB-PA-01-01 (1/23/01)
- **Legal and Related References:** Social Security Act - section 473 (c)

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

Answer: This question has moved to [9.4; question 9](#).

- **Source/Date:** Preamble to the Final Rule (65 FR 4020) (1/25/00)
- **Legal and Related References:** The Indian Child Welfare Act of 1978; 45 CFR 1355.20

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

Answer: This question has moved to [9; question 1](#).

- **Source/Date:** ACYF-CB-PIQ-88-02 (1/27/88)
- **Legal and Related References:** Social Security Act - sections 422, 428 and 472; 25 CFR 20.3

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

Answer: This question has moved to [9; question 2](#).

- **Source/Date:** April 13, 2007
- **Legal and Related References:** Social Security Act - sections 471(a)(20)

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

Answer: This question has moved to [9.4; question 10](#).

- **Source/Date:** April 13, 2007
- **Legal and Related References:** Social Security Act - sections 471(a)(20)(A) and 472(a)(2)(B)(ii)

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

Answer: This question has moved to [9.4; question 11](#).

- **Source/Date:** April 13, 2007
- **Legal and Related References:** Social Security Act & sections 471(a)(20)(A) and 472(a)(2)(B)(ii)

9. Question: Section 479B(c)(1)(C)(ii)(I) of the Social Security Act permits affidavits and nunc pro tunc documents to be used for the first 12 months of a tribal title IV-E plan to verify reasonable efforts and contrary to the welfare judicial determinations. May a nunc pro tunc order used by a Tribe to verify these judicial determinations be signed by a judge other than the judge who originally made the contrary to welfare or reasonable efforts determinations?

Answer: Yes, a nunc pro tunc order may be signed by a judge other than the judge who originally made the contrary to welfare or reasonable efforts determinations as long as the judge signing the nunc pro tunc order considers the evidence (in the court file or otherwise) and agrees that it was contrary to the child's welfare to remain in the home and that reasonable efforts were made.

- **Source/Date:** 05/04/11
- **Legal and Related References:** Social Security Act & section 479B(c)(1)(C)(ii)(I)

10. Question: If a Tribal title IV-E agency places an Indian child in accordance with the Indian Child Welfare Act (ICWA), does that violate section 471(a)(18) of the Social Security Act (the Act)?

Answer: No. 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. ICWA and section 471(a)(18) of the Act work together to provide important protections for children. When a Tribal title IV-E agency places an Indian child (as defined by ICWA)

according to the placement preferences established in ICWA, the agency is acting in accordance with section 474(d)(4) of the Act and 45 CFR 1355.38(a)(5). Therefore, it does not violate section 471(a)(18) of the Act.

However, Tribal title IV-E agencies must ensure that children achieve permanency in a timely manner (see section 471(a)(15)(C) of the Act). This is consistent with the Bureau of Indian Affairs' (BIA) guidance to State courts. The BIA has explained that if, after a diligent search has been completed for families in accordance with the ICWA preference criteria, and a suitable prospective foster care, preadoptive, or adoptive family has not been identified, the agency has good cause to expand the search beyond the order of preference (BIA Guidelines for State Courts; Indian Child Custody Proceedings; 44 FR 67584).

As with State agencies, if a Tribal title IV-E agency places a child to whom the ICWA protections do not apply, then the agency must comply with section 471(a)(18) of the Act, which prohibits agencies from:

- delaying or denying a child's foster care or adoptive placement on the basis of the child's or the prospective parent's race, color, or national origin; and
- denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent's or the child's race, color, or national origin.
- **Source/Date:** 03/06/2012
- **Legal and Related References:** Social Security Act - sections 471(a)(18) and 474; 45 CFR 1355.38(a)(5); The Indian Child Welfare Act of 1978; BIA Guidelines for State Courts on Indian Child Custody Proceedings; 44 FR 67584 (November 26, 1979)

11. Question: Do Indian Tribes have to operate the title IV-B programs to operate a title IV-E program?

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

- **Source/Date:** 12/19/08
- **Legal and Related References:** Social Security Act section 471(a)(2)

12. Question: A IVE/IVB agency must must file a petition to terminate the parental rights (TPR) of a child in foster care, (unless there is an exception) under certain circumstances, such as when a child has been in foster care for 15 of the most recent 22 months (see 475(5)(E) of the Act). A TPR may affect a child's ability to be a full member of his/her tribe, preventing the child from accessing services and benefits

available to tribal members. May a tribal agency develop an alternative to terminating a parent's rights (TPR) that allows the child to retain full membership in the tribe, such as a modification of parental rights?

Answer: Yes, a tribal agency may develop an alternative to a "termination" of parental rights, such as a "modification" of parental rights, as long as the tribe's process meets the case review system requirement defined in section 475(5)(E) of the Act. This means that the process of modifying parental rights will result in a child becoming available for adoption and for the tribe to concurrently identify, recruit, process and approve a qualified adoptive family. Therefore, whether the modification of parental rights meets the statutory provisions will depend on a specific tribe's law, policy or procedures.

- **Source/Date:** 2/15/15
- **Legal and Related References:** Legal and Related References: Social Security Act – sections 475(5)(E); 45 CFR 1356.21(i)

13. Question: If a tribal title IV-E agency's service area spans more than one state, how should the agency determine whether the child is AFDC eligible?

Answer: The tribal title IV-E agency must use the AFDC plan (as it was in effect on July 16, 1996) of the state where the child resides (479B(c)(1)(C)(ii)(II) of the Act). However, the tribal title IV-E agency may determine the state in which a child resides in accordance with tribal law or policy.

- **Source/Date:** 12/10/2015
- **Legal and Related References:** 479B(c)(1)(C)(ii)(II)