DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

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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: Notice of proposed rulemaking.

SUMMARY: The Administration for Children and Families is proposing to amend the current regulations for 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). This Notice of Proposed Rulemaking (NPRM) 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 NPRM proposes to set 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.

The publication of a Notice of Proposed Rulemaking often engenders confusion in the field regarding its applicability to existing policy. The existing regulations and policy remain in full force and effect. Regulations published in the final rule will be effective prospectively from the date of publication and have no bearing on the application of policy that was in effect prior to the publication of the final rule.

DATES: In order to be considered, written comments on this proposed rule must be received on or before December 17, 1998.

ADDRESSES: Please address comments to Carol W. Williams, Associate Commissioner, Children's Bureau, Administration on Children, Youth and Families, 330 C Street, SW, Washington, DC 20447. Comments will be accepted electronically at http://www.acf.dhhs.gov/hypernews. Comments will not be accepted by telephone or fax.

Beginning 14 days after the close of the comment period, comments will be available for public inspection in Room 2068, 330 C Street, SW, Washington, DC, Monday through Friday, between the hours of 9:00 a.m. and 4:00 p.m.

In order to ensure that public comments have maximum effect in developing the final rule, please cite the section and paragraph number of the proposed regulation that relates to each comment. Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of these comments also may be sent to the Department representative cited above.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Director of Policy, Children's Bureau, Administration on Children, Youth and Families, (202) 401–5789.

SUPPLEMENTARY INFORMATION: The preamble to this Notice of Proposed Rulemaking (NPRM) is organized as follows:

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I. Summary of Proposed Review Processes

This Notice of Proposed Rulemaking (NPRM) presents a revised framework for reviews of Federally-assisted child and family services and for reviews of related eligibility determinations for Federally-assisted foster care programs. The revised review procedures for these programs were developed in response to concerns expressed by the Congress and the States regarding the effectiveness of the current review procedures and the benefits to the States relative to the efforts required of them. ACF had begun revising the review procedures when Congress, through the Social Security Amendments of 1994 (Pub. L. 103–432), mandated changes in the Federal monitoring of State child and family service programs funded under titles IV–B and IV–E. This legislation directed the Department of Health and Human Services, in consultation with State agencies, to promulgate regulations for child and family service programs which will:

- Determine whether these programs are in substantial conformity with applicable State plan requirements and Federal regulations;
- Develop a timetable for conformity reviews; and
- Specify the State plan requirements subject to review, and the criteria to be used in determining a State's substantial conformity with these requirements.

Since ACF was already revising its approach to monitoring eligibility requirements for title IV–E foster care maintenance payments at the time the legislation was enacted, we have also included the proposed title IV–E eligibility review process in this NPRM. While Pub. L. 103–432 also permits a program improvement process for compliance issues associated with the Adoption and Foster Care Analysis and Reporting System (AFCARS), we intend to propose an AFCARS program improvement protocol in a separate NPRM.

The revised review processes, including the instruments used in the reviews, grew out of extensive consultation with interested groups, individuals and experts in the field of child welfare and related areas. A series of focus groups related to the child and family service reviews was conducted with representatives of State programs and national organizations, as well as with family and child advocates. Review teams consisting primarily of Federal and State agency staff have conducted 20 pilot reviews of child and family services and foster care programs using the proposed processes. We have taken seriously the comments and suggestions received during the consultations, focus groups and pilot reviews and have incorporated them in the development and refining of the new monitoring approaches that are proposed in this NPRM.

The revised review framework reflects the basic purposes of publicly-supported child and family services: to

assure safety for all children; to assure permanent, nurturing homes for these children; and to enhance the well-being of children and their families. In support of these goals, this proposal is designed to achieve the following objectives:

- Reviews of child and family services programs will focus on the results these programs achieve. In the past, review procedures have focused almost entirely on review of the accuracy and completeness of case files and other records to determine that required legal processes and protections were being carried out. This proposal provides for reviews that determine that child welfare practices, procedures and requirements are achieving desired outcomes for children and families. Reviews to assure eligibility for Federally-assisted foster care will not only address conformity with key requirements, but will assist States in improving their systems, thereby enhancing their capacity to serve children needing foster care placements.
- The revised framework for conducting reviews of both child and family services and eligibility for Federal foster care payments will promote partnerships between States and the Federal government. It will strengthen Federal-State collaboration in achieving improvements in child welfare systems. Joint reviews, with peer involvement, will identify strengths and weaknesses, define corrective actions, and make it possible to craft specific technical assistance plans that support program improvements.
- This proposed revision will promote greater public support and collaboration for child and family services within each State. The proposal for participation of interested and committed individuals and organizations in the State self-assessment process, in the conduct of on-site reviews, and in the development and evaluation of program improvement plans will accommodate broader perspectives on the degree to which the desired results are being achieved and encourage greater commitment within the State to address areas where improvements are needed.
- The revised approach will shift the focus of reviews to program improvement and away from financial penalties imposed on those States that do not ''pass'' their reviews. States that do not achieve expected results in areas related to child safety, permanency and well-being may have a portion of their Federal funds withheld, but only if the State's program improvement plan does not effectively correct the identified problem(s).
- The proposed new framework for reviews will be comprehensive. It will address not only foster care and adoption but the full range of child and family services, including family preservation and support services, child protective services, and independent living services.
- The revised review procedures will generate a significant amount of useful information on the State's child welfare system, enabling policy makers, program managers, Federal program officials, and concerned citizens to understand better the full range of issues related to the State's child and family services. The dynamic process—involving interviews with children, parents, judges, social workers, foster parents, and other major service providers—will yield findings of higher quality which will lead to improved outcomes in a way that the previous reviews of case files could not.

II. Introduction to the Title IV–E Eligibility and Child and Family Service Reviews

A. Key Features of the New Reviews

Both of the proposed review processes reflect significant departures from the existing reviews. We have intentionally proposed measures that will reduce the burden on States while balancing the need to review for protections that are critical to the safety and well-being of a vulnerable population of children and families. Wherever the statute has permitted flexibility, we have attempted to reduce our reliance on the paperwork and documentation requirements that characterized prior reviews in favor of a more comprehensive examination of the results of a State's efforts to alleviate the problems of families and children. While the two procedures have unique features and concerns, some key features are common to both:

- The procedures have moved from a focus on total compliance with statutory requirements to a determination of ''substantial conformity'' or ''substantial compliance'' in an effort to avoid penalizing States whose systems are generally performing well;
- Both proposed processes now include a stage where program improvement measures will be undertaken to correct areas of nonconformity and noncompliance and strengthen State programs;
- Both reviews provide opportunities for States to receive technical assistance from the Federal government in implementing program improvement plans;
- The reviews operationalize partnership concepts through joint Federal/State participation in the on-site reviews and in developing and evaluating program improvement plans;
- The reviews rely on existing sources of data, such as the Adoption and Foster Care Analysis and Reporting System (AFCARS) and the National Child Abuse and Neglect Data System (NCANDS), for information needed in the reviews, rather than requiring States to duplicate efforts in data collection and submissions;
- Both reviews propose to focus attention on recent practices in an effort to evaluate fairly the current status of child and family services in the States;
- The proposed regulations include various provisions for flexibility and individualizing the reviews to States.

B. Consultation With the Field and Pilot Reviews

ACF has sought extensive consultation from the child welfare field in a variety of ways. Experts in the field and representatives of legal, advocacy, educational and research institutions provided information to the teams on issues related to both reviews. A series of focus groups related to the child and family service reviews was conducted with representatives of State programs, national organizations, family and child advocates, National Resource Centers, child welfare experts and others. Drafts of instruments and procedures were reviewed by similar individuals and organizations throughout the developmental process. On-site review teams, composed primarily of Federal and State agency staff, conducted 10 full child and family service pilot reviews and two partial pilots in fiscal years 1995 through 1997 using the proposed process. Pilots of the title IV–E eligibility reviews were conducted in 12 States during fiscal years 1995 through 1998.

C. Reinventing the Review Process

In 1994, the Administration for Children and Families commissioned a team to develop recommendations for reinventing the review process across the range of child and family services programs. Later, two separate teams were established in the Administration on Children, Youth and Families' Children's Bureau to identify ways that the Federal process of reviewing State programs could be redesigned or restructured.

In commissioning two teams to reinvent the review process, the ACF leadership recognized that both the section 427 reviews and the title IV–E eligibility reviews had led to a number

of improvements in child and family services, including written case plans as a routine component of child welfare casework, periodic judicial and administrative reviews of children in foster care, increased capacity among States to identify and track children in foster care, and an increased focus on permanency planning for children in foster care. Other contributions included the establishment of procedural protections for vulnerable children against remaining in unsafe homes or in non-permanent placements, increased involvement of the courts in making judicial determinations about removals of children from their homes and the need to continue foster care placements, and enhanced stewardship by ensuring that Federal funds were expended in accordance with statutory requirements.

Along with these accomplishments, the ACF also recognized the validity of a number of criticisms about the reviews. Because the reviews relied heavily on case documentation and process, States that provided and documented all the required protections were able to pass compliance reviews without necessarily having practices and procedures in place culminating in satisfactory outcomes for the children and families served by the State. On the other hand, States that might be achieving desirable outcomes, but whose case record documentation did not reflect all of the required protections, were penalized through the loss of incentive funds.

Additionally, the reviews focused only on foster care services and adoption assistance rather than on the full range of child and family services; therefore, they did not promote the development and integration of a continuum of services needed by many of the families and children served by State agencies. The absence of regulations governing both review processes also complicated the goal of consistent application of policies and review procedures across the States.

In June 1994, the Office of Inspector General, Department of Health and Human Services, reported the findings of a study of oversight of State child welfare programs that confirmed our concerns. The report was based on information obtained from interviews with State child welfare officials in 13 States, and other sources. It addressed a number of issues about previous section 427 and title IV–E eligibility reviews, including the following: review reports had not been issued in a timely fashion; ACF had not provided sufficient technical assistance to States; severe problems that were identified in successful lawsuits against States had not surfaced during a review, and reviews focused more on case record content than how well children were served. The report delivered a clear message from State officials that the existing review processes were not adequately meeting their needs and should be revised substantially.

At the same time that ACF was taking steps to reinvent its review processes, Pub. L. 103–432, the Social Security Act Amendments of 1994, was signed by the President on October 31, 1994. The Conference Committee report for the Social Security Act Amendments of 1994 outlined Congressional concerns with ACF review practices. It pointed out that the review process did little to address quality of care for children; that compliance criteria needed to be written clearly and uniformly; and that review standards needed to be developed in a more open setting which encouraged discussion and participation among affected parties. The concerns of State officials, ACF and Congress presented a clear case for reinventing the review process and form the basis for the strategies proposed in this NPRM.

III. Background

A. Legislative History

The review structures for section 427 and title IV–E have been in place since the early 1980s. They were authorized by the Adoption Assistance and Child Welfare Act (Pub. L. 96–272), passed by Congress in 1980, which amended sections of title IV–B and provided for mandatory Federal reviews of State foster care services under section 427 of the Act. The statute also established Part E of title IV of the Social Security 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 October 1, 1982.

The creation of title IV–E and amendments to title IV–B reflected the perception of Congress and most State child welfare administrators that the public child welfare agencies responsible for dependent and neglected children had become holding systems for children living away from their parents. Congress intended that Pub. L. 96–272 would mitigate the need for the placement of children into foster care and encourage greater efforts by State agencies to find permanent homes for children—either by making it possible for them to return to their own families or by placing them in adoptive homes. The goals of Pub. L. 96–272 have not yet been fully realized, however, as evidenced by continued increases in the numbers of children entering foster care, increasing lengths of stay in care, and growing concerns about the safety, permanency and well-being of children served by public agencies.

In August 1993, under the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 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 specific family preservation and family support services 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 of the Act and amended section 422 of the Act to include, as State plan assurances, the protections formerly required in section 427. As a result, ACF is no longer conducting ''427'' reviews to confirm whether (or not) a State is eligible to receive additional title IV–B, subpart 1 funds. In addition to mandating the Secretary, DHHS, to promulgate regulations for reviews of State child and family service programs, the amendments to the Act also 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, Pub. L. 103–382, (MEPA) to address excessive lengths of stay in foster care experienced by children of minority heritage. One factor contributing to these excessive lengths of stay in foster care was State agencies' attempts to place children of minority heritage in foster and adoptive homes of similar racial or ethnic background. The MEPA forbids the delay or denial of a foster or adoptive placement solely on the basis of 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, section 422(b)(9), which compels States to make diligent efforts to recruit and retain 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. The MEPA, in section 553, 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 a number of factors in making foster and adoptive placements. In 1996, through section 1808, ''Removal of Barriers to Interethnic Adoptions'' (Section 1808), 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 amended title IV–E by adding a State plan requirement, section 471(a)(18), 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 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 child welfare reform legislation since Pub. L. 96–272 in 1980. The Adoption and Safe Families Act (ASFA) seeks to provide States the necessary tools and incentives to achieve the original goals of Pub. L. 96–272: safety; permanency; and child and family well-being. The impetus for the ASFA was a general dissatisfaction with the performance of the child welfare system in achieving these goals for children and families. This dissatisfaction came as a result of:

(1) A number of high profile child deaths across the country, the occurrence of which was often attributable to confusion and misinterpretation over the reasonable efforts provision. This confusion stems from the notion that there is a lack of clarity about the relationship between reasonable efforts and child safety;

(2) growth in the foster care caseload. We are now slightly in excess of a half-million children in foster care on any one day. This number has almost doubled since the mid-eighties. More children are coming into foster care each year than are exiting;

(3) increased costs of foster care; and,

(4) a need for greater emphasis on individual responsibility by parents and accountability by States for moving children to permanency in a timely manner.

The ASFA seeks to strengthen the child welfare system's response to children's need for safety and permanency at every point along its continuum of care. In this NPRM, we propose regulations for those provisions in the ASFA which strengthen the child welfare system's response to safety and certain provisions which address permanency.

B. Interrelationship of Titles IV–B and IV–E

Titles IV–B and IV–E are closely related parts of the Act. Each title provides funds to States to serve large numbers of children and families who are among the most vulnerable to harm and separation in our society. The two programs help finance services to the almost 3,000,000 children who are reported annually as alleged victims of maltreatment (data from 1994 NCANDS), and the approximately 469,000 children who are in foster care placements on a given day (estimates from 1994 Voluntary Cooperative Information System (VCIS)/AFCARS).

Title IV–B, subpart 1 makes funds available to States for services directed toward protecting children, strengthening families, preventing unnecessary separation of parents and children, providing care and services to children and families when separation occurs, and working with parents and children to reunify families or achieve an alternate permanent plan for the child. Subpart 2 initially provided funding for family preservation and family support services. Under the ASFA, subpart 2 funds must now also be used to provide time-limited reunification services and services to promote and support adoption.

Title IV–E foster care funds enable States to provide foster care for children who were or would have been eligible for assistance (Aid to Families With Dependent Children) under a State's approved title IV–A plan (as in effect on July 16, 1996) but for their removal from home. The Act includes requirements which define the circumstances under which a State shall make foster care maintenance payments (section 472(a)), and mandates a child's placement in an approved or licensed facility (section 472(b)). The eligibility review is focused on these requirements, so that ACF can verify that children in foster care for whom Federal financial participation is being claimed (or can be claimed) are eligible and are being placed with eligible foster care providers.

Titles IV–E and IV–B are linked not only by common goals but by numerous cross-references to detailed protections or safeguards for children in foster care, e.g., a case review system which includes periodic case reviews and permanency hearings. Further, while title IV–E requires that reasonable efforts be made to prevent removal of children from their homes when it is safe to do so, to safely reunify children in foster care with their families, and to make and finalize permanent placements for children who cannot return home, the services needed to provide reasonable efforts are not funded by title IV–E, but are made available in many circumstances through title IV–B and other sources of State and Federal funds. While title IV–B requires States to deliver child welfare services in order to be eligible for Federal funds, title IV–E tests both the eligibility of each child on whose behalf a payment is made and the eligibility of the foster home or child-care institution in which the child is placed.

IV. Overview of Title IV–E Eligibility Reviews

A. Development of the Reviews

The title IV–E eligibility review process proposed in this NPRM reflects a number of important lessons learned in the pilot reviews, including the following:

- Pilot reviews conducted jointly by a team of Federal and State staff fostered working partnerships and assisted the States in identifying strategies for corrective action where indicated in the reviews and increased the knowledge of State staff on eligibility requirements for title IV–E foster care maintenance payments.
- Examining a sub-sample of non-IV–E cases during the reviews, along with the IV–E cases, increased the potential for States to receive Federal funding to which they are entitled by statute and demonstrated the fairness of the reviews to States.
- The emphasis on program improvement planning in the reviews led to specific recommendations for improving title IV–E error rates and the quality of services to children in such critical areas as foster home licensing and services to prevent removal of children from their families and reunify children in foster care with their families.
- Examination of cases involving more recent foster care entries linked the reviews and potential disallowances to current practices and policies that impact both eligibility for services and the quality of services provided, rather than focusing on older practices inherent to the previous reviews.

The revised title IV–E review strategy incorporates these important lessons learned from the pilots, while ensuring compliance with key requirements of the statute regarding eligibility for funds. The requirements are designed to enhance child safety, permanency and well-being, and they provide a specific framework for reviewing State compliance through the title IV–E eligibility reviews.

We believe that the proposed changes to the review process will produce results which are more meaningful and helpful to States which undergo a title IV–E eligibility review with the intention of improving their State systems. Additional changes in the title IV–E eligibility review process are included in the section-by-section discussion of the NPRM.

B. Summary of the Title IV–E Eligibility Review Process

We are proposing to conduct title IV–E eligibility reviews in States at three-year intervals. The review process includes an initial review of foster care cases for the title IV–E eligibility requirements defined in the statute. States determined to be in substantial compliance based on the 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 follow-up review will be conducted after completion of the program improvement plan.

The reviews will be conducted by a joint team of Federal and State staff in order to promote working partnerships through the review process. In contrast to prior reviews, the sample for the reviews will be drawn from the AFCARS data base, reducing the burden on the State to select the sample.

The threshold error rate for a determination of non-compliance is proposed at 15 percent in the first round of reviews following publication of the final rule, and 10 percent for subsequent years. States with error rates within the threshold will receive disallowances only on the ineligible cases. Further, if the number of ineligible cases in the review that follows the program improvement plan is within the threshold, disallowances will be assessed only on those cases. If the number exceeds the threshold in the review following the program improvement plan, disallowances will be extrapolated to the universe.

V. Overview of Child and Family Service Reviews

A. Development of the Reviews

The child and family service reviews proposed in this NPRM are the result of extensive piloting and consultation. Among the chief lessons learned from the developmental process are the following:

- Reviewing for outcomes, as opposed to procedural indicators alone, is more likely to lead to improvements in State programs;
- Three outcome areas of safety, permanency, and child and family well-being were identified and agreed upon as the areas in which almost all outcomes associated with Federally-funded child and family services fit;
- Reviewing for documentation alone in case records is insufficient for evaluating outcomes and the quality of services;
- The pilots indicated that a smaller sample of cases reviewed more intensely yielded more information about outcomes than larger samples that involved only case record reviews;
- The pilots indicated that State self-assessment is a viable approach for identifying programmatic strengths and needs, for building on the community planning process begun through implementation of the Child and Family Services Plan (CFSP) planning requirements, and for enhancing Federal/State partnerships (The final rule on Foster Care Maintenance Payments, Adoption Assistance, and Child and Family Services published November 18, 1996, contains the requirements governing the CFSP (61 FR 58632).);
- The review process is an effective means of assisting States in examining the effects of practice innovations and technical assistance and refining the indicators used to measure progress over time; and,
- A review team that includes State representatives from outside the State agency helps broaden the perspective of the review, supports locally-based partnerships between the State agency and the communities it serves, increases the likelihood that the review will be relevant to all populations served by the agency, and helps identify training needs in the State.

With these lessons in mind, our primary goal in revising the reviews for child and family services is to assist States in improving outcomes for children and families by identifying the strengths and needs within State programs and those areas where technical assistance can lead to program improvements. Supporting goals include: (1) reviewing for the actual outcomes of services as well as the procedures that support desirable outcomes; and (2) using the reviews to promote the integration of the range of Federally-funded child and family services programs.

In developing the NPRM, we have followed the statutory requirements closely when the statute has provided specific parameters for the reviews. Where we were required to make decisions about issues, such as the State plan requirements subject to review and the criteria for determining substantial conformity, we have focused on the emphasis the statute places on program improvements. We have integrated the proposed review requirements with other requirements related to data collection and the CFSPs in order to reduce the burdens on States whenever possible. Finally, in emphasizing the importance of outcomes over procedure, we are proposing a review process that States can adapt to their ongoing self-evaluation and integrate into their own quality assurance efforts, apart from periodic Federal reviews.

We chose not to emphasize the penalty structure associated with the child and family services reviews. Rather, we have designed a review process that will lead to meaningful improvements in the outcomes of services delivered to children and families and will strengthen State and Federal collaboration. We have purposefully crafted the regulation to encourage States to make the necessary program improvements.

B. Summary of the Child and Family Service Reviews

We are proposing to 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 process we are proposing includes two stages: a State self-assessment and an on-site review. The State self-assessment will be completed by the State members of the review team, including staff of the State agency and community representatives, in collaboration with ACF Regional Offices. In the second phase, a representative team of Federal, State and community reviewers will review a small ''discovery sample'' of cases selected randomly and stratified by type of cases, based on the findings of the self-assessment. The reviews will examine cases which reflect a wide range of services provided by the State, e.g., child protective services, out-of-home and in-home services, but more emphasis will be placed on those cases reflecting State-specific issues identified in the self-assessment. Information on each case will be gathered from the case records as well as interviews with the children, parents, social worker, foster parent and service providers in the case. Systemic issues will be reviewed on-site, primarily through interviews with State and community stakeholders from within and outside the State agency.

As explained in the section-by-section discussion of the preamble, we are proposing to make ''substantial conformity'' determinations for each outcome and systemic factor reviewed, rather than an overall determination of conformity for the State's entire title IV–B and IV–E program. To be determined to be in ''substantial conformity,'' each outcome reviewed on-site must be rated ''substantially achieved'' in at least 90% of the cases examined in the first review, and 95% in the subsequent reviews. To be determined to be in ''substantial conformity'' for the systemic factors reviewed, each factor must be operating in accordance with applicable statutory requirements. Federal funds may be withheld from States that are determined to be in nonconformity. However, States first will be required to implement program improvement plans to correct areas of nonconformity and, if the plans are implemented successfully, funds will not be withheld.

We propose that States determined to be operating in substantial conformity be reviewed at five-year intervals and States not in substantial conformity be reviewed at three-year intervals.

VI. Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996 and the Multiethnic Placement Act of 1994

On August 20, 1996, President Clinton signed the Small Business Job Protection Act of 1996. Section 1808 of this Act (section 1808), ''Removal of Barriers to Interethnic Adoption,'' repeals and replaces the nondiscrimination provision of the Multiethnic Placement Act of 1994 (MEPA). Section 1808 prohibits denial of or delay in the placement of a child for adoption or foster care on the basis of race, color, or national origin of the adoptive parent, foster parent, or child involved. It also prohibits denying 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 child involved. This provision became a new title IV–E State plan requirement, section 471(a)(18) of the Act, effective January 1, 1997. Noncompliance with section 471(a)(18) constitutes a violation of title IV–E as well as a violation of title VI of the Civil Rights Act of 1964.

The diligent recruitment requirement at section 422(b)(9) of the Act in no way mitigates the prohibition on denial or delay of placement based on race, color or national origin. However, the statute is clear that the section 1808 prohibitions against delaying or denying placement based on race, color, or national origin have no effect on the application of the Indian Child Welfare Act of 1978.

In implementing the provisions of section 1808, we will identify potential violations during the conduct of child and family services reviews. We will refer cases so identified, as well as cases brought to our attention by any other means, to the Department's Office for Civil Rights (OCR) for investigation. Based on the OCR investigation in any such case, we will determine whether a violation of section 471(a)(18) has occurred. Under section 474(d) of the Act, States and other entities receiving title IV–E funding are subject to financial penalties and corrective action for such violations.

VII. Welfare Reform Legislation and Title IV–E Eligibility

On August 22, 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) was signed into law (Pub. L. 104–193). This law repealed the Aid to Families with Dependent Children (AFDC) program and replaced it with the Temporary Assistance for Needy Families (TANF) block grant. This change has implications for the title IV–E foster care program since title IV–E eligibility is predicated, in part, on the child's eligibility for AFDC. The PRWORA, as amended by the Balanced Budget Act of 1997 (Pub. L. 105–33), requires States to apply the AFDC eligibility requirements that were in effect in the State on July 16, 1996, when determining whether children are financially eligible for Federal foster care. Consistent with this approach, we continue to use references which predate the passage of TANF, but are to be applied as they were in effect on July 16, 1996.

VIII. The Adoption and Safe Families Act of 1997

On November 19, 1997, the President signed into law the Adoption and Safe Families Act (ASFA) of 1997, Pub. L. 105–89. This legislation, passed by the Congress with overwhelming bipartisan support, represents an important landmark in Federal child welfare law. Its passage affords us an unprecedented opportunity to build on the reforms of the child welfare system that have begun in recent years in order to make the system more responsive to the multiple, and often complex, needs of children and families. The Adoption and Safe Families Act embodies a number of key principles that must be considered in order to implement the law:

- The safety of children is the paramount concern that must guide all child welfare services. The new law requires that child safety be the paramount concern when making service provision, placement and permanency planning decisions. The law reaffirms the importance of making reasonable efforts to preserve and reunify families, but also now clarifies instances in which States are *not* required to make efforts to keep children with their parents, when doing so places children's safety in jeopardy.
- Foster care is a temporary setting and not a place for children to grow up. To ensure that the system respects a child's developmental needs and sense of time, the law includes provisions that shorten the time frame for making permanency planning decisions, and that establish a time frame for initiating proceedings to terminate parental rights. The law also strongly promotes the timely adoption of children who cannot return safely to their own homes.
- Permanency planning efforts for children should begin as soon as a child enters foster care and should be expedited by the provision of services to families. The enactment of a legal framework requiring permanency decisions to be made more promptly heightens the importance of providing quality services as quickly as possible to enable families in crisis to address problems. It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about parents' ability to protect and care for their children.
- The child welfare system must focus on results and accountability. The law is clear that it is no longer enough to ensure that procedural safeguards are met. It is critical that child welfare services lead to positive results. The law contains a number of tools for focusing attention on results, including an annual report on State performance; the creation of an adoption incentive payment for States, designed to support the President's goal of doubling the annual number of children who are adopted or permanently placed by the year 2002; and a requirement to study and make recommendations regarding additional performance-based financial incentives in child welfare.

We are proposing regulations in this NPRM for the following provisions in the ASFA:

- Section 471(a)(15) of the Act regarding reasonable efforts;
- Section 471(a)(20) of the Act regarding criminal records checks;
- Section 475(1)(E) of the Act regarding documentation of the State's

efforts to make and finalize a child's placement when the permanency goal is adoption, guardianship, or some other permanent arrangement;

- Section 475(5)(C) of the Act regarding permanency hearings;
- Section 475(5)(E) of the Act regarding requirements to file or join a petition to terminate parental rights.
- Section 475(5)(F) of the Act regarding the date a child has entered foster care; and,
- Section 475(5)(G) of the Act regarding notice of reviews and hearings and an opportunity to be heard for foster parents, relative caregivers, and preadoptive parents.

The proposed title IV–E review only monitors eligibility for foster care maintenance payments. Therefore, those provisions in the ASFA which amend title IV–B, subpart 2, and the Adoption Assistance program will be regulated in a subsequent NPRM. We will propose regulations for the following ASFA provisions in the next NPRM:

- Title IV–B, subpart 2 of the Act regarding the Promoting Safe and Stable Families program;
- Section 471(a)(21) of the Act regarding health insurance coverage for children with special needs for whom an adoption assistance agreement is in effect; and,
- Section 473(a)(2)(C) of the Act regarding a child's continued title IV–E eligibility for adoption assistance in cases where an adoption disrupts or the adoptive parent(s) die.

ACF does not intend to issue regulations to implement the adoption incentive bonuses at section 473A of the Act because of the time-limited nature of the provision. Rather, we have provided guidance through policy issuance.

IX. Strategy for Regulating the Adoption and Safe Families Act of 1997

We have decided to regulate the provisions of ASFA and other recent statutory amendments through two NPRMs. This, the first NPRM, transmits ACF's proposed review systems for child and family services and title IV–E eligibility, proposes an enforcement strategy for the statutory prohibitions regarding race preference in foster and adoptive placements, and addresses those provisions in the ASFA related to the foster care maintenance program. The second NPRM will propose codification of the remaining ASFA amendments to the Social Security Act. Clarification and interpretation required by the field to implement the time sensitive provisions in the ASFA will be addressed by policy issuances prior to codification in a final rule.

We considered issuing a single comprehensive NPRM which would encompass technical and programmatic changes to titles IV–B and IV–E and the review processes, but rejected that approach in favor of the alternative strategy for the following reasons:

(1) ACF is required by statute to promulgate regulations to implement State plan compliance reviews. After extensive consultation with the field to develop these proposed review procedures and several years of pilot testing, it is critical that the field receive guidance on the proposed review processes without further delay;

(2) The proposed review processes can easily accommodate revisions to program operation and policy; and,

(3) ACF has a statutory obligation to enforce the provisions of section 471(a)(18) of the Act.

Soon after the enactment of the ASFA, we held focus groups in Washington, DC and in each of the 10 Federal regions to obtain input from the field on the implementation of the new law. We learned a great deal about the provisions in the law that require clarification and guidance. The section-by-section discussion in the preamble offers guidance on the intent of the ASFA and its implementation.

We want to be very clear about the effective dates in the ASFA. The provisions in the ASFA were effective on the date of enactment, November 19, 1997, except for those provisions which require action on the part of the State legislature. The ASFA establishes a delayed effective date (the first day of the calendar quarter following the first legislative session which follows the enactment of the ASFA) for States that must pass legislation to implement certain provisions. States may not wait until final regulations are promulgated to come into compliance with the ASFA provisions. States must adhere to the effective dates in the statute.

X. Section-by-Section Discussion of the NPRM

A. Child and Family Service Reviews

Part 1355—General

Section 1355.20 Definitions

We have amended 45 CFR 1355.20 to include definitions of new terms relevant to monitoring, including *full review, partial review, and State self-assessment.* We have added a definition of the *National Child Abuse and Neglect Data System,* since the term is not defined in other regulations (See Part X.B. for other definitional revisions in § 1355.20.)

Section 1355.31 Elements of the Review System

Section 1355.31 is added to specify the scope of the reviews covered in the NPRM.

Section 1355.32 Timetable for the Reviews

This section specifies the review timetable for the initial and subsequent reviews as required by Section 1123A of the Social Security Act.

In paragraph (a), we are proposing a six-month period following publication of the final rule and prior to the commencement of Child and Family Service reviews so that States can become knowledgeable about the review process before the initial reviews begin in each State. The extended time period proposed for completing the initial reviews takes into account that: (1) States will need time to become familiar with and prepare for these new reviews; and (2) the ACF Regional Offices must schedule these reviews in all of the States within each region, in conjunction with separate scheduling for the newly revised title IV–E eligibility reviews. We learned from our pilot reviews that approximately six months is required to prepare for and conduct a review that examines the quality of services and outcomes.

In paragraph (b), we describe the timetable for reviews following the initial review, in accord with the statutory requirement for less frequent reviews of States that are determined to be in substantial conformity. We propose that full reviews be conducted at five-year intervals in States found to be in substantial conformity. We also propose that the State self-assessment portion of the review be completed three years after a review in which a State is found to be in substantial conformity.

In addition, we propose that reviews for States determined not to be in substantial conformity occur at three-year intervals. This proposal is based on the recognition that many States have technical assistance needs that will extend beyond a year or two in order for them to implement program improvement plans designed to correct the areas of nonconformity in their child and family services program.

In paragraph (c), we implement the provision at section 1123A(b)(1)(C) of the Act regarding the reinstatement of more frequent reviews of States and also provide examples of information that might indicate that the State is not operating in substantial conformity. We propose that when information is received suggesting the possibility of

nonconformity, ACF will conduct detailed inquiries prior to initiating an unscheduled review. We do not wish to pursue more frequent reviews than are necessary and will conduct detailed inquiries prior to initiating an unscheduled review. If the State, however, does not provide the additional information requested, we will proceed with a review. When a full review is not deemed necessary or appropriate, we propose that a targeted partial review be conducted of the areas indicated to be in nonconformity.

Section 1355.33 Procedures for the Review.

In paragraph (a), we propose a two-phase review process and suggest that the joint State-Federal review team have multiple representation, including individuals and organizations outside the State agency with whom the State was required to consult in developing its State plan (external members). Federal review team members will consist primarily of staff from ACF, but may also include staff from other agencies within HHS, including the Office for Civil Rights (OCR).

We received positive feedback from participants in the pilot reviews that this approach encourages Federal-State collaboration during the review, as well as during the development and implementation of program improvement plans. We found that a team with a more diverse composition:

- Had a broader perspective of the extent to which outcomes were being achieved, and was more comprehensive in its identification of areas needing improvement within a State;
- Would be better able to integrate the proposed review process with the CFSP planning process by including the external representatives in both processes and building on the existing consultation requirements in place;
- Satisfied a repeatedly expressed need on the part of the focus group participants for a broad base of community involvement in the new review process, including representatives other than staff of the State agency; and
- May lead to increased opportunities for technical assistance from those involved in identifying the State's strengths and needs.

In paragraph (b), we describe the proposed State self-assessment process which is based on data, provided by ACF to the States in report format, from their own most recent submissions to the AFCARS and NCANDS systems. State review team members will review and analyze the data to evaluate the strengths and needs of the child and family services systems in the State. ACF will conduct an independent analysis of the AFCARS and NCANDS data and provide consultation to the State during the development of the self-assessment to ensure that it is complete and accurate. In promoting the principles of State flexibility and program improvement through the reviews, the analysis of the self-assessment will provide the focus for the on-site review by identifying particular aspects of State programs that need further review. This approach is proposed as an alternative to conducting standard reviews on similar populations in every State, absent any recognition of individual State needs. State self-assessments were used successfully to structure the on-site reviews around specific outcome areas, service areas, and systemic issues. We think this approach will promote a more efficient use of State and Federal resources.

In paragraph (c), we describe the proposed on-site review process. The proposal that the on-site review be focused in specified geographic locations in the State, including the State's largest city, reflects an approach used in all of the pilots. It provided members of the review team opportunities to speak to local stakeholders and conduct face-to-face interviews with children and families, service providers, foster families and staff from various localities. Because the nation's large metropolitan areas are often characterized by complex social and organizational issues that affect large numbers of children and families, we propose that each State's largest metropolitan area be one of the locations selected for an on-site review.

In paragraph (c)(3), we propose that ACF has final approval if consensus cannot be reached regarding the selection of programmatic areas of emphasis for the on-site reviews and the geographic locations in which the on-site review will occur. However, our experience from the pilot reviews suggests that, in most cases, the State and ACF will reach consensus.

The proposed approach of using various sources of information to determine substantial conformity with the outcomes and systemic factors is also based on the pilot reviews. The comparative experiences in the pilots revealed that the reviews yield findings of greater quality and higher accuracy when they include case reviews and interviews rather than rely solely on the case records.

The on-site review, by design, is qualitatively focused, reflecting our belief that a small sample that examines outcomes thoroughly will best promote the State/Federal partnerships and collaboration necessary to achieve program improvements through the reviews. We propose that the sample of cases be randomly selected and that the sampling plan be approved by the ACF designated official in order to achieve an objectively selected sample. We have not prescribed a specific number of cases to be included in the sample, since the number will vary by State, depending upon the size of the State and the areas under review. However, we propose to select a relatively small sample, that is, 30–50 cases, and conduct an intense review, including interviews with the relevant parties in each case.

In some pilot States, we used both the old review method of merely reading case records and the proposed method of reading case records and conducting interviews with families and other relevant parties. In those pilot States where both the old and the proposed review methods were deployed simultaneously, the review teams reported that the proposed method provided a more accurate measure of the status of outcomes in the States. Conducting interviews with families and other relevant parties resulted in a more balanced approach by the review team when considering the State's success in achieving outcomes for families.

In paragraph (d), we propose that partial reviews be jointly planned and conducted by the State and ACF. Partial reviews will be targeted to the nature of the concern.

We believe the stated emphasis on program improvement will best be served through timely feedback to the States on the review findings. Therefore, in paragraph (e), we propose a time frame of 30 calendar days in which to notify the State of ACF's determination as to whether the State is operating in substantial conformity. However, the letter of notification will not include a detailed report of the review. Rather, it will summarize and confirm the findings of the review, many of which will have been assembled and reported to the State at the conclusion of the on-site review. We propose that the substance of findings related to a determination of nonconformity be expounded upon and developed in the context of the program improvement plan, which will then serve as a guide to the State in achieving substantial conformity (see section 1355.35).

Section 1355.34 Criteria for Determining Substantial Conformity

This section describes the criteria which will be used to determine a

State's degree of conformity with specified State plan requirements for each outcome and systemic factor of the State's service delivery system that undergoes review.

We propose to base conformity on the specific outcomes and systemic factors reviewed, rather than on the State program as a whole. Accordingly, we have limited the State plan requirements subject to review to those requirements related specifically to outcomes and the delivery of improved services. We are, in effect, proposing that conformity with these requirements constitutes ''substantial conformity,'' rather than reviewing for and requiring some percentage of compliance with all of the title IV-B and IV-E State plan requirements. Also, making determinations of substantial conformity based on specific outcomes and systemic factors will permit States to take advantage of technical assistance opportunities to focus on those aspects of their programs needing improvement.

In paragraphs (a)(1) and (2), we propose to determine the State's substantial conformity with applicable CFSP requirements based on: (1) the achievement of the seven outcomes specified in paragraph (b); and (2) the functioning of seven core systemic factors directly related to the State's capacity to deliver services leading to improved outcomes, as specified in paragraph (c). In paragraph (a)(3), we propose that a review and analysis of the aggregate data in the State self-assessment should be consistent with, and support, the findings of the on-site review. Significant discrepancies between the aggregate data and the on-site review findings may be a contributing factor in determining that a State is not in substantial conformity.

In paragraph (b)(1), we link substantial conformity to the outcomes for children and families, and list the seven outcomes that are subject to review. These outcomes were derived from discussions with numerous focus groups, consultation with experts in the field, and from an extensive review of the literature on the outcomes for children and families served by the programs under review. The pilot reviews have demonstrated them to be appropriate outcomes to measure.

In paragraph (b)(2), we propose that a State's level of achievement (i.e., ''substantially achieved,'' ''partially achieved,'' or ''not achieved'') with regard to each outcome, as determined by the review team, reflect the extent to which a State has implemented the CFSP requirements and assurances subject to review. We have specified those CFSP requirements that are directly related to the outcomes that will undergo review, including the new title IV-B State plan requirement to make effective use of cross-jurisdictional resources to place children in adoptive homes.

While the requirement at section 471(a)(18) of the Act has a direct impact on permanency for the children affected, we have proposed only to use the child and family services review as a mechanism for identifying potential section 471(a)(18) compliance issues rather than as a mechanism to determine compliance with this provision, hence its exclusion from this paragraph. The statutory requirements for enforcing section 471(a)(18) necessitate a different approach from that taken in the child and family services review. However, the self-assessment and the instruments for the on-site portion of the review will include questions designed to probe for potential section 471(a)(18) compliance issues. Once identified through a child and family services review, or otherwise, potential noncompliance with section 471(a)(18) will be addressed through the process proposed at section 1355.38.

In paragraph (b)(2)(vii), the proposed review of the title IV–E requirement regarding reasonable efforts is not a duplication of the review of reasonable efforts determinations performed in the title IV–E foster care eligibility reviews. We are not proposing to review for reasonable efforts determinations in court orders or other court documentation, but for the actual services provided to prevent removals, facilitate reunification, or, in conformance with the ASFA, to make and finalize alternate permanent placements. This State plan requirement clearly supports two of the outcomes proposed for review: (1) *children are, first and foremost, protected from abuse and neglect, and are safely maintained in their homes whenever possible;* and (2) *children have permanency and stability in their living situations.*

In paragraph (b)(3), we propose that in order for a State to be determined to be in substantial conformity, each outcome to be examined must be rated as ''substantially achieved'' in at least 90 percent of the cases reviewed on-site in the initial review and 95 percent in subsequent reviews. For example, if 40 cases are reviewed as part of an initial on-site review, each outcome must have been ''substantially achieved'' for at least 36 (90%) of these cases as determined by the review team. The rationale for the phased-in standard of outcome achievement is that States will need time to focus their resources on program improvements and the new approach to the reviews and may not be able to conform to a 95 percent standard initially. However, given the goal of the proposed review process to support practice improvements over time, we believe a 95 percent standard better reflects the ongoing quality of outcomes we are promoting.

The on-site review instruments are designed to guide reviewers in determining the degree of outcome achievement. Specific items in the on-site review instruments are indexed to each outcome. These items will be examined collectively from a case-specific qualitative level in determining if each outcome has been or is being achieved at a satisfactory level, that is, ''substantially achieved.'' We have published the items indexed to the outcomes at Attachment A, at the end of this preamble, in order to give States a more specific idea of what is reviewed during the on-site process. We do intend to publish the self-assessment and on-site review instruments in meeting Paperwork Reduction Act requirements. These documents provide detail regarding the information to be collected and reviewed. We want to be clear, however, that the items will not be published as part of the final rule because they are subject to change as we learn more about how particular issues affect outcomes for children and families.

In the pilot reviews, we invested considerable effort in preparing reviewers to collect and consider the information needed to make decisions about outcome achievement. In addition, we assembled a cross-section of representatives from within and outside the State agency and made numerous revisions to the instrument to increase the likelihood of objective conclusions. We propose to require that conclusions about outcomes be made on the basis of several perspectives, including those of the children, parents, social worker and service providers involved in the cases reviewed, in order to provide us with more comprehensive information about each case undergoing review.

We believe that the proposed review of outcomes is necessary to achieve the goal of improved services. In each of the pilots, reviewers were able to apply the criteria to the outcomes in a manner that led to decisions considered by the review team to be valid. Further, the compilation of findings around outcomes by the review team was generally consistent with the State agency's perception of the strengths and needs of its programs which, we think,

adds further validity to the approach we are proposing.

In paragraph (c), we propose also to link substantial conformity to a State's implementation of those CFSP requirements clearly related to delivering child welfare services which lead to improved outcomes, in addition to the review of the actual outcomes. We have identified the seven core systemic factors that we propose to examine, along with the specific criteria that will be reviewed to determine if each systemic factor is operating in substantial conformity. The factors we have chosen to examine emerged from a much longer list that was refined over the course of the pilot reviews. The systemic factors to be reviewed are those that seemed to most critically influence agency capacity at both the State and local levels.

The nature of the systemic factors and criteria for determining substantial conformity does not accommodate measurement at an interval level, e.g., percentage of achievement. We are, therefore, proposing that the review team apply specific criteria associated with each factor and determine whether the State is operating in substantial conformity with the CFSP requirements related to each factor. In paragraphs (c)(1) through (7), we have identified the components of each systemic factor that will be examined. The factors include: (1) The Statewide information system; (2) the case review system (which incorporates the new requirements in the ASFA for permanency hearings, termination of parental rights, and notice of hearings for foster and preadoptive parents); (3) the quality assurance system (which includes the new State plan requirement to establish and maintain quality standards for children in foster care); (4) training; (5) service array (including the new services that must be provided under title IV–B subpart 2, i.e., time limited reunification services and post-legal adoption services); (6) agency responsiveness to the community; and (7) foster/adoptive parent licensing, recruitment, and retention (which includes the new State plan requirements for criminal record checks and plans for effective use of cross-jurisdictional resources for making adoptive placements).

Since these factors relate to systemic issues within State agencies, the degree to which they are operating in substantial conformity with CFSP requirements is a decision made with input from the entire review team. The decision will be based on information contained in the State self-assessment, as well as interviews with a broad cross-section of internal and external stakeholders at the State and local levels. In proposing the criteria to evaluate each systemic factor, we have worked to stay within the limits of the statutory and regulatory language related to the factors.

With regard to the case review system required in section 422 and defined in section 475 of the Act, we will not base substantial conformity on the documentation of these requirements for individual children as was the practice in previous section 427 reviews. Rather, the extent to which the State has in place a case review system that effectively promotes desirable safety, permanency, and well-being outcomes for the children and families served by the State will determine the degree of conformity.

We propose in paragraph (d) that the review instruments be provided to all States when the final rule becomes effective. This will ensure that States are aware of the methodology that will be used to make determinations related to outcome achievement and the functionality of systemic factors. We are particularly interested in comments regarding the most effective method for keeping States informed of the content of the review instruments.

Section 1355.35 Program Improvement Plans

This section describes the requirements for developing, implementing and reviewing State program improvement plans and for providing technical assistance to States in implementing the program improvement plans. It implements the requirement in section 1123A(b)(4) of the Act that States found not to be in substantial conformity be afforded the opportunity to develop and implement a corrective action plan. We are proposing the term ''program improvement plan'' as an alternative to corrective action plan, believing that it better reflects the principles of program improvement and State/Federal partnerships that we are attempting to cultivate through the reviews.

In paragraph (a)(1) we propose to require that the program improvement plan be developed jointly between the State and HHS, consistent with other regulatory requirements that the State plan be developed jointly, and in keeping with the desire to promote State and Federal partnerships through the reviews.

In paragraphs (a) (2) through (5), we describe the required content of the program improvement plans, specifically that the plans address the areas of nonconformity and identify the activities, time frames, technical assistance and evaluations needed to achieve substantial conformity.

In paragraph (b), we propose the option of a voluntary program improvement plan for States that meet the criteria for substantial conformity but yet have areas where program improvements are needed, and we describe the requirements for such voluntary plans.

In paragraph (c)(1), we propose that a State's program improvement plan be approved in accordance with section 1123A(b)(4)(A) of the Act. In addition, we propose that a State submit its plan for approval within 60 days following receipt of the written notice of nonconformity so that a State found to be in nonconformity may receive prompt assistance in achieving program improvements.

In paragraph (c)(2), ACF will approve the plan if it meets the requirements for program improvement plans described in this section. If the plan does not meet the requirements and is not approved, we propose in paragraph (c)(3) that the State be given 30 additional days to revise and re-submit the plan for approval. If the State does not re-submit the plan, or if the re-submitted plan continues to fail to meet the requirements and cannot be approved, we propose in paragraph (c)(4) to initiate withholding of funds in accordance with the provisions of § 1355.36 of this part. We believe that reasonable time frames must govern the submission of approvable program improvement plans, and would appreciate comments as to whether the time frame for the joint development of the program improvement plan is adequate as proposed.

In paragraph (d), we are proposing that program improvement plans be approved for time periods of up to two years, depending upon the level of nonconformity. We do not expect all program improvements to take two years to implement and expect States to address areas of nonconformity expeditiously. States will be required to prioritize areas needing improvement that pose risks to child safety and complete the appropriate action steps within a time frame to be determined in consideration with the level of risk. We do recognize, however, that, in some circumstances, it will be impossible for the State to address the areas needing improvement within the two year time frame, even with technical assistance. In such situations we are, thus, proposing a three-year period of time as the maximum implementation period for the plans, consistent with the time frame for the ongoing full reviews.

In paragraph (e), we propose procedures for evaluating the implementation of program improvement plans. We propose that the State members of the review team and the ACF Regional Office determine the appropriate intervals for evaluating the plans, since the content of each plan and the needs of individual States will vary significantly. Our proposal that the evaluations occur no less frequently than annually is an effort to: (1) assure that delays in evaluation do not prevent the State from correcting the areas of nonconformity in a timely manner; (2) integrate the implementation of the plans with the joint planning process between the State and ACF; and (3) reduce the burden on States by using the existing annual CFSP progress review and update as the vehicle for evaluating the plans, rather than create an additional process.

In paragraph (e)(3), we address evaluation of individual components of the program improvement plans. We are proposing that the areas of nonconformity be addressed individually when evaluating the plans, so that once they are determined to be complete they will not require further evaluation.

In paragraph (e)(4), we propose the option for the State and ACF to renegotiate the terms of the program improvement plans, as needed. This is based on the fact that changes in approach may be needed during the implementation of a plan, and we want to provide that flexibility for the States.

In paragraph (f), we elaborate on the proposal that States integrate their program improvement plans with CFSP planning and implementation.

To the extent that ACF has the resources and funds available, it shall make technical assistance available to improve the outcomes or other factors that are outlined in a State's program improvement plan.

Our goals in this section and in the withholding section (45 CFR 1355.36) include: providing timely feedback on the findings of the review to the State, based on joint planning, collaboration and agreement on the strengths and needs of the program; avoiding the ''review and penalize'' approach used in prior reviews; and focusing the period following the review on program improvement. In the pilot reviews, we found that the final reports of the reviews, prepared by ACF in collaboration with the State and the review team, required (at a minimum) several months to complete and delayed the development of program improvement plans well beyond the completion of the actual review. We, therefore, have proposed that ACF develop a concise, focused report of findings within 30 days of the review. This method allows us to expeditiously engage the State in developing a program improvement plan that addresses the mutually agreed upon areas of nonconformity. We have proposed that program improvement plans be developed within 60 days of ACF issuing a written confirmation to the State of the findings of the review.

Section 1355.36 Withholding Federal Funds Due to Failure To Conform Following the Completion of a State's Program Improvement Plan

This section describes the process for withholding funds due to the failure of the State to meet the criteria for substantial conformity. We have addressed statutory requirements by specifying the methods used to determine the amount of Federal funds to be withheld due to a State's failure to comply substantially, and the conditions under which the funds will be withheld. In reviewing this section, the reader should note that the withholding of funds is suspended during the implementation period of a program improvement plan. Following the completion of the program improvement plan, the amount of funds which will be withheld and collected in arrears is the amount identified in conjunction with those areas of nonconformity that remain uncorrected.

In paragraphs (a)(1) and (2), we define the pool of funds to which any penalties should apply. Inasmuch as section 1123A(a) of the Act requires that the Secretary review a State's conformity with State plan requirements of both titles IV–B and IV–E, we have deemed it appropriate and consistent to propose that funds under each of these titles be subject to withholding. This approach is further supported by the close linkages we see between both titles, for example, in the areas of protections for children, the recruitment of foster and adoptive families, and the development of training strategies. While greater emphasis is placed on title IV–B State plan requirements in the reviews of State child and family services programs, the requirements within the two titles are sufficiently intertwined so as to justify a pool of both title IV–B and title IV–E funds. However, in recognition of this greater emphasis, we believe that it is appropriate that the pool of funds subject to withholding be comprised of a State's total title IV–B allocation. Since a smaller number of title IV–E State plan requirements have been included as part of these reviews, we are proposing that the pool of title IV–E funds subject to withholding be limited to a State's claims for title IV–E foster care administrative costs, and not include foster care maintenance payments.

In paragraph (b)(1), we propose that withholding funds based on a determination that a State is not operating in substantial conformity be delayed until the State has the opportunity to develop and implement a program improvement plan.

In paragraph (b)(2), we propose that funds not be withheld from a State if the determination of nonconformity is caused by the State's correct use of formal statements of Federal law or policy provided by DHHS.

In (b)(3), we are proposing that withholding apply to the year under review and each succeeding year until the failure to conform ends through the successful completion of the program improvement plan, or until a subsequent review determines that the State is operating in substantial conformity. The amount of funds subject to withholding that we are proposing is relatively modest for a single year. We therefore believe that for potential withholding to serve as an incentive for program improvements, it must be applied over the entire period of nonconformity.

In (b)(4) we address the statutory requirement that the amount of funds withheld must be proportionate to the extent of nonconformity. In paragraph (b)(4)(i), we define the pool of funds from which any funds shall be withheld due to nonconformity. The pool includes the State's entire title IV–B allocation, subparts 1 and 2, for the years to which the withholding applies, plus an amount equivalent to 10 percent of the State's Federal claims for title IV–E foster care administrative costs (exclusive of training costs matched at 75 percent) for the years to which the withholding applies. Only 10 percent of the title IV–E foster care administrative claims is proposed since a smaller number of the State plan requirements subject to review are specifically title IV–E related.

In paragraphs (b)(4)(ii) and (iii), we are proposing that equal weight be given to each of the seven core outcomes, described in § 1355.34(b)(2) of this part, and the seven core systemic factors, described in § 1355.34(c)(2) of this part, in determining substantial conformity. We propose that the amount of funds subject to withholding for each outcome and systemic factor be one percent of the pool of the State title IV–B allocation and title IV–E foster care administrative costs. We propose that funds be withheld only for those

particular outcomes and systemic factors that are determined not to be in substantial conformity, whether as a result of a full or partial review. Therefore, States determined not to be operating in substantial conformity based on only one outcome would be subject to a one percent withholding, and States with greater degrees of nonconformity would be subject to proportionately higher withholding.

We think that our proposal for withholding provides a sufficient penalty to serve as an incentive for program improvements as needed, but does not withhold so much as to prohibit States from making improvements or delivering services. Our definition of the pools of funds to which penalties will apply is consistent with the extent to which we will be reviewing State plan requirements for programs administered under both funding sources. We anticipate that the maximum penalty proposed for States determined not to be in substantial conformity on all of the outcomes and systemic factors reviewed will be less than penalties imposed under the section 427 reviews, on a year-by-year basis. This is primarily due to our expectation that the development and implementation of a program improvement plan, along with the provision of technical assistance, will result in significant progress by the State in achieving substantial conformity. This proposal is consistent with our intent to de-emphasize penalties in favor of efforts to improve services. We particularly invite comments on this issue.

In paragraph (b)(5), we propose the maximum amount of funds to be withheld if the State cannot achieve substantial conformity through the implementation of a program improvement plan.

In paragraph (c), consistent with section 1123A(b)(4)(C) of the Act, we propose that the amount of funds withheld not be deducted from a State's allocation during the implementation period of the program improvement plan, provided the plan conforms to the requirements in the final rule.

The statute also requires that the Secretary rescind the withholding of funds if the State's failure to conform is resolved by successful completion of a corrective action plan. We have addressed this requirement in paragraph (d), and also propose that the Secretary not withhold any portion of funds that applies to individual outcomes or systemic factors that are brought into substantial conformity through partial completion of the program improvement plan.

In paragraph (e)(1), we propose that the statutory requirement that ACF notify the State no later than 10 days following a final determination of substantial failure to conform be interpreted as 10 business days. Although each State will be notified of whether it is, or is not, operating in substantial conformity following the on-site review, this earlier determination shall not be considered final for States which are determined not to be in conformity. These States will be notified of the final determination following the successful or unsuccessful completion of a program improvement plan.

In paragraph (e)(2), we clarify when and under what circumstances the actual withholding of funds will occur. The decision to withhold funds from a State will be directly related to its progress in implementing a program improvement plan. At the completion of the program improvement plan, the amount of funds associated with any remaining areas of nonconformity will be withheld by the Department for the time period beginning with the year under review in which the initial determination of nonconformity was made to the date of the final determination of nonconformity, and from that date forward until substantial conformity is achieved. In paragraph (e)(3), we propose that the amount of funds withheld be computed to the end of the quarter in which substantial conformity is achieved.

In paragraph (e)(4), we propose the penalty structure for States that fail to participate in the development of a program improvement plan, or in the implementation of a plan, as required by ACF.

Section 1355.37 Opportunity for Public Inspection of Review Reports and Materials

In this section, consistent with the requirements for State plans at 45 CFR 1355.21(c), we propose that the State make reports and materials related to the child and family services reviews available for public inspection. We think it is critical that States obtain the broadest public involvement in the implementation of child welfare programs. We are particularly interested in comments regarding the method of dissemination of these materials in order to accomplish this goal.

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

In this section, we implement the provisions of sections 474(d)(1) and (2) of the Act. Section 474(d) contains enforcement provisions applicable to section 471(a)(18) of the Act, which requires the removal of barriers to interethnic adoption. We have chosen to codify the section 1808 enforcement procedures in regulations in conjunction with the 1123A review process because the statute specifically identifies the 1123A review process as a mechanism for assuring State compliance with section 471(a)(18) of the Act. While the 1123A review process is an appropriate mechanism for detecting possible violations of section 471(a)(18) of the Act, the corrective action and penalty structure required by section 474(d) of the Act does not fit within the ''substantial conformity'' standard by which other title IV–B and title IV–E State plan requirements are measured in the 1123A review process. Therefore, ACF has developed a separate process for addressing violations of section 471(a)(18), once identified.

After considering a number of options, we determined that implementing section 474(d) of the Act requires collaboration with OCR because it has significant expertise in investigating alleged civil rights violations. Moreover, a State's noncompliance with section 471(a)(18) of the Act is also a violation of title VI of the Civil Rights Act of 1964. OCR and ACF will collaborate throughout the process of bringing the State into compliance with section 471(a)(18) of the Act which includes consultation during the development, approval, implementation, and evaluation of corrective action plans.

In paragraph (a)(1), we propose that ACF refer all cases involving potential violations of section 471(a)(18) of the Act to OCR for investigation. Such cases may come to our attention during the course of a child and family services review or by other means, such as a letter of complaint. Violations based on a court finding will not be referred to OCR for investigation. Rather, ACF will invoke the appropriate penalty and corrective action procedures described in the regulation.

In paragraph (a)(2), we propose that after OCR completes its investigative procedure, it will make its file available to ACF, which will then make a determination, based on the OCR file, whether there has been a violation of section 471(a)(18). In paragraphs (a)(2)(i) and (a)(2)(ii), consistent with statutory language, we propose that a violation of section 471(a)(18) occurs with respect to a person if the agency delays or denies placement based on race, color, or national origin. In paragraph (a)(2)(iii), we have included as a violation of

section 471(a)(18) of the Act a State's maintenance of any statute, regulation, policy, procedure, or practice that would result in the delay or denial of placement based on race, color, or national origin. The statute requires immediate penalties for violations with respect to a person while providing States the opportunity to implement corrective action to avoid penalties in unspecified circumstances. Logically, circumstances in which States should first have an opportunity for corrective action prior to receiving a penalty include those that have the potential to cause a violation of section 471(a)(18) with respect to a person.

In paragraph (a)(3), we propose that ACF provide written notification to the State or entity of its determination regarding alleged section 471(a)(18) violations.

In paragraph (a)(4), we propose that if ACF determines that no violation has occurred, it will take no further action. However, if ACF determines that a violation has occurred, it will invoke the enforcement process outlined in section 474(d) of the Act, which includes penalties and corrective action. Penalties will be issued in the form of disallowances and will thus be appealable to the Departmental Appeals Board (DAB) under the procedures prescribed in 45 CFR Part 16.

In paragraph (a)(5), we make clear that the implementation of section 471(a)(18) is to have no impact on the State's compliance with the requirements of the Indian Child Welfare Act of 1978.

In paragraph (b)(1), we explain that, in accordance with section 474(d)(1) of the Act, an immediate penalty will be levied against a State found to be in violation of section 471(a)(18) with respect to a person or as the result of a court finding (see paragraph (g)(4) of the proposed regulation and the corresponding preamble language). The penalty will be imposed for the fiscal quarter in which the State receives notification from ACF that it is in violation of section 471(a)(18), and for every subsequent quarter in that fiscal year, or until the State successfully completes a corrective action plan. While penalties resulting from violations of section 471(a)(18) are appealable to the DAB, States that voluntarily engage in corrective action may do so without prejudice during the appeal process in order to correct deficiencies and come into compliance expeditiously. If the violation occurs as a result of a court finding and the State is appealing the court's decision, ACF will notify the State that the violation has occurred and of the appropriate penalty structure, however, it will not impose the penalty until there is a final determination through the appeal process. The State may engage in a corrective action plan during the judicial appeal process if it so chooses.

Paragraphs (b)(2) and (b)(3) describe the approval process for corrective action plans submitted in response to violations of section 471(a)(18) with respect to a person or as the result of a court finding. Approval of such plans is at the sole discretion of ACF. We did not prescribe time lines for submission of corrective action plans. Clearly, it is in a State's best interest to come into compliance in a timely fashion in order to minimize the length of time the penalty is imposed.

In paragraph (c)(1), we explain that any State with a statute, regulation, policy, procedure, or practice in place that, if applied, would likely result in a violation of section 471(a)(18) of the Act with respect to a person will be found in violation of section 471(a)(18). In conformance with the statute, a State will have up to six months from the date it receives notification of the violation from ACF to implement a corrective action plan for complying with section 471(a)(18). We chose to interpret the term ''implement'' to mean ''begin'' rather than ''complete.'' We think this interpretation is consistent with Congress' intent to resolve noncompliance with section 471(a)(18) in a timely fashion and affords States sufficient time to develop and implement corrective action. A State that fails to implement a corrective action plan within the six months allotted, will be assessed a penalty in accordance with section 474(d)(1) of the Act.

Paragraphs (c)(2) and (c)(3) describe the approval process for corrective action plans submitted in response to violations of section 471(a)(18) caused by a statute, regulation, policy, procedure, or practice that could result in a violation with respect to a person. Approval of such plans is at the sole discretion of ACF. We did not prescribe time lines for submission of corrective action plans, but note that it is in a State's best interest to submit the plan at the earliest possible date in order to effect implementation within the six months allotted.

In paragraph (c)(4), we describe what constitutes ''implementing'' a corrective action plan. A corrective action plan will be considered ''implemented'' when a State begins to carry out the action step(s) in the plan. ACF's approval of a corrective action plan is not considered implementation of the plan.

In paragraph (c)(5), once the corrective action plan is implemented, we propose to levy a penalty against a State that fails to complete the corrective action plan within the time allotted in the plan. Although the statute does not specifically address the completion of corrective action plans, Congress clearly intended all States to comply with section 471(a)(18) of the Act. Therefore, States that fail to complete a corrective action plan within the time specified in the plan will be subjected to a penalty in accordance with section 474(d)(1) of the Act.

Subsection (d) proposes requirements for corrective action plans developed in response to a violation of section 471(a)(18).

In paragraph (e), we propose that the evaluation of a State's corrective action plan be completed solely by HHS staff. We believe that a joint evaluation would be inappropriate when a State has been found to be in violation of this title IV-E State plan requirement. We propose to evaluate the State's corrective action plan within 30 calendar days of the latest projected completion date specified in the plan. We think this is a sufficient amount of time since ACF can evaluate action steps as they are completed. Within the 30 days, ACF will determine if the State has completed the corrective action plan. If the corrective action plan has not been completed, ACF will calculate the amount of reduction in the State's title IV-E payment and notify the State agency accordingly.

In paragraph (f), we define ''title IV-E funds'' as the Federal share of all expenditures made under title IV-E.

Paragraph (g)(1) reiterates the circumstances in which a State's title IV-E funds may be reduced as the result of a violation of section 471(a)(18): the delay or denial of a foster or adoptive placement based on race, color, or national origin; or, failure to implement or complete a corrective action plan of the type described in subsection (c).

In paragraph (g)(2), in accordance with section 474(d)(1) of the Act, we propose to reduce the title IV-E funds of a State that has violated section 471(a)(18) with respect to a person for the fiscal quarter in which the State received notification of this violation and for each succeeding quarter that fiscal year or until the State completes a corrective action plan, whichever is sooner.

In paragraph (g)(3), for States that fail to implement or complete a corrective action plan of the type described in subsection (c), we propose to reduce the State's title IV-E funds for the fiscal quarter in which the State received

notification of this violation. The reduction will continue for each succeeding quarter within that fiscal year or until the State completes the corrective action plan, whichever is sooner.

In paragraph (g)(4), a State determined to be in violation of section 471(a)(18) on the basis of a court finding will have its title IV-E funds reduced in accordance with section 474(d)(1) 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, whichever is sooner.

In paragraph (g)(5), we propose that a State determined not to be in compliance with section 471(a)(18) undergo a reduction in its title IV-E funds for a period not to exceed the four fiscal quarters in the fiscal year in which the State was notified of its noncompliance. Should the State fail to come into compliance with section 471(a)(18) of the Act during the fiscal year in which it was notified of its violation, ACF will treat the violation as a new finding at the beginning of the subsequent fiscal year and impose the penalty and corrective action process accordingly.

In paragraph (h)(1), in accordance with section 474(d)(1) of the Act, we propose the penalty structure for States that violate section 471(a)(18) with respect to a person or fail to implement or complete a corrective action plan of the type described in subsection (c).

In paragraph (h)(2), we address the penalty structure for an entity that has received title IV-E funds from a State and has been determined to have violated section 471(a)(18) with respect to a person. We propose that all title IV-E funds received by that entity from a State agency for the quarter in which the entity receives a notification from ACF that it is in violation of section 471(a)(18) be remitted directly to the Secretary by the entity in accordance with section 474(d)(2) of the Act. The penalty against the entity will be calculated based on the State's documentation of expenditures.

Pursuant to section 474(d)(1) of the Act, in paragraph (h)(3) we propose that the reduction of title IV-E funds due to a State's failure to conform to section 471(a)(18) shall not exceed five percent of that State's fiscal year title IV-E payment.

In paragraph (h)(4), we propose holding States or entities liable for any interest accrued on the amount of funds reduced by the Department, in accordance with the provisions of 45 CFR 30.13.

Section 1355.39 Administrative and Judicial Review

In this section, we implement the statutory provisions (section 1123A(c)(2) and (3) of the Act) under which States may appeal decisions made by the Department with regard to determinations of substantial conformity and the subsequent withholding of funds. We propose that States be afforded the same opportunities for appeal upon being notified by ACF of a violation of section 471(a)(18) of the Act.

In paragraph (c), we propose that no appeal be available to a State when it has been determined to be in violation of section 471(a)(18) of the Act based on a court finding.

B. Title IV-E Eligibility Reviews

Part 1355—General

Section 1355.20 Definitions

1355.20 is being revised to define terms used throughout the proposed rule.

The definition of *child care institution* is primarily a reiteration of the statutory definition at section 472(c)(2) of the Act.

The definition of *original foster care placement* has been removed from § 1356.21, moved to this section, and replaced with *date the child enters foster care* to comply with the ASFA. The date the child enters foster care determines when the case review system requirements in section 475 of the Act have to be met, such as: administrative reviews, permanency hearings, the new requirement for filing or joining a petition for termination of parental rights, and the requirements for providing ''time-limited reunification services'' funded under title IV-B, subpart 2. This term has no significance for claiming Federal financial participation for foster care maintenance payments. The rules for obtaining Federal reimbursement for foster care maintenance payments have not changed. This term should not be confused with the date the child is physically removed from home.

We understand, through our consultation process, that there is a need for clarification of the ''judicial finding of child abuse or neglect'' language. We are interpreting this language as referring to the hearing at which the court finds that the child has been abused or neglected and gives placement and care responsibility to the State agency; this usually takes place at what we refer to as the ''full hearing.'' A finding of abuse or neglect does not occur at a shelter or emergency placement hearing where the State is given temporary custody of the child.

We propose that the date the child entered foster care on the basis of a voluntary placement agreement be the date the agreement is signed by all relevant parties.

We are proposing a revised definition of *foster care* which will change the term ''family foster homes'' to ''foster family homes'', so that it is consistent with the definition of ''foster family home'' in this section. It also clarifies the status of a child as being in foster care, even though an adoption subsidy payment has been made prior to the finalization of the adoption.

The definition of *foster care maintenance payments* is derived from section 475(4)(A) of the Act. In this definition, we elaborate upon the meaning of ''daily supervision'' consistent with a policy interpretation issued by ACYF (ACYF-CB-PIQ–97–01). States may claim reimbursement under title IV-E foster care maintenance for child care provided to title IV-E eligible children during the foster parent's working hours while the child is not in school and in those situations when a foster parent must participate in activities that are beyond the scope of ''ordinary parental duties,'' but consistent with parenting a child in foster care. According to the legislative history of Public Law 96–272, '' * * * payments for the costs of providing care to foster children are not intended to include reimbursement in the nature of a salary for the exercise by the foster family parent of ordinary parental duties * * *'' Since foster care maintenance payments are not salaries, foster parents must often work outside the home; hence the interpretation that licensed child care that provides daily supervision during a foster parent's working hours when the child is not in school is an allowable expenditure under title IV-E. Examples of other allowable activities include licensed child care while the foster parent is attending foster parent training, case conferences, or case review hearings.

States have requested clarification regarding disbursement of funds for allowable child care. States may include the cost of allowable child care in the basic foster care maintenance payment or may make a separate maintenance payment directly to the licensed provider. For example, if, in a particular foster family, both parents work, the State may include the cost of child care in the maintenance payment made to that family or may pay the licensed provider directly. Regardless of the payment method chosen, the State must be able to provide documentation to verify allowable expenditures.

The definition of *foster family home* has been amended to clarify that the statute makes no distinction between approved and licensed foster homes. Consequently, approved foster homes must meet the same standards as licensed homes. To date, there has been confusion in the field regarding the statutory terminology of ''licensed or approved.'' Some States have interpreted this language to allow a type of two-tiered system for approving foster family homes. This is an incorrect interpretation of the statute. The terms ''licensed'' and ''approved'' are treated equally in the statute. Irrespective of the terminology, licensure or approval for foster homes must be based on the same standards. This clarification does not repeal the policy at ACYF-PIQ–85–11 which permits States to waive certain licensing requirements, such as square footage, for relative foster family homes.

Provisional licensure or approval is insufficient for meeting title IV-E eligibility requirements. States may not claim reimbursement until final licensure or approval is granted. The State may, however, claim reimbursement back to the first of the month in which all title IV-E eligibility criteria are met.

The definitions of *full hearing* and *temporary custody proceeding* are being added to clarify the meaning of these terms as used by ACF in these regulations.

We have added a definition of *legal guardianship* which reiterates the statutory language found at new section 475(7) of the Act. In our initial consultations on the implementation of the ASFA, questions were raised regarding the applicability of this term to ''long-term foster care.'' The statute no longer recognizes long-term foster care as a permanency goal. A State is not precluded from establishing placement in a permanent foster family home as a permanency goal if it has a compelling reason to do so. However, placement in a permanent foster family home does not fall within the definition of ''legal guardianship,'' for the obvious reason that foster parents are not granted the rights associated with guardianship.

The definition of *permanency hearing* recognizes the statutory changes in terminology, timing, and purpose of these hearings contained in the ASFA. Since the intent of the law, both prior and subsequent to the ASFA, is to provide judicial oversight for children whom a State has yet to place in a permanent setting, we propose to limit the court-appointed or approved body for the conduct of permanency hearings to one which is not a part of or under the supervision or direction of the State agency. We also propose to exclude any hearings that do not provide parents and other interested parties an opportunity to be heard, as was the legislative intent (Congressional Record-Senate, August 3, 1979, S. 11710).

In order to meet children's permanency needs and to create a child welfare system that is responsive to a child's sense of time, Congress moved the timing for the ''dispositional hearing'' to 12 months, renamed it the ''permanency hearing,'' and clarified its purpose to unequivocally establish that States must set and act on permanency plans for children in foster care without delay. In our early consultation with the field regarding the implementation of the ASFA, we repeatedly heard that it was critical that the field understand that permanency hearings must occur within 12 months of the child entering foster care, but may occur sooner if reunification is appropriate or it becomes clear that an alternate permanency plan must be established.

During the focus groups, we also learned that the language at section 475(5)(C) is being misunderstood as requiring States to cease reunification efforts at the permanency hearing. The State is not obliged to set an alternate permanency plan at the permanency hearing if the child and family are not able to reunify at that time. However, the intent of the ASFA in shortening the time line for holding a permanency hearing was to place greater accountability and responsibility on parents for making their home ready and safe for the child's return. Congress understood that families often present very complicated issues that must be resolved prior to reunification. For example, parents dealing with substance abuse issues may require more than 12 months to resolve those issues. However, a parent must be complying with the established case plan, making significant measurable progress toward achieving the goals established in the case plan, and diligently working toward reunification in order to maintain it as the permanency plan at the permanency hearing. Moreover, the State and court must expect reunification to occur within a time frame that is consistent with the child's developmental needs. If this is not the situation, the State is obliged to establish and act on an alternate permanency plan for the child at the permanency hearing. Too often, reunification is retained as the permanency goal when a parent is negligent in complying with the requirements of the case plan until the months or weeks immediately prior to the permanency hearing. A parent's resumption of contact or overtures toward participating in the case plan in the months or weeks immediately preceding the permanency hearing are insufficient grounds for retaining reunification as the permanency plan. In such situations, the parent must demonstrate a genuine, sustainable investment in completing the requirements of the case plan in order to retain reunification as the permanency goal.

The shortened time frames and increased accountability for parents makes it incumbent on the State to begin providing services to families as soon as it receives responsibility for the child's placement and care. Ideally, the State will begin delivering services to resolve those parental issues which lead to the removal as soon as the child is removed from home.

Part 1356—Requirements Applicable to Title IV–E

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

Effective October 16, 1994, the Assistant Secretary of ACF delegated the authority to the Commissioner, ACYF, to disapprove title IV–E State plans which provide for foster care and adoption assistance under section 471 of the Act. Accordingly, we have deleted the pertinent language in this NPRM to conform with the revised delegation.

Section 1356.21 Foster Care Maintenance Payments Program Implementation Requirements

In this section, we have clarified certain existing policies and modified others which have a direct impact on determining the eligibility of children in the title IV–E foster care program. We have proposed additional foster care maintenance payment requirements, which are consistent with the law and intent of Congress, that will apply to States as they implement their title IV–E State plans.

Section 1356.21(a)

This paragraph remains unchanged from the current regulation.

Section 1356.21(b) Reasonable Efforts

We are amending the language at this section of the regulation to implement the ASFA requirement that the State hold the child's health and safety as its paramount concern when making reasonable efforts. The reasonable efforts provision, as amended by the ASFA, has a threefold purpose:

(1) To maintain the family unit and prevent the unnecessary removal a child

from his/her home, when it can be done so without jeopardizing the child's safety;

(2) If temporary out-of-home placement is necessary to ensure the immediate safety of the child, to effect the expeditious reunification of the child and family when reunification is the appropriate permanency goal or plan; and,

(3) When reunification is not appropriate or possible, to effect an alternate permanency goal in a timely manner.

During our consultation with the field, some recommended that we define reasonable efforts in implementing the ASFA. We do not intend to define ''reasonable efforts.'' To do so would be a direct contradiction of the intent of the law. The statute requires that reasonable efforts determinations be made on a case-by-case basis. We think any regulatory definition would either limit the courts' ability to make determinations on a case-by-case basis or be so broad as to be ineffective. In the absence of a definition, courts may entertain actions such as the following in determining whether reasonable efforts were made:

- Would the child's health or safety have been compromised had the agency attempted to maintain him or her at home?
- Was the service plan customized to the individual needs of the family or was it a standard package of services?
- Did the agency provide services to ameliorate factors present in the child or parent, i.e., physical, emotional, or psychological, that would inhibit a parent's ability to maintain the child safely at home?
- Do limitations exist with respect to service availability, including transportation issues? If so, what efforts did the agency undertake to overcome these obstacles?
- Are the State agency's activities associated with making and finalizing an alternate permanent placement consistent with the permanency goal? For example, if the permanency goal is adoption, has the agency filed for termination of parental rights, listed the child on State and national adoption exchanges, or implemented child-specific recruitment activities?

In order to strengthen the child welfare system's response to child safety, Congress provided a list of circumstances in which reasonable efforts are required. It also provided States the authority to identify a list of aggravated circumstances in which reasonable efforts are not required. Typically, State child welfare agencies and the courts encounter cases in which it is appropriate to make reasonable efforts to prevent a child's removal from home or to reunify the family. Quite frequently, though, States are faced with circumstances in which it is unclear how much effort is reasonable. At the initial stage of and throughout its involvement with a family, the child welfare agency assesses the family's needs and circumstances. The State agency should make reasonable efforts to prevent the child's removal from home or to reunify the family commensurate with the assessment . If the assessment indicates that it is not reasonable to prevent the child's removal or to reunify the family, the assessment itself satisfies the reasonable efforts requirement, if the court makes such a determination. In such cases, the court is not determining that reasonable efforts are not required. Rather, the court is determining that it is not reasonable to make efforts, beyond completing the assessment, to prevent the child's removal from home or to reunify the family.

In proposing the application of the reasonable efforts requirements for title IV–E eligibility determinations, this proposed rule effects a significant change from existing policy. Under current ACF policy, either a judicial determination regarding the reasonable efforts made prior to the placement of a child or a determination to reunite the child and parents, but not both, has been required for Federal financial participation (FFP). Consistent with the statutory language at section 472(a)(1) of the Act, we propose that, in order to satisfy title IV–E eligibility requirements, there must be a judicial determination that: (1) Reasonable efforts were made to prevent a child from being removed from home; (2) reasonable efforts were made to reunify the child with his/her family if the removal could not be prevented; (3) if reasonable efforts were not made to prevent the child's removal from home or to reunify the child with his or her family, that reasonable efforts are/were not required; and (4) if the permanent plan for the child is adoption, guardianship, or some other permanent living arrangement other than reunification, that reasonable efforts were made to make and finalize that alternate permanent placement.

Section 1356.21(b)(1) Judicial Determination of Reasonable Efforts To Prevent Removal in Non-emergency Situations

We propose to clarify the requirement that judicial determinations of reasonable efforts to prevent removal in non-emergency situations must be made prior to the removal of the child from home. If the circumstances of the case were such that reasonable efforts were not required, there must be a judicial determination to that effect.

Section 1356.21(b)(2) Judicial Determinations of Reasonable Efforts to Prevent Removal in Emergency Situations

We propose new requirements regarding judicial determinations of reasonable efforts to prevent removal in emergency situations in order to take into account the fact that many children are removed from their homes in emergency circumstances, primarily because of safety issues.

We are permitting State flexibility in the timing of this determination in emergency situations, up to a maximum of 60 days, recognizing that the initial proceeding leading to the removal may not have been a full hearing. Additionally, the agency may not have had time to prepare information regarding its reasonable efforts prior to the emergency proceeding, nor would the judge have had time to make a careful evaluation of such evidence. We think a 60-day period of time is sufficient for involved persons to perform the appropriate duties, while ensuring that a child is afforded the protection of the judicial determination within a reasonable amount of time, irrespective of the emergent circumstances leading to the removal.

While we recognize that concern for the child's safety may preclude efforts to prevent removal, the court must make a reasonable efforts determination. Even when children are removed in emergency circumstances, the court must consider whether appropriate services were or should have been provided. When the court determines that it was reasonable for the agency to make no effort to provide services to prevent removal in light of the exigent circumstances discovered through the assessment of the family, such as the safety or protection of the child, there must be a judicial determination to that effect. If, at the time the court determines that reasonable efforts to prevent a child's removal from home were not required, the court also determines that reasonable efforts are not required to reunify the child with his or her family, there must be a separate judicial determination to that effect.

Section 1356.21(b)(3) Judicial Determination of Reasonable Efforts to Reunify the Child and Family

We are proposing that a judicial determination of reasonable efforts to

reunify be made at any time within a 12 month period following the date the child enters foster care when the case plan goal is reunification, and at least once every 12 months thereafter. Since the permanency hearing must be held over the same 12 month interval, States may want to consider seeking a judicial determination of reasonable efforts to reunify at that hearing. Moreover, making reasonable efforts to reunify the child and family affords the State the opportunity to assess the appropriateness of reunification as a case plan goal and determine an alternate permanency goal if necessary. Making reasonable efforts typically provides the State the evidence it needs to support a decision that an alternate permanency plan is appropriate. The State is not precluded from seeking this determination at an earlier point in time if it so chooses.

If the judicial determination regarding reasonable efforts to reunify is not made within the proposed time frame, we propose that the child become ineligible once 12 months has elapsed since the date the child entered foster care or the most recent judicial determination of reasonable efforts to reunify was made, and until such time as the next reasonable efforts to reunify determination is made. We think this is consistent with statutory intent to ensure that a State is continuing to make reasonable efforts, subject to judicial review, to return a child home as soon as it is safe and appropriate to do so.

If there is a judicial determination that reasonable efforts to reunify the child with his or her family are not required and the State has determined that it is not appropriate to attempt to reunify the child with his or her family, a permanency hearing must be held within 30 days to establish an alternate permanent plan for the child. The alternate permanency plan may be established at the same time the court determines that reasonable efforts to reunify are not required.

Section 1356.21(b)(4) Judicial Determination of Reasonable Efforts to Make and Finalize Placements When the Permanency Goal is Not Reunification

We are proposing that the judicial determination regarding reasonable efforts to make and finalize a permanent placement be made within 12 months of the date the permanency goal of adoption, guardianship, or some other permanent living arrangement is established, and every 12 months thereafter. We considered requiring this type of reasonable efforts determination to occur every six months in response to the timeliness language in the statute but were concerned about the burden this would impose on the State agency and the courts. We would appreciate comments on the proposed time frame for making judicial determinations of reasonable efforts to make and finalize permanent placements.

If a judicial determination regarding reasonable efforts to make and finalize a permanent placement is not made within the time frame proposed, the child becomes ineligible under title IV–E from the end of the twelfth month following the date the alternate permanency goal is established, or the date of the most recent judicial determination of reasonable efforts to make and finalize a permanent placement, and will remain so until such a determination is made.

Section 1356.21(b)(5) Circumstances in Which Reasonable Efforts to Prevent a Removal or to Reunify a Child With His or Her Family Are Not Required

In this paragraph, we propose that the court that has responsibility for hearing child welfare dependency cases must make the determination that reasonable efforts to prevent a child's removal from home or to reunify a child and family are not required. Depending on the circumstances, this determination may be based on the findings of another court or the findings of the court that is determining whether reasonable efforts are required.

In subparagraph (i), the court that hears child welfare dependency cases may find that the child has been subjected to aggravated circumstances, if it has the authority to do so, and that reasonable efforts are not required because the statutory language at section 471(a)(15)(D)(i) of the Act regarding aggravated circumstances does not require a criminal conviction.

In subparagraph (ii), the court's determination that reasonable efforts are not required must be based on the findings of a criminal court. The statutory language at section 471(a)(15)(D)(ii) requires a criminal conviction of one of the felonies identified therein. In circumstances in which the criminal proceedings have not been completed or are under appeal, the court that hears child welfare dependency cases must determine whether reasonable efforts are required based on the developmental needs of the child and the length of time associated with completion of the criminal proceedings or the appeals process.

In subparagraph (iii), when the determination that reasonable efforts are not required is based on a previous involuntary termination of parental rights, that determination is clearly based on the findings of another court decision.

During our consultation process, we heard that States wanted to know if their laws must specifically use the ''aggravated circumstances'' language in the ASFA and if we plan to provide a definition of or parameters for defining ''aggravated circumstances.'' We do not think it is necessary or appropriate to be so prescriptive as to require States to adopt the specific ASFA language in identifying aggravated circumstances in which reasonable efforts are not required.

The ASFA clearly provides States the authority to determine what ''aggravated circumstances'' are. If a State already has laws that would serve to define aggravated circumstances, it would not need to amend or change those laws. We will not, therefore, define ''aggravated circumstances,'' nor will we provide examples beyond those in the statute.

States have expressed concern that the language at section 471(a)(15)(D) of the Act prohibits the State from making reasonable efforts in certain circumstances. This is an incorrect interpretation. The ASFA identifies when reasonable efforts are not required. The ASFA upholds the State agency's authority to make reasonable efforts to prevent a child's removal from home or to reunify a child with the family even in situations in which it is not required to do so, if the child's health and safety can be assured and it is in his/her best interests.

Section 1356.21(b)(6) Concurrent Planning

This paragraph reiterates the statutory provision at section 471(a)(15)(F), affording States the option of making reasonable efforts to make and finalize an alternate permanent placement concurrently with reasonable efforts to reunify a child with his/her family. Concurrent planning can be an effective tool for expediting permanency, and Congress intended to offer it as such. However, since it may not be an appropriate approach for every child or family, States are not required to use concurrent planning and the decision to do so must be made on a case-by-case basis. We urge States to obtain technical assistance and provide appropriate training and supervision to agency workers prior to deploying a concurrent planning strategy.

Section 1356.21(b)(7) Federal Parent Locator Service

The ASFA amended section 453 of the Act to specifically provide for the

use of the Federal Parent Locator Service (FPLS) in expediting permanency. We have included the use of the FPLS in the reasonable efforts section of the regulation because Congress intended the FPLS to be used as a tool for locating absent parents early in the case planning process as a potential permanency option. Congress also intended the FPLS as a tool for the States in completing termination of parental rights proceedings.

Section 1356.21(c)(1) Contrary to the Welfare Determination—Non-emergency Situations

We propose that in non-emergency situations the ''contrary to the welfare'' determination must be made prior to the removal of the child from home, and documented in the initial removal court order to enable the child to be eligible for title IV–E foster care. The ''contrary to the welfare'' determination is an important protection to safeguard the rights of the child and his/her parents and to ensure appropriate action by the State agency.

Section 1356.21(c)(2) Contrary to the Welfare Determination—Emergency Situations

With regard to emergency situations, we propose that the ''contrary to the welfare'' determination be included in the first court ruling (including a temporary custody order, whether or not there was a hearing) pertaining to removal.

The ''contrary to the welfare'' determination requirement in section 472(a)(1) was a title IV–A provision dating back to 1961 which was carried over into the title IV–E program. Congress included this requirement in the belief that judicial oversight would prevent unnecessary removal of children from their homes. It relied on the courts to protect children and families, and to provide an important safeguard against potential inappropriate agency action. The purpose of the requirement is to minimize the number of children inappropriately placed in foster care, and increase efforts at keeping families together.

We do not intend to second guess the States as to when an emergency exists and will, therefore, in the absence of contradictory information, presume that there is an emergency when a child is removed without a previously-issued court order (excluding those for previous removals of the child, or in-home supervision orders). However, the reasonable efforts determination must be made within a specified time thereafter.

Section 1356.21(d) Documentation of Judicial Determinations

We have proposed modification of current documentation requirements in paragraph (d) based on ACF's review of States' documentation of judicial determinations over the past years. Consistent with language in section 472(a)(1) of the Act, in paragraph (d)(1) we propose that the judicial determinations regarding ''contrary to the welfare'' and ''reasonable efforts'' be stated specifically in the court orders identified in § 1356.21, paragraphs (b) and (c) and must include the evidentiary basis for that determination. The 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. A transcript of the court proceedings which verifies that the court considered the facts of the case and made a finding with respect to the reasonable efforts and contrary to the welfare requirements is the only other form of documentation that will be accepted.

Given the fundamental importance of the protection of children as required by the Act, we propose in paragraph (d)(2) that affidavits and *nunc pro tunc* orders not be accepted as documentation of ''reasonable efforts'' or ''contrary to the welfare'' findings for eligibility purposes. Considering the large number of children for whom State agencies are responsible, and the large number of cases that go before the courts, affidavits or depositions created months or years after the fact cannot be considered as reliable evidence of prior compliance with Federal requirements. We believe that a prohibition on the use of affidavits and *nunc pro tunc* orders is necessary in order to assure children in foster care of the protections to which they are entitled in a timely fashion.

In light of the significance of the judicial determinations, we are proposing in paragraph (d)(3) that explicit evidence be provided that the judge has made an individual determination which is to be stated in the court order and not merely incorporated by reference to a State law. We believe that judicial determinations should be as meaningful as possible, and should be child-specific in order to ensure that the circumstances of each child are reviewed individually. In the past, it has been our experience that State laws often permit removal of a child from home in a number of circumstances and not solely, for example, based on a determination that remaining in the home would be contrary to the child's welfare. When State law cites a number of circumstances under which a child may be removed, it is not possible for a reviewer to determine for which reason the judge authorized that removal. However, even if State law allows only one reason for removal which does meet Federal requirements, we are still proposing to require an explicit determination.

Section 1356.21(e) Trial Home Visits

We believe that six months is a reasonable period of time for States to determine the appropriateness of a child remaining at home or returning to foster care, absent a court order that extends or shortens the period of time. This is consistent with the statutory requirement for the status of the child to be reviewed every 6 months. During the period of time in which the child is on a trial home visit, no title IV–E foster care maintenance payments are made since she/he is not placed in a foster home or child care facility. However, administrative costs may be incurred on behalf of the child and claimed subsequently by the State agency. If the child is returned to foster care within the six month period, the placement is considered continuous and title IV–E foster care maintenance payments may resume, assuming all eligibility requirements continue to be met.

Section 1356.21(f) Case Review System

Paragraph (c) in this section of the current regulation has been re-designated paragraph (f).

Section 1356.21(g) Case Plan Requirements

Paragraph (d)(1)–(4) in this section of the current regulation has been re-designated paragraph (g)(1)–(4). In paragraph (g)(1), we propose that case plans be developed jointly with parents. We believe this language serves the goal of the ASFA to begin the permanency planning process and service delivery as soon as possible following a child's removal from home. If the parent is not able or willing to participate in the development of the case plan, it should be so noted in the plan. We have also amended paragraph (g)(3) to include the ASFA case plan requirement for States to include a discussion of the reasonable efforts made to make and finalize a permanent placement for the child in the case plan when the permanency goal is adoption or any other permanent arrangement. A State must document its

efforts to make and finalize permanent placements for all permanency goals. States should not interpret the statutory reference to adoption exchanges as meaning this provision only applies to adoptions. The statutory reference to the use of adoption exchanges was an example of the types of efforts a State should make to make and finalize permanent placements. Although placement in a permanent foster family home is not a preferred permanency goal, it can be an appropriate one for some children. Prior to establishing such a goal for a child, the State should exhaust all efforts to place that child in an adoptive home, with a legal guardian, or some other permanent arrangement outside the foster care system.

Section 1356.21(h) Application of Permanency Hearing Requirements

We have redesignated paragraph (e) as paragraph (h), revised it to recodify existing language, added four new provisions, and changed the name to *permanency hearing,* consistent with ASFA.

In redesignated paragraph (h)(2), language has been added to clarify that the exception to the requirement for permanency hearings applies only to children placed in a court-specified long-term, permanent *foster family home* placement (not in an institution or other group living arrangement). We also propose that a permanency hearing be conducted within three months of any change in a court-sanctioned long-term, permanent foster family care placement. Under the existing regulations, this exception also applies to children who were legally freed for adoption and placed in a preadoptive home. Consistent with the intent of the ASFA, children in such circumstances must be afforded the protection of permanency hearings until the adoption is finalized.

In new paragraph (h)(3) we describe the requirement of amended section 471(a)(15)(E) of the Act to hold a permanency hearing within 30 days of a judicial determination that reasonable efforts are not required. We have written the regulation to clarify that States need not hold a permanency hearing within 30 days if the court finds that reasonable efforts to prevent a child's removal from home are not required. A determination that reasonable efforts to prevent the child's removal are not required does not negate the State's obligation to make reasonable efforts to reunify the child. Only a judicial determination that reasonable efforts to reunify a child with his or her family are not required relieves the State of that obligation. Consequently, the permanency hearing must be held within 30 days of the determination that reasonable efforts to reunify the family are not required.

The statute allows the State to set an alternate permanency goal of placement in a permanent foster family home only if it demonstrates to the court a compelling reason not to place the child in an adoptive home, with a relative, or with a legal guardian. In new paragraph (h)(4), we follow the statute in requiring the State to document, to the State court, the compelling reason for placement in a permanent foster family home.

In new paragraph (h)(5) we clarify that if an administrative body, appointed or approved by a court, holds a permanency hearing, procedural safeguards extended to parents in court hearings must also be extended to the parents by the administrative body.

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

In this section, we describe the new requirements at section 475(5)(E) of the Act for termination of parental rights (TPR). Congress passed this provision to compel States to quickly move those children for whom adoption is the appropriate plan to permanency. It is not intended to create a pool of legal orphans. Misinterpretation of the reasonable efforts requirements and other factors have resulted in children remaining in foster care for extended periods of time while the State agency works to make the child's home safe for his or her return. Congress passed this provision to end children's languishing in foster care.

In paragraph (i)(1), we follow the statute in describing under what conditions the State, through its authorized attorney, must file or join a petition for TPR in accordance with section 475(5)(E) of the Act.

In subparagraph (i)(1)(i), we propose the requirements for filing or joining a petition to terminate parental rights when a child has been in foster care for 15 of the most recent 22 months. We are proposing that in such situations, the State must file the petition for TPR by the end of the fifteenth month. We think that 15 months is more than an adequate amount of time for States to assess whether reunification is possible and if adoption is the most appropriate permanent plan.

In subparagraph (i)(1)(i)(A), in accordance with the statute, we propose that States must begin calculating when to file the petition for TPR beginning on the date the child enters foster care under section 475(5)(F).

In subparagraph (i)(1)(i)(B), we propose that for the purpose of implementing the TPR provision for children with multiple foster care placement episodes within the 22 month period, the State must use a cumulative method of calculating 15 months in foster care. For example, a child enters foster care on January 15, 2001 and is discharged from foster care three months later on April 15, 2001. He remains home for six months and then enters foster care again on October 15, 2001. The State must apply the TPR requirement at section 475(5)(E) with respect to this child based on the date he entered foster care for the first foster care episode, or January 15, 2001. If this child remains in foster care for another 12 months, the State will be obliged to comply with section 475(5)(E) on October 15, 2002, because this child will have been in foster care for a cumulative total of 15 out of the previous 22 months. However, the time line for conducting case reviews, permanency hearings, and providing time-limited reunification services for the subsequent foster care episode must be based on the date the child entered foster care for that episode, October 15, 2001.

If the child in the above scenario does not return to foster care until January 15, 2003, the State must begin calculating a new 15 out of 22 month period for applying section 475(5)(E), the other case review requirements, and providing time-limited reunification services as of January 15, 2003, because this most recent date of entry into foster care is more than 22 months after the date the child entered foster care during the prior episode.

In subparagraph (i)(1)(i)(C), we propose that the State not count time spent on trial home visits or runaway episodes when calculating 15 out of 22 months.

Finally, in subparagraph (i)(1)(i)(D), we propose that States need only apply section 475(5)(E) to a child once. If, when a child reaches 15 months in foster care, the State does not file a petition for TPR because one of the exceptions applies, or the State does file such a petition but the court does not sustain that petition, the State does not need to begin calculating another 15 out of 22 months in foster care for that child. We think the requirements at sections 471(a)(15)(C) and (E) and 475(1)(E) of the Act regarding reasonable efforts to make and finalize alternate permanency placements and the requirements at section 475(5)(C) of the Act regarding permanency hearings

provide children sufficient protections with respect to achieving permanency, thereby removing the need to require multiple applications of section 475(5)(E) of the Act. However, this does not preclude the State from filing, or the court from ordering, a petition for TPR upon later review if the permanency plan has not been achieved.

In subparagraph (i)(1)(ii), we propose that, once a court of competent jurisdiction (this could be the court that has responsibility for hearing child welfare dependency cases) determines that a child is an abandoned infant, the State has up to 60 days to file a petition for termination of parental rights. We chose 60 days because this time frame allows the State ample time to hold a permanency hearing, if adoption is not established as the permanency goal at the hearing in which the child is determined to be an abandoned infant, and to complete the necessary procedures associated with filing a petition for termination of parental rights. States have asked if we intend to provide a definition of or parameters for the definition of ''abandoned infant.'' The statute specifically provides that authority to the States. If a State already has a statutory definition of ''abandonment,'' it is not necessary to enact statutory language specific to abandoned infants.

In subparagraph (i)(1)(iii), we propose that the State agency file a petition to terminate parental rights within 60 days of a judicial determination that reasonable efforts to reunify the child and family are not required because the parent has been found by a court of competent jurisdiction to have committed one of the felonies listed at paragraph (b)(5)(ii). We believe that 60 days from the judicial determination that reasonable efforts to reunify the family are not required is ample time for the State to hold a permanency hearing, if adoption is not established as the permanency goal at the time the court determines that reasonable efforts are not required, and to complete the necessary procedures for filing a petition to terminate parental rights. We have attempted to interpret the requirements for filing a petition for TPR when the parent has committed certain felonies based on how we think these circumstances will present themselves in actual practice situations and to demonstrate the relationship between sections 471(a)(15)(D) and (E) of the Act and section 475(5)(E) of the Act. The following examples illustrate how the foregoing procedure would operate:

(1) A parent with two children has been convicted of one of the felonies enumerated at paragraph (b)(5)(ii) with respect to the older child. The State agency petitions the court for jurisdiction of the younger child and recommends that it not be required to make reasonable efforts to reunify the younger child with the parent because of the criminal conviction against the parent with respect to the older child, and it does not believe the parent can be rehabilitated. The court determines, in accordance with section 471(a)(15)(D) of the Act, that reasonable efforts to reunify the younger child with the parent are not required. In accordance with section 471(a)(15)(E) of the Act, the State must hold a permanency hearing within 30 days of the judicial determination that reasonable efforts to reunify the parent and child are not required. If adoption becomes the permanency goal, the State then has 30 days from the permanency hearing to file a petition to terminate parental rights.

(2) A parent is convicted of one of the felonies listed in paragraph (b)(5)(ii), serves his/her sentence and is released from prison, and subsequently comes to the attention of the State agency due to neglect. The State agency petitions the court for jurisdiction of the child and recommends a permanency plan of reunification because it believes the parent can be rehabilitated. The court's approval of reunification as the permanency plan is the compelling reason for the State not to file a petition to terminate parental rights in accordance with section 475(5)(E) of the Act. The State would then be obliged to hold a permanency hearing within 12 months of the child's entry into foster care.

In paragraph (i)(2), we follow the statute in identifying the exceptions to section 475(5)(E) of the Act. The decision to seek termination of parental rights is one of the most difficult to confront social workers and State agencies. Section 475(5)(E) of the Act is intended to be a catalyst for making critical assessments of and decisions regarding the viability and probability of reunification and for expediting the adoption process when it is clear that reunification can not occur and adoption is the appropriate plan. Congress did recognize that, despite a family's diligent efforts, 15 months may be an inadequate amount of time to make the home safe for the child's return. Therefore, it stipulated three exceptions to section 475(5)(E).

In paragraph (i)(2)(i), we propose that the State may exercise its statutory option to not apply section 475(5)(E) of the Act when a child is placed with a relative.

In paragraph (i)(2)(ii), we propose that the State does not have to apply section 475(5)(E) of the Act when there is a compelling reason, documented in the case file and available for court review, for determining that the application of section 475(5)(E) is not in the child's best interests. We have not defined the term ''compelling reason.'' Rather, we provide two broad examples:

(1) Adoption is not the appropriate plan for the child. This category could include cases where an older child expresses a wish not to be adopted and another permanency plan has been identified, a child has a significant bond with a non-family member who wishes to serve as legal guardian, the parent and child have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and another permanency plan has been identified, or the State agency and the Tribe have identified another permanency plan for the child; or,

(2) Insufficient grounds for filing such a petition exist. This category could include cases where the parent has made significant measurable progress and continues to make diligent efforts to complete the requirements of the case plan but needs more than 15 months to do so, the State agency is working with a non-offending biological parent to establish a permanent placement, or the State need not join an existing petition if it does not agree with the arguments presented in the petition or it believes that the petitioner would not serve as an appropriate placement option for the child.

In paragraph (i)(2)(iii), we follow the statute in proposing that the State need not apply section 475(5)(E) when the services identified in the case plan have not been provided.

We think it is critical that we assess States' implementation of this new provision for terminating parental rights, particularly the extent to which States make use of the exceptions discussed above. In the self-assessment completed for the child and family services reviews, States will be asked to document the extent to which they make use of the exceptions provided at section 475(5)(E) of the Act.

During the consultation process we learned of confusion regarding the requirements for the court with respect to the compelling reason. We are not interpreting the statutory language which requires that the documentation of the compelling reason be ''* * * available for court review * * *'' as a requirement that the court make a determination with respect to the compelling reason. To interpret this language as requiring a court

determination with respect to the compelling reason not to file a TPR would place an unnecessary additional burden on the State agency and the courts. We do anticipate, however, that the court will have the opportunity to review the compelling reason not to file for TPR as part of its ongoing oversight.

In paragraph (i)(3), we follow the statute in requiring States to concurrently identify, recruit, process, and approve a qualified adoptive family for the child when it files for or joins a petition to terminate parental rights to that child.

Section 1356.21(j) Child of a Minor Parent in Foster Care

In this section, we paraphrase statutory language found in section 475(4)(B) of the Act.

Section 1356.21 (k) and (l) Removal From the Home of, and Living With, a Specified Relative

In paragraphs (k) and (l), we propose a new policy regarding the requirements in sections 472(a) (1) and (4) of the Act regarding a child's removal from the home of a relative and the six month ''living with'' exception. The purpose of this new policy is to provide a clear statement about what constitutes a child's home or foster home for the purpose of title IV–E eligibility and to ensure equitable treatment of relative and non-relative foster care providers.

Eligibility for foster care under title IV–E, which is based on the child's eligibility for AFDC (as in effect in the State on July 16, 1996), derives from the title IV–A (AFDC) requirement that the child must be living in the home of a relative specified in section 406(a) of the Act (as in effect on July 16, 1996). To be eligible for title IV–E, the child must have been eligible for AFDC in the month court proceedings leading to removal were initiated or the month in which a voluntary placement agreement was signed. If the child had not been living with a specified relative in the month that removal proceedings were initiated or the voluntary agreement was signed, s/he must have been: (1) Living with such a relative at some time within the previous six months; and (2) AFDC eligible in the month of the initiation of court proceedings leading to removal or the voluntary agreement if the child had still been living with such relative in that month. Obviously, the child must continue to be eligible at the time of entry into foster care as well as throughout the placement.

In the absence of regulations specific to the foster care program, we have previously followed the AFDC regulations at 45 CFR 233.90(c)(l)(v)(B). Under the AFDC definition, the child's home is the family setting maintained or in the process of being established as evidenced by assumption and continuation of responsibility for the day-to-day care and control of the child by a relative with whom the child is living, if the relative is one of specified degree. Under current policy, if a parent who is eligible for AFDC leaves a child with another relative and does not return, the child's home is considered to have shifted to the home of the other relative. If legal custody or responsibility for placement and care is given to the State agency and the child remains with the relative, such transfer of responsibility does not constitute removal, and the child is therefore ineligible for title IV–E foster care. Thus, current policy does not recognize that there can be a temporary or indefinite stay with another relative without that relative's home becoming the child's home.

Under the proposed policy change, an otherwise eligible child who had been living with a parent or other specified relative within six months of the initiation of court proceedings or a voluntary placement agreement would meet the ''living with'' requirement under the title IV–E foster care program, regardless of the child's relationship to the interim caretaker and regardless of whether the interim caretaker becomes the subsequent foster care provider. The removal of the child from the home of a specified relative within the six-month period can be either a physical removal or a court-ordered removal of custody.

The following examples illustrate the operation of the proposed rule:

(1) An AFDC eligible parent leaves the child with either a relative or a non-relative caretaker for the weekend. Two months later the parent has not returned. The caretaker contacts the State agency which petitions the court to remove the child from the parent's custody due to neglect. The court grants the petition and the State agency assumes responsibility for placement and care. The agency licenses the same caretaker's home as a foster home and decides that the child should remain with this caretaker for the purpose of foster care. The AFDC eligible child had been living with the parent within six months of the initiation of court proceedings. Under the proposed regulation (paragraph (j)(1)(iii) of § 1356.21), the court's authorization of the removal of the child from the parent's custody would meet the eligibility requirements in section 472(a)(1) and the fact that the child had been living with the parent within six months of the date of petition would meet the eligibility requirements in section 472(a)(4)(B)(ii). Thus, the child, if otherwise eligible, would be eligible for title IV–E foster care.

(2) The same situation as in (1) above exists, but the caretaker waits seven months to contact the agency and the agency makes the caretaker the foster care provider. The child would not be eligible for title IV–E foster care, regardless of whether the caretaker is or is not a relative, because she/he had not been living with the parent within six months prior to the initiation of court proceedings pertaining to removal. Thus, the requirements of section 472(a)(4)(B) and subsection (j) of § 1356.21 would not be met.

(3) An AFDC eligible parent leaves the child with a relative and does not return. The relative, who meets the AFDC eligibility criteria, keeps the child for seven months, but then requests that the child be removed and placed in a foster home. The State agency petitions the court to remove the child from the parent's custody. The court grants the petition and gives the State agency responsibility for placement and care. Although the court removes custody from the parent, the child is physically removed from the caretaker relative's home and is placed in a licensed foster family home. The child is eligible for title IV–E foster care because she/he has been physically removed from the home of a specified relative within six months of initiation of court proceedings and was eligible for AFDC while living there, and the ''living with'' requirement has been met, thus meeting the requirements of section 472(a)(1) and 472(a)(4)(B).

(4) The same situation as in (3) above exists, but the child had been living with a non-relative caretaker for seven months prior to placement in foster care. She/he would be ineligible for title IV–E foster care since the ''living with'' requirement of section 472(a)(4)(B) would not have been met.

(5) A parent and child live in the home of the parent's mother, all of whom are eligible for AFDC. The parent leaves the home and does not return. Four months later, the child's grandmother contacts the State agency which petitions the court to remove the child from the parent's custody due to her neglect. The court grants the petition and gives the State agency responsibility for placement and care. The agency licenses the grandmother's home as a foster home and decides that the child should remain with this relative caretaker for the purpose of foster care. Since the child had been living with the parent within six months of the initiation of court proceedings

and the court authorized removal of the child from the parent's custody, this would meet the eligibility requirements in sections 472(a)(1) and 472(a)(4)(B) and the otherwise eligible child would be eligible for title IV–E foster care. If the grandmother had waited longer than six months to contact the agency, the child would have been ineligible for title IV–E foster care in her home. However, if the grandmother had waited longer than six months to contact the agency and the agency physically removed the child from the grandmother and placed him/her in another licensed home for the purpose of foster care, the child would be eligible for title IV–E foster care because the child's eligibility is then tied to the grandmother.

We think that the proposed policy which expands the circumstances in which a child may remain with a relative and be eligible for foster care accords with the statutory purposes. Foster care placement with relatives can provide continuity during the period of separation from the parent and enhance the possibility that a child will ultimately be able to return home.

Section 1356.21 (m) and (n) Review of Payments and Licensing Standards; Foster Care Goals

Paragraphs 1356.21(g) and (h) in the current regulation have been re-designated paragraphs (m) and (n), respectively.

Section 1356.21(o) Notice and Opportunity To Be Heard

In this paragraph, we implement the new requirement for the case review system at section 475(5)(G) of the Act that mandates giving notice to foster parents, preadoptive parents and relative caregivers of hearings and reviews and provides them an opportunity to be heard. While Congress recognizes foster parents, preadoptive parents, and relative caregivers as a valuable resource in obtaining information regarding the progress of a case and in permanency planning, it intended only to provide these individuals an opportunity to provide input regarding the children in their care. Congress did not intend giving notice of and an opportunity to be heard to be construed as providing these individuals standing as a party to the case, as stated in the statute and proposed regulation. This provision does not, however, preclude the court from awarding foster parents, preadoptive parents, and relative caregivers standing. Foster parents, preadoptive parents, and relative caregivers must receive notice of permanency planning hearings and reviews that occur while a child is placed with them. We do not intend to prescribe how this noticing should occur. We presume that a State will use the same procedure for giving notice to foster parents, relative caregivers, and preadoptive parents as it does for parents and others who are parties to the case.

Section 1356.22 Implementation Requirements for Children Voluntarily Placed in Foster Care

This section has been redesignated and revised by updating the statutory and regulatory provisions which include the requirements a State must meet in order to receive title IV-E funds for voluntary foster care placements. The ASFA requirements, including expedited termination of parental rights, apply to all children in foster care, regardless of whether the child entered as a result of a voluntary placement agreement.

Section 1356.30 Safety Requirements for Foster Care and Adoptive Home Providers

In paragraph (a), we propose that the State conduct or require criminal records checks for prospective foster and adoptive parents unless it elects to ''opt out'' of this provision as provided for at section 471(a)(20)(B) of the Act. Section 471(a)(20) applies to all foster parents, including those foster family homes that operate under the auspices of a child placing agency's license rather than their own license.

In paragraph (b), we propose that the State may not license or approve any prospective foster or adoptive parent, nor may the State claim Federal reimbursement 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 the prospective foster/adoptive parent has been convicted of a felony involving child abuse or neglect, other crimes against children, spousal abuse, or a violent crime.

In paragraph (c), we propose that the State may not license or approve any prospective foster or adoptive parent, nor may the State claim Federal reimbursement 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 the prospective foster/adoptive parent has, within the last five years, been convicted of a felony involving physical assault, battery, or a drug-related offense.

In paragraph (d), we follow the statute in describing the means by which the State can elect not to conduct or require criminal records checks: a letter from the Governor to the Secretary indicating the State has made such an election or through State legislation. States should note that, because of the statutory connection to licensing and reimbursement for foster care maintenance and adoption assistance expenditures, conducting criminal records checks is an allowable title IV-E administrative expenditure.

We used the language ''conduct or require'' with respect to the State agency's role in obtaining criminal records checks because we do not intend to hold the State responsible for conducting criminal records checks on the employees of the child placing agencies with which it contracts for foster family placements. However, the State must have documentation that these checks have occurred before claiming title IV-E reimbursement for children placed with contractors.

In paragraph (e), we propose that, for all foster care placements and prospective adoptive homes where a criminal records check of the caretaker(s) has not been performed, the State must document, in the licensing file of that provider, the process or procedures it has undertaken to meet the safety requirements at section 475(1) of the Act.

This requirement applies to all foster family homes, adoptive homes, relative caregivers, and the staff of child care institutions. Section 475(1), as amended by the ASFA, requires States to ensure the safety of foster care and adoptive placements. The State may claim the cost of conducting this procedure as a title IV–E administrative expenditure, as it would if it elected to conduct criminal records checks.

During the consultative process we learned that there is confusion in the field regarding the ''final approval'' language in section 471(a)(20) of the Act. Final approval means full licensure or approval. Furthermore, States cannot claim Federal financial participation (FFP) for foster care maintenance and adoption assistance payments until all title IV–E eligibility criteria are met. Criminal records checks are a title IV–E eligibility requirement because licensure, in part, is predicated on such checks. Therefore, the State may not claim FFP until the criminal record

check has been completed and the foster or adoptive parent has final approval. The same holds true in those situations where the State chooses to comply with section 475(1) through some procedure or process other than a criminal records check.

We were asked during the consultation process if the ASFA requires criminal records checks at the State level, Federal level, or both. There is no statutory language that would suggest an answer to this question. Therefore, the State may exercise its discretion in choosing whether to conduct criminal records checks at the State or Federal level.

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

Although Federal standards and guidelines for title IV-E eligibility reviews have been previously issued in different forms of ACF policy memoranda, this is the first time they have been published in accordance with the rulemaking process. We have taken the opportunity to review these standards in the context of ACF's overall review strategy, and determined that some changes are warranted. The following paragraphs highlight the significant changes which we are proposing in this section, and the underlying rationales.

Section 1356.71(b) Composition of Review Team and Preliminary Activities Preceding an On-Site Review

In paragraph (b)(1), we propose that State agency staff participate in eligibility reviews as part of the review team. Our experience when conducting pilot reviews in conjunction with State staff proved to be an excellent example of how Federal and State staff can work together as partners. The experience of reviewing case records to ascertain whether appropriate documentation was in the record was often as useful and enlightening to State staff as it was to their Federal counterparts. As a result of their participation, State representatives could more easily pinpoint deficiencies and plan corrective action accordingly. Federal staff were able to provide immediate technical assistance to State staff as issues presented themselves, thereby increasing their knowledge base.

Paragraph (b)(2) proposes that the State agency provide ACF with the complete payment history for each of the 88 sample and oversample cases (or 165 cases, if a second review is warranted) prior to the on-site review. This information will enable ACF at the exit conference to provide the State agency with preliminary estimates of the potential disallowance (if any) of title IV–E funds based on the number of cases initially determined to be ineligible. Access to this information early in the review process will also prevent later delays in the calculation of final disallowances and the preparation of the final report.

Section 1356.71(c) Sampling Guidance and Conduct of Review

We propose that data reported in the Adoption and Foster Care Analysis and Reporting System (AFCARS) and transmitted to ACF by State agencies for the most recent reporting period be used by ACYF statisticians to select the title IV–E foster care sample of children to be reviewed. The ''period of review'' will coincide with the AFCARS reporting period, which is currently six months in duration. This procedure will reduce the burden on States (in the past, some States had elected to draw their own samples), promote uniformity in sample selection, and utilize the AFCARS database in a practical and beneficial way. If the AFCARS data for the most recent reporting period are not available or are deficient, an alternative sampling frame will be selected in conjunction with the State agency for the period of time comparable to the most recent AFCARS reporting period.

In determining the sample size for this new review system, we elected not to rely on or replicate that used in the prior review system, 50 cases. We originally planned to use a ''discovery'' sampling methodology with respect to the initial review. However, by definition, this would have resulted in a State being in non-compliance if one or more cases were found to be ineligible by the review team.

Therefore, after deliberating over various combinations of sample sizes and critical numbers of ineligible cases, a more reasonable ''acceptance'' sampling methodology requiring a sample size of 80 (plus a 10 percent oversample of eight cases) with a critical number of eight (ineligible cases) is proposed based on the following information.

According to Appendix D: Table for Determining Minimum Sample Size and for Evaluating Attributes Sample Results in *Practical Statistical Sampling for Auditors* by Arthur J. Wilburn (A copy is reprinted at Attachment B at the end of this Preamble with permission of the publisher), there is an 88 percent probability that the population ineligibility case error rate (case error rate) in a universe size that exceeds 1000 is less than 15 percent when the number of ineligible cases is less than or equal to eight. (Wilburn's text is found in a 1984 publication by Marcel Dekker Inc. called STATISTICS: Textbooks and Monographs series, volume 52). This probability is sufficiently high for ACF to propose that a case error rate of less than 15 percent be utilized as the standard by which States will be determined to be in compliance. We are proposing a higher case error rate than that previously used in title IV–E reviews (the previous standard was a 10 percent error rate) in recognition of the fact that States will need some time to modify procedures and/or implement system modifications to comply with the proposal requiring documentation of judicial determinations of ''reasonable efforts'' to reunify a child and family, to make and finalize a permanent placement when the case plan goal is not reunification, and that reasonable efforts to prevent a removal or to reunify a child with his or her family are not required. We are proposing that, after a three-year transition period, the case error rate threshold revert to less than 10 percent, with the critical number of ineligible cases equal to four in a sample of 80 cases. Under the proposed rule, States in which cases were determined to be ineligible would be subject to disallowances equivalent to the amount of payments associated with those cases for the entire period of time they have been determined to be ineligible.

We also propose that States in which ACF has made a final determination of substantiated ineligibility for nine or more cases undergo a second eligibility review following the completion of their program improvement plans (see paragraph (i) of this section). It is anticipated that the successful implementation of the program improvement plan will contribute significantly to the correcting of deficiencies identified during the first review and, as a consequence, result in smaller disallowances. Upon completion of the subsequent review consisting of 150 cases, we propose that disallowances be made based on an extrapolation from the sample to the universe of payments made during the period reviewed. (This larger sample size is necessary in order to accommodate the extrapolation procedure and ensure its statistical validity). Critical values that will determine whether an extrapolated disallowance will be assessed against the State will be the same as those utilized in previous eligibility reviews to determine whether a stage two review would be conducted, that is, both the

case and dollar error rates will have to exceed 10 percent. (Case and dollar error rates are determined by dividing the number of cases in the sample, and the total of their associated payments, by the number of ineligible cases and the total of their associated payments, respectively). If either or both of these error rates is less than 10%, there will be no extrapolation and the disallowance amount will be computed only on the basis of payments associated with ineligible cases for the period of time they have been determined to be ineligible.

Section 1356.71(e) Review Instrument

The eligibility review checklist which has been used in past on-site reviews has undergone significant modification in order to accommodate policy changes reflected in this proposed rule. It has been repeatedly tested during pilot reviews conducted by ACF in fiscal years 1995 through 1998.

State agencies and ACF Regional Offices participating in these reviews were asked to evaluate the checklist and provided comments on its format, language, and content. ACF will make available to the States copies of the checklist upon publication of the final rule.

Section 1356.71(f) Eligibility Determination—Child

In this paragraph, we propose that the case record contain proper and sufficient documentation, in accordance with paragraph (d)(1) to verify a child's eligibility.

Section 1356.71(g) Eligibility Determination—Provider

In order to ascertain that children are being properly placed in foster care provider facilities which are in compliance with statutory requirements contained in sections 472(c), 471(a)(20), and 475(1)(A) of the Act, we propose that the State agency make available pertinent licensing files to the review team. These files must contain the licensing history, including documentation in the form of letters of approval or certificates of licensure/approval, and substantiate that for each case being reviewed the facility(ies) in which the child is placed is(are) licensed or approved (during the period of care under review) by the agency in the State responsible for this activity. The licensure or approval must be in accord with standards established by the State which are consistent with recommended standards of national organizations for the licensure of foster homes and institutions and include documentation that safety requirements per § 1356.30 have been met. If the licensing file does not contain sufficient information to support a child's placement in a facility, as determined by the reviewer, then the State agency may provide supplemental information via access to other resources, for example, a computerized database. Failure to provide appropriate documentation supporting a child's placement in a properly licensed or approved facility will result in a finding of ineligibility for the case for a specified period of time. In determining the period of ineligibility, any foster care home or facility that is licensed for a portion of a month will be considered to have been licensed that entire month.

Section 1356.71(h) Standards of Compliance

In this section, we propose definitions of ''substantial compliance'' and ''non-compliance'' so that ACF will be able to make this determination, and so that State agencies will know beforehand the standard to which they must adhere. When discussing what a reasonable standard of compliance might be for States to meet, we considered retaining a 10 percent error rate which had been the standard used in earlier reviews to determine whether or not a State had to undergo a stage two review. If we apply this standard in future reviews where we plan to examine a sample of 80 foster care cases, it means that, in accordance with ''acceptance'' sampling methodology, a State's case records could contain no more than four errors (ineligible cases) if it is to be in ''substantial compliance'' with statutory and regulatory eligibility requirements. This determination, in conjunction with the recognition that States in the future will need to document judicial determinations of ''reasonable efforts'' to reunify a child and his/her family and to make and finalize alternate permanent placements, leads us to believe that maintenance of the 10 percent error rate for the initial review would be too stringent under these circumstances. Therefore, we propose as a new standard an acceptable error rate of less than 15 percent, thus permitting a State to have as many as eight errors (ineligible cases) within a sample of 80 cases and still be in ''substantial compliance'' for its initial review. However, we propose that three years after the date the final regulation becomes effective, this error rate decrease to 10 percent based on the expectation that States will have had sufficient time to modify their procedures to accommodate the new requirements regarding the documentation of judicial determinations of ''reasonable efforts'' to reunify the family and to make and finalize alternate permanent placements.

Section 1356.71(i) Program Improvement Plans

We propose in paragraph (i)(1) to require that States determined not to be in substantial compliance develop a program improvement plan designed to correct the areas of non-compliance, and that it be developed jointly between the State and ACF in keeping with the desire to promote State and Federal partnerships through the reviews. Under the former title IV–E review process, ineligible title IV–E payments were identified and, if claimed by States, were subsequently disallowed. While this procedure, in most cases, allowed for the recovery of funds by ACF, it did not necessarily lead to correcting the deficiencies identified by reviewers. We propose that the program improvement plan identify action steps to be taken by the State to correct deficiencies identified by the review team, and that each action step have a projected completion date which will not extend more than one year from the date the program improvement plan is approved by ACF. (When a legislative change is necessary to bring a State into substantial compliance, an extension of the one-year time frame may be negotiated between the State agency and ACF). This will assure that proper attention is given to correcting deficiencies in a timely manner. In this way, by identifying the problems, proposing solutions, and implementing corrective action, we expect to remove the basis for future adverse findings of non-compliance.

Approval of the program improvement plan means that ACF is in agreement with the information provided within it, and does not mean that a State can be assured of being in ''substantial compliance'' following a subsequent review of its case records.

In paragraph (i)(2), we propose that the State agency submit a program improvement plan to ACF within 60 days after receiving notification that it is not in substantial compliance. We think a period of 60 days is adequate for a program improvement plan to be developed, since the on-site review will have identified the reasons for disallowing certain cases, and it is our intention to convey this information to the State agency verbally at the exit conference as well as in the letter of notification following the review. However, if the State agency and ACF need more time to submit and/or review additional documentation in support of

cases determined to be ineligible, a 30-day extension may be granted to accommodate this task. We would appreciate comments as to whether the time frame for the joint development of the program improvement plan is adequate as proposed.

Section 1356.71(j) Disallowance of Funds

We propose that the amount of funds to be disallowed be determined by the extent to which a State is not in compliance with eligibility requirements. A State which is in ''substantial compliance'' would have its disallowance calculated on the basis of the number of actual cases reviewed and found to be ineligible. We propose that the disallowance be computed on the basis of payments associated with the ineligible cases for the entire period of time that each case has been determined to be ineligible. Thus if, for example, a case was deemed ineligible on the basis that a judicial determination regarding ''contrary to the welfare'' had not been properly made at the time a child was removed from home, all title IV–E payments which were claimed for this case from the time of removal would be disallowed. For States found to be in ''non-compliance'' after the first review (i.e., not in substantial compliance), we propose that they have a disallowance calculated on the same basis, but also be required to develop and implement a program improvement plan and undergo a second review.

Since the implementation and completion of a program improvement plan may take as long as one year, we propose that a second review be conducted during the AFCARS reporting period which immediately follows the latest projected completion date approved in the program improvement plan. For example, if there were three action steps outlined in a program improvement plan with completion dates of January 1, April 1 and July 1, 1998, the second review must be conducted sometime between October 1, 1998 and March 31, 1999. This should allow sufficient time for the planning and preparation that needs to take place by Federal and State agencies prior to an on-site review, as well as provide an opportunity for the review team to examine cases which will have been impacted by a State's corrective action. The review will provide a basis for determining if a State has successfully corrected deficiencies identified in the program improvement plan and continued to meet all other eligibility requirements since the first review was conducted. If the review team determines that a State is in ''substantial compliance'', a second disallowance will be calculated on the basis of actual cases reviewed and found to be ineligible. We propose that this disallowance be computed on the basis of payments associated with the cases from the point in time from which they have been determined to be ineligible.

If a State remains in non-compliance, we propose that the disallowance be determined based on extrapolation from the sample to the universe of claims paid for the duration of the AFCARS reporting period under review (currently six months). Thus a State should be able to forestall a potentially significant disallowance by focusing its efforts on improving specified aspects of operations identified as needing strengthening. However, in any event, we anticipate that disallowances resulting from the second review of cases made in States determined to be in non-compliance will be smaller than those taken in the past by ACF. This is due to a number of reasons: (1) the required implementation of a program improvement plan for States that are in non-compliance; (2) the provision of technical assistance (upon request) to a State agency by ACF; (3) the State agency's own efforts to correct the deficiencies identified in its program improvement plan; and (4) the fact that any extrapolated disallowance will be for a six-month period of time (corresponding with the reporting period of AFCARS unless, or until such time as, it changes), rather than a one-year period of time as has been the case in past years. More important than the monetary benefits that may accrue to States from ACF's new monitoring approach, however, is the recognition that the protections afforded children under title IV–E are likely to be provided and subsequently documented by States in the future in a more consistent manner.

In paragraph (j)(3), we specify that the State agency will be liable for applicable interest on the amount of funds disallowed by the Department, in accordance with regulations at 45 CFR 30.13.

XII. 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 Notice of Proposed Rulemaking presents a revised framework for reviews of Federally-assisted child and family services and for reviews of related eligibility determinations for Federally-assisted foster care programs. The revised review procedures for these programs were developed in response to concerns expressed by the Congress and the States regarding the effectiveness of the current review procedures and the benefits to the States relative to the efforts required of them. ACF had begun revising the review procedures when Congress, through the Social Security Amendments of 1994 (Public Law 103–432), mandated changes in the Federal monitoring of State child and family service programs funded under titles IV–B and IV–E. In conformance with this legislation, we are proposing regulations for child and family service programs which will:

- determine whether these programs are in substantial conformity with applicable State plan requirements and Federal regulations;
- develop a timetable for conformity reviews; and
- specify the State plan requirements subject to review, and the criteria to be used in determining a State's substantial conformity with these requirements.

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 non-profit 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.

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). This proposed 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, for an annual cost of $225,420. This estimate was based on the burden hours associated with each information collection identified in the ''Paperwork Reduction Act'' section. We did not include State travel costs in the estimate because these costs will vary significantly based on how a State chooses to structure its participation in the reviews.

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 NPRM contains information collection requirements in certain sections which the Department has submitted to OMB for its review.

The sections that contain information collection requirements are: 1355.33(b) on State self-assessments, and (c) on submission of data; 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 needs to require this collection of information: (1) in order to review States' compliance with the provisions of the statute and implementing regulations of title 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.

The frequency of State responses will vary. It is known that each State will have to do self assessments at least once every three years. States not in substantial conformity must submit a program improvement plan. Case plans for title IV–E must be done in accordance with the case review system. The following table provides annual estimates of the burden hours associated with each collection.

Collection	Number of respondents	Number of responses	Average burden hours per response	Total burden hours
1355.33(b)—State Agency Self Assessment	17—State Agencies Administering the Title IV–B & E Programs.	1	240	4,080
1355.33(c)—On-Site Review	17—State Agencies Administering the Title IV–B & E Programs.	35	8	4,760
1355.35(a)—Program Improvement Plan	17—State Agencies Administering the Titles IV–B & IV–E Programs.	1	80	1,360
1355.38 (b) and (c)—Corrective Action Plan	5—State Agencies Administering Titles IV–B and IV–E.	1	80	400
1356.71(i)—Program Improvement Plan	17—State Agencies Administering the Title IV–E Program.	1	63	1,071

When the Department publishes its pre-clearance Notice requesting approval of this information collection under the Paperwork Reduction Act, we will publish, in their entirety, the self-assessment and the on-site review instruments.

The Administration for Children and Families will consider comments by the public on this proposed collection of information in:

- Evaluating whether the proposed collections are necessary for the proper performance of the functions of ACF, including whether the information will have practical utility;
- Evaluating the accuracy of ACF's estimate of the burden of the proposed collection of information;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations. Written comments to OMB for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW, Washington, DC 20503, Attn: Desk Officer.

List of Subjects

45 CFR Part 1355

Adoption and foster care, child welfare, grant programs—social service programs.

45 CFR Part 1356

Adoption and foster care, administrative costs, fiscal requirements (title IV–E).

Attachment A To The Preamble (For discussion on § 1355.34)—Index of Performance Indicators to Outcomes

1. *Safety Outcome 1:* Children are, first and foremost, protected from abuse and neglect, and are safely maintained in their homes whenever possible.

Performance Indicators

- Services to family to protect child(ren) in home.
- Current risk of harm to child.
- Child deaths due to maltreatment.

2. *Safety Outcome 2:* The risk of harm to children will be minimized.

Performance Indicators

- Timeliness of initiating investigations.
- Repeat maltreatment.
- Current risk of harm to child.
- Child maltreatment in foster care.
- Child deaths due to maltreatment.

3. *Permanency Outcome 1:* Children will have permanency and stability in their living situations.

Performance Indicators

- Foster care re-entries.
- Stability of foster care placement.
- Unachieved permanency goals.
- Independent living services for youths >16 y.o.
- Use of long term foster care.
- Effectiveness of adoption services.

4. *Permanency Outcome 2:* The continuity of family relationships, culture and connections will be preserved for children.

Performance Indicators

- Proximity of current placement.
- Placement with siblings.
- Visiting with parents and siblings in foster care.

- Cultural connections and preservation.
- Relative placement.
- Current relationship of child in care with parents.

5. *Well-Being Outcome 1:* Families will have enhanced capacity to provide for their children's needs.

Performance Indicators

- Needs and services of child, parents, foster parents.
- Child and family involvement in case planning.
- Current relationship of child in care with parents.
- Worker visits with child.
- Worker visits with parents.

6. *Well-Being Outcome 2:* Children will receive appropriate services to meet their educational needs.

Performance Indicators

- Educational needs of the child.

7. *Well-Being Outcome 3:* Children will receive adequate services to meet their physical and mental health needs.

Performance Indicators

- Physical health of the child.
- Mental health of the child.

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Appendix B to the Preamble discussion on S1356.71(c)
Probability That Error Rate in Universe
Size of Over 1,000 is Less Than:*

Size of Sample Examined	Number of Errors Found	1%	2%	3%	4%	5%	6%	7%	8%	9%	10%	12%	14%	16%	18%	20%
40	0	33.10	55.43	70.43	80.46	87.15	91.58	94.51	96.44	97.70	98.52	99.40	99.76	99.91	99.96	99.99
	1	6.07	19.05	33.85	47.90	60.10	70.10	77.99	84.06	88.60	91.95	96.12	98.20	99.19	99.65	99.85
	2	0.75	4.57	11.78	21.45	32.33	43.35	53.75	63.06	71.06	77.72	87.39	93.24	96.55	98.31	99.21
	3	0.07	0.82	3.14	7.48	13.82	21.73	30.63	39.93	45.08	57.69	72.32	83.02	90.16	94.58	97.15
	4	0.01	0.12	0.67	2.10	4.80	8.96	14.54	21.32	28.97	37.10	53.31	67.62	78.90	87.02	92.44
	5		0.01	0.12	0.49	1.39	3.09	5.82	9.67	14.65	20.63	34.64	49.58	63.46	75.04	83.87
	6			0.02	0.10	0.34	0.91	1.99	3.76	6.39	9.95	19.80	32.45	46.31	59.71	71.41
50	0	39.50	63.58	78.19	87.01	92.31	95.47	97.34	98.45	99.10	99.49	99.83	99.95	99.98	100.00	100.00
	1	8.94	26.42	44.47	59.95	72.06	81.00	87.35	91.73	94.68	96.62	98.69	99.52	99.83	99.94	99.98
	2	1.38	7.84	18.92	32.33	45.95	58.38	68.92	77.40	83.95	88.83	94.87	97.79	99.10	99.65	99.87
	3	0.16	21.78	26.28	13.91	23.96	35.27	46.73	57.47	66.97	74.97	86.55	93.30	96.88	98.64	99.43
	4	0.02	0.32	1.68	4.90	10.36	17.94	27.10	37.11	47.23	56.88	73.21	84.72	91.92	96.01	98.15
	5		0.05	0.37	1.44	3.78	7.76	13.51	20.81	29.28	38.39	56.47	71.86	88.23	90.71	95.20
	6		0.01	0.07	0.36	1.18	2.89	5.85	10.19	15.96	22.98	39.35	56.16	70.81	81.99	89.66
60	0	45.28	70.25	83.92	91.37	95.39	97.56	98.72	99.33	99.65	99.82	99.95	99.99	100.00	100.00	100.00
	1	12.12	33.81	54.08	69.78	80.85	88.21	92.91	95.92	97.58	98.62	99.57	99.87	99.96	99.99	100.00
	2	2.24	11.87	26.85	43.24	58.26	70.60	80.02	86.83	91.54	94.70	98.04	99.32	99.79	99.93	99.98
	3	0.31	3.22	10.57	21.87	35.27	48.87	61.27	71.71	80.00	86.26	93.99	97.59	99.10	99.69	99.90
	4		0.73	3.40	9.17	18.03	29.11	41.15	52.98	63.73	72.90	86.12	93.57	97.27	98.93	99.61
	5		0.13	0.91	3.25	7.87	14.98	24.20	34.74	45.71	56.28	74.10	86.23	93.35	97.05	98.79
	6			0.21	0.99	2.97	6.71	12.50	20.20	29.37	39.36	59.08	75.29	86.50	93.27	96.92
70	0	50.52	75.69	88.14	94.26	97.24	98.69	99.38	99.71	99.86	99.94	99.99	100.00	100.00	100.00	100.00
	1	15.53	40.96	62.47	77.51	87.03	92.81	96.10	97.93	98.92	99.45	99.86	99.97	99.99	100.00	100.00
	2	3.34	16.50	35.08	53.44	68.63	79.87	87.59	92.60	95.72	97.58	99.28	99.80	99.95	99.99	100.00
	3	0.54	5.19	15.87	30.71	46.61	61.15	73.07	82.10	88.53	92.88	97.48	99.19	99.76	99.93	99.98
	4	0.07	1.32	5.93	14.85	27.21	41.13	54.77	66.80	76.61	84.12	93.36	97.51	99.16	99.74	99.92
	5		0.28	1.86	6.12	13.72	24.27	36.58	49.24	61.06	71.28	85.94	93.92	97.64	99.17	99.73
	6		0.50	0.50	2.18	6.04	12.61	21.75	32.70	44.40	55.82	74.98	87.57	94.50	97.81	99.20
	7			0.12	0.68	2.34	5.80	11.54	19.54	29.33	40.12	61.33	78.12	89.04	95.06	98.00
	8			0.02	0.19	0.80	2.38	5.49	10.54	17.59	26.37	46.66	66.03	80.85	90.36	95.63
	9				0.05	0.25	0.88	2.36	5.14	9.60	15.86	32.88	52.46	70.10	83.23	91.55
80	0	55.25	80.14	91.26	96.18	98.35	99.29	99.70	99.87	99.95	99.98	100.00	100.00	100.00	100.00	100.00
	1	19.08	47.70	69.62	83.46	91.40	95.68	97.89	98.99	99.53	99.78	99.96	99.99	100.00	100.00	100.00
	2	4.66	21.56	43.19	62.52	76.94	86.56	92.50	95.96	97.89	98.93	99.74	99.94	100.00	100.00	100.00
	3	0.87	7.69	21.93	39.84	57.16	71.42	81.50	89.11	94.69	96.47	98.99	99.74	99.99	99.99	100.00
	4	0.13	2.24	9.28	21.64	37.11	52.83	66.67	77.65	85.69	91.20	97.01	99.10	99.94	99.94	99.99
	5		0.55	3.33	10.12	21.08	34.78	49.18	62.50	73.66	82.31	92.91	97.52	99.76	99.78	99.95
	6		0.11	1.03	4.12	10.53	20.39	32.73	46.03	58.79	69.96	58.92	94.30	99.23	99.36	99.82
	7			0.28	1.47	4.66	10.68	19.64	30.89	43.24	55.44	75.84	88.77	97.97	98.36	99.47
	8				0.47	1.84	5.02	10.65	18.88	29.21	40.73	63.29	80.54	95.44	96.37	98.69
	9				0.13	0.65	2.13	5.24	10.51	18.10	27.66	49.61	69.88	84.34	92.88	97.13
	10					0.21	0.82	2.35	5.36	10.31	17.34	36.86	57.45	75.28	87.43	94.35
90	0	59.53	83.77	93.55	97.46	99.01	99.62	99.85	99.95	99.98	99.99	100.00	100.00	100.00	100.00	100.00
	1	22.73	53.96	75.60	87.95	94.33	97.43	98.87	99.51	99.80	99.92	99.97	99.98	100.00	100.00	100.00
	2	6.19	26.88	50.90	70.30	83.36	91.20	95.56	97.85	98.99	99.54	99.91	99.92	99.99	100.00	100.00
	3	1.29	10.68	28.49	48.74	66.42	79.55	88.26	93.59	96.65	98.31	99.61	99.69	99.93	99.99	100.00
	4	0.22	3.48	13.41	29.20	47.03	63.36	76.31	85.55	91.61	95.35	98.72	99.05	99.93	99.98	100.00
	5		0.96	5.39	15.19	29.48	45.60	60.84	73.52	83.05	89.68	96.63	97.58	99.77	99.97	99.99
	6		0.23	1.88	6.92	16.39	29.53	44.35	58.69	71.05	80.75	92.60	94.70	99.31	99.90	99.96
	7			0.57	2.79	8.13	17.23	29.45	43.22	50.81	68.85	85.99	89.83	98.27	99.70	99.87
	8			0.16	1.00	3.62	9.08	17.81	24.27	42.20	55.13	76.65	82.61	96.21	99.22	99.65
	9				0.32	1.45	4.32	9.83	18.21	29.03	41.25	65.05	73.09	92.64	98.20	99.14
	10					0.53	1.89	4.97	10.43	18.48	28.75	52.23	61.82	87.13	96.34	98.10
100	0	63.40	86.74	95.25	98.31	99.41	99.80	99.93	99.98	99.99	100.00	100.00	100.00	100.00	100.00	100.00
	1	26.42	59.67	80.54	91.28	96.29	98.48	99.40	99.77	99.91	99.97	100.00	100.00	100.00	100.00	100.00
	2	7.94	32.33	58.02	76.79	88.17	94.34	97.42	98.87	99.52	99.81	99.97	100.00	100.00	100.00	100.00
	3	1.84	14.10	35.28	57.05	74.22	85.70	92.56	96.33	98.27	99.22	99.86	99.98	100.00	100.00	100.00

*This chart is found at Appendix D: Table for Determining Minimum Sample Size and for Evaluating Attributes Sample Results in *Practical Statistical Sampling for Auditors*, by Author J. Wilburn. It is printed with permission of the publisher, *Marcel Dekkes, Inc.*

BILLING CODE 4184–01–C

(Catalog of Federal Domestic Assistance Program Numbers 93.658, Foster Care Maintenance; 93.659, Adoption Assistance and 93.645, Child Welfare Services—State Grants)

Dated: April 30, 1998.

Olivia A. Golden,

Assistant Secretary for Children and Families.

Approved: July 8, 1998.

Donna E. Shalala,

Secretary.

For the reasons set forth in the Preamble, 45 CFR Parts 1355 and 1356 are proposed to be amended 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 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 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 the child enters foster care means the earlier of: the date of the first judicial finding that the child has been subjected to child abuse or neglect and placement and care responsibility is given to the State by the court; or, the date that is 60 calendar days after the date on which the child is physically removed from the home. When a child enters foster care on the basis of a voluntary placement agreement, the ''date a child enters foster care'' means the date on which the voluntary placement agreement is signed. This definition determines the date used in calculating all time period requirements related to the case review system in section 475 of the Social Security Act and for providing time-limited reunification services described at section 431(a)(7) of the Act.

* * * * *

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 pre-adoptive 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 the 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, agency workers, 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. (1) *Daily supervision* for which foster care maintenance payments may be made includes:

(i) *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; and

(ii) *Child-care institutions*—routine day-to-day direction and arrangements to ensure the well-being and safety of the child.

(2) [Reserved]

Foster family home means the home of an individual or family licensed or approved 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. Provisional licensure or approval is insufficient for meeting title IV–E eligibility requirements. States may not claim title IV–E reimbursement until final licensure or approval is granted.

Full hearing (often referred to by State courts as the evidentiary hearing, jurisdictional hearing, fact-finding hearing, merits or adjudication hearing) is the civil hearing in which the allegations, as set forth in the petition, of dependency, abuse or neglect concerning a child are addressed. The hearing enables the court to determine which allegations of the petition have been proven or admitted, if any, and whether court or agency intervention should continue. This is the hearing in which the State agency is assigned responsibility for placement and care of the child. The full hearing is never a shelter care hearing or emergency removal hearing (see definition of *temporary custody proceeding*).

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 State self-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 (Public Law 93–247), as amended.

Partial review means the joint Federal and State review of one or more 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. 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.

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:

(i) The child will be returned to the parent;

(ii) The child should be placed for adoption, with the State filing a petition for termination of parental rights;

(iii) The child should be referred for legal guardianship;

(iv) The child should be placed permanently with a fit and willing relative; or

(v) The child should be 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 return home, be referred for termination of parental rights and placed for adoption, placed with a fit and willing relative, or placed with a legal guardian.

(2) The permanency hearing must be held no later than 12 months after the date the child enters foster care 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 considered permanency hearings.

* * * * *

State self-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 self-assessment refers to the completion of the Federally-prescribed self-assessment instrument by members of a review team that meet the requirements of § 1355.33(a)(2) of this part.

Temporary custody proceeding (often referred to as the shelter care hearing, detention hearing, preliminary protective hearing, or emergency removal hearing) is the judicial proceeding held at the time of, or shortly after, the emergency removal of a child from the home. This proceeding gives the State agency temporary custody of a child until a full hearing is held.

* * * * *

3. New sections 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 1355.39 of this part apply to reviews of child and family services programs administered by States and Indian Tribes 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 three-year period that begins six months 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 State self-assessment to ACF three years after the on-site review. The State self-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 State self-assessment by ACF is required.

(2) State programs 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) Complete a full review in the six month period that begins three years after the 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 information that indicates the State may no longer be operating in substantial conformity.

(2) Prior to conducting a full or partial review, ACF will conduct an inquiry and require the State to submit additional data whenever the following information indicates that the State may not be in substantial conformity:

(i) Information included in the State self-assessment (completed between full reviews) or Annual Progress and Services Reports on the CFSP;

(ii) Information from reports from data bases, including the Adoption and Foster Care Analysis and Reporting System (AFCARS) and the National Child Abuse and Neglect Data System (NCANDS);

(iii) Information from reviews, audits or assessments conducted by ACF, the Office of Inspector General, or other public or private organizations;

(iv) The disposition of class action lawsuits brought against a State, whether such disposition is through the process of litigation or through settlement of the lawsuit through a consent decree; or

(v) Other information brought to the attention of the Secretary.

(3) If the additional information and inquiry indicate to the satisfaction of ACF that the State is operating in substantial conformity, ACF will not proceed with any further review of the issue addressed by this inquiry at this time.

(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.

§ 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 State self-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 who 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 State was required to consult in developing its CFSP, as described and required in 45 CFR 1357.15(l);

(iii) Federal staff of HHS; and

(iv) Other individuals, as deemed appropriate and agreed upon by the State and ACF.

(b) *State self-assessment.* The first phase of the full review will be a State self-assessment conducted by the internal and external State members of the review team. The self-assessment must assess:

(1) The outcome areas of safety, permanency, and well-being of children and families served by the State agency;

(2) The characteristics of the State agency that impact most significantly on the agency's capacity to deliver services to children and families that will lead to improved outcomes; and

(3) The strengths and areas of the State's child and family services programs that require further examination through an on-site review.

(c) *On-site review.* The second phase of the full review will be an on-site review.

(1) The on-site review will cover specific areas of the State's child and family services continuum. It will be jointly planned by the State and ACF, and guided by information in the completed State self-assessment that identifies areas thought to be 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 Regional Office and the State, provided the State's largest metropolitan subdivision is one of the locations selected for the on-site review.

(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) Social workers, foster parents, and service providers for the cases selected for the on-site review; and

(iv) Interviews with other individuals, such as those representing the sources of consultation for the development of the State's CFSP, as required by 45 CFR 1357.15(l).

(5) The composition of the sample of cases selected for the on-site review, by number of cases and type of cases, will be jointly determined by the ACF Regional Office and the State, based on the findings of the State self-assessment, subject to the following criteria:

(i) Cases comprising the sample, including any sub-samples, of the sample must be randomly selected;

(ii) The number of cases reviewed must be sufficient to evaluate the qualitative issues agreed upon by the ACF Regional Office and the State as the focus of the on-site review based on analysis of the State self-assessment and any other relevant data available to the State;

(iii) The sampling plan used to select cases for the on-site review must be approved by the ACF designated official.

(d) *Partial review.* A partial review, when required, will be planned and conducted jointly by ACF and the State agency based on the nature of the concern.

(e) Within 30 calendar days following either a partial or full 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.* A State's substantial conformity with title IV–B and title IV–E State plan requirements will be based on the following:

(1) its ability to meet criteria related to outcomes for children and families;

(2) its ability to meet criteria related to the State agency's capacity to deliver services leading to improved outcomes;

(3) aggregate data in the State self-assessment used to examine each outcome and performance indicator which corroborates the findings of the on-site component of the review, and;

(4) the determination of conformity by the ACF Regional Office based on the criteria described in paragraphs (a) through (c) of this section.

(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 are safely maintained in their homes whenever possible; and

(B) The risk of harm to children is minimized;

(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 will 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 implemented the following CFSP requirements or assurances:

(i) 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;

(ii) The requirements in 45 CFR 1357.15(q) regarding the permanency provisions for children and families in sections 422 and 471 of the Act;

(iii) The requirements in section 422(b)(9) of the Act regarding recruitment of potential foster and adoptive families;

(iv) 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;

(v) The requirements in section 422(b)(11) of the Act regarding the State's compliance with the Indian Child Welfare Act;

(vi) 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,

(vii) 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 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.

(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. Information from the self-assessment and the on-site review must indicate that the State has implemented the referenced State plan requirements related to the State agency's capacity to deliver services leading to improved outcomes, and actually delivered those services, by meeting each of the criteria listed for the following core systemic factors:

(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 parents' 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 social worker 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 (section 422(b)(10)(B)(ii) 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 (section 422(b)(10)(B)(ii) 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) (section 422(b)(10)(B)(ii) of the Act);

(iv) provide a process for termination of parental rights proceedings in accordance with section 475(5)(E) 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.

(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 State self-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 include, 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 jurisdictions covered in the State's CFSP; and,

(vi) services that can be individualized to meet the unique needs of children and families served by the agency.

(6) *Agency responsiveness to the community:* (i) the State, in implementing the provisions of the CFSP, engages in ongoing consultation with a broad array of individuals and organizations representing the State and county agencies responsible for implementing the CFSP and other major stakeholders in the services delivery system including, at a minimum, tribal representatives, consumers, service providers, foster care providers, the juvenile court, and other public and private child and family serving agencies (45 CFR 1357.15(l)(4));

(ii) the agency develops, in consultation with these or similar representatives, annual reports of progress and services delivered pursuant to the CFSP (45 CFR 1357.15(l)(4));

(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) 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 take place.

§ 1355.35 Program improvement plans.

(a) *Mandatory program improvement plan.* States found not to be operating in substantial conformity shall develop a program improvement plan. The program improvement plan must:

(1) Be developed jointly by State and Federal staff in consultation with the review team;

(2) Identify the areas in which the State's program is not in substantial conformity;

(3) 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;

(4) 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;

(5) 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.

(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 the program improvement plan to ACF for approval within 60 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 this part will apply.

(d) *Duration of program improvement plans.* A State will have two years to successfully complete the provisions in its program improvement plan. However, a State must complete provisions in its program improvement plan that address child safety in less than two years. The level of risk to child safety will be considered by the State and ACF in determining such time frames. The ACF may grant a one-year extension, for a maximum of three years, when the provisions in the program improvement plan are too extensive for the State to successfully complete within the two-year period.

(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;

(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;

(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; and

(iii) The renegotiated plan is approved by ACF.

(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 conform following the completion of a State's 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 foster care 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) Title IV–B funds and a portion of title IV–E funds will be withheld for States determined not to be operating in substantial conformity only after the State has had an opportunity to correct the areas of nonconformity through the development and implementation of a program improvement plan.

(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 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'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.

(4) The amount of title IV–B and title IV–E funds to be withheld by ACF will be computed as follows:

(i) The pool of title IV–B and title IV–E funds from which funds will be withheld due to a determination that a State is not operating in substantial conformity includes:

(A) The State's allotment of title IV–B funds for each of the years to which withholding applies, and

(B) 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.

(ii) An amount equivalent to one percent of the funds described in paragraph (b)(4)(i) 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)(2) of this part that is determined not to be substantially achieved, and

(iii) An amount equivalent to one percent of the funds described in paragraph (b)(4)(i) 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)(2) of this part that is determined not to be in substantial conformity.

(5) The maximum amount of title IV–B and title IV–E funds to be withheld due to the State's failure to comply is fourteen percent per year of the funds described in paragraph (b)(4)(i) 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 under the following circumstances:

(1) When the State's failure to conform is ended by the successful completion of a program improvement plan;

(2) Upon determination by the State and ACF that action steps have been completed and goals achieved as specified in the program improvement plan, ACF will rescind the withholding of the portion of title IV–B and title IV–E funds related to those goals as of the date at the end of the quarter in which they were determined to be achieved.

(e) *Withholding of funds.* (1) States determined not to be in substantial conformity which 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 latest 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) Funds related to goals and action steps which have not been achieved at the conclusion of a program improvement plan will be withheld by ACF at that time for a period beginning October 1 of the fiscal year for which the determination of nonconformity was made to the latest completion date specified in the program improvement plan; and

(ii) 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.

(3) When the point in time at which the State is determined to be in substantial conformity 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 withholding of fourteen percent of its title IV–B and title IV–E funds, as described in paragraph (b)(5) of this section, for each year or portion thereof to which the withholding of funds applies.

(5) *Interest on withheld funds.* 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 self-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, if applied, would likely result in a violation against a person as defined in paragraphs (2)(i) and (2)(ii) of this section.

(3) ACF will provide the State or entity involved 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 regulation.

(5) Compliance with the Indian Child Welfare Act of 1978 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.

(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, obtain approval of, and implement a corrective action plan within six months of receiving notification from ACF that it is in violation of section 471(a)(18) of the Act. If the State fails to implement the corrective action plan within six months, a penalty will be imposed in accordance with paragraph (g)(3).

(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 re-submit the plan until it has an approved plan.

(4) ACF will consider a State to have implemented its corrective action plan when it begins to carry out the action step(s) in the plan.

(5) Once implemented, a State must complete the corrective action plan according to the time frame in the plan. If the State fails to complete the corrective action plan within the specified time, a penalty will be imposed in accordance with paragraph (g)(3) of this section.

(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 dates for completing each action step. Extension of these dates may be negotiated with ACF.

(e) *Evaluation of corrective action plans.* ACF may evaluate action steps in a corrective action plan that address a violation of section 471(a)(18) as they are completed. 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 of the latest projected completion date specified in the plan. 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 notification of failure to complete the plan.

(f) *For the purposes of this section:* The term *title IV–E funds* refers to the Federal share of expenditures a State claims 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 may be reduced in specified amounts in accordance with subsection (h) 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 or complete a corrective action plan described in paragraph (c) of this section.

(2) Once ACF notifies a State 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 notification and for each succeeding quarter within that fiscal year or until the State completes a corrective action plan, whichever is sooner.

(3) For States that fail to implement or complete a corrective action plan as described in paragraph (c) of this section, 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, whichever is sooner.

(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 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, whichever is sooner.

(5) The maximum number of quarters that a State will have its title IV–E funds reduced due to the 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.

(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 amount of title IV–E funds claimed by the State for the fiscal year in which the first finding of noncompliance was made;

(ii) 3 percent of the amount of title IV–E funds claimed by the State for the fiscal year in which the second finding of noncompliance was made;

(iii) 5 percent of the amount of title IV–E funds claimed by the State for the fiscal year in which the third or

subsequent finding of noncompliance was made.

(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 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 in violation of section 471(a)(18) of the Act:

(a) May appeal 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(b) 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 receives notice of the decision by the Board. The State must appeal 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 has been determined to be in violation of section 471(a)(18) which is based on a judicial decision.

PART 1356—REQUIREMENTS APPLICABLE TO TITLE IV–E

4. 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.

5. Section 1356.20 is amended by revising 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 authority for determining that proposed plan material is not approvable, or that a previously approved plan no longer meets the requirements for approval.

* * * * *

6. Section 1356.21 is revised to read as follows:

§ 1356.21 Foster care maintenance payments program implementation requirements.

(a) 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, and sections 472, 475(1), 475(4), 475(5) and 475(6) of the Act.

(b) *Reasonable efforts.* 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), (d) and (g)(4) 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 removal in non-emergency situations.* When a child is removed from home pursuant to a court order, the court must determine, before issuing such an order, whether reasonable efforts had been made to prevent removal prior to the removal of the child from home. Except as specified in paragraph (b)(2) of this section, if a judicial determination regarding reasonable efforts to prevent removal is not made prior to the child's removal from the home, as evidenced in the court order initiating that removal, 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 determinations of reasonable efforts to prevent removal in emergency situations.* (i) A child will be considered to be removed from his/her home in an emergency situation when a court order has not been obtained in advance of the removal.

(ii) When it is necessary to remove a child from his/her home prior to obtaining a court order, the judicial determination as to whether reasonable efforts were made to prevent removal or that reasonable efforts to prevent removal were not required in accordance with paragraph (b)(5) of this section must be made at the first full hearing pertaining to removal of the child or no later than 60 days after a child has been removed from home, whichever is first. A State may claim Federal financial participation from the first day of the month in which all eligibility criteria have been met.

(iii) If the determination concerning reasonable efforts to prevent removal is not made as specified in clause (ii) above, the child is not eligible under the title IV–E foster care maintenance payments program for the duration of that stay in foster care.

(3) *Judicial determination of reasonable efforts to reunify the child and family.* (i) The court must determine that the State agency made reasonable efforts to reunify the family within twelve months of the date the child enters foster care when the permanent plan or goal for the child is to reunify the family, and at least once every twelve months thereafter as long as the permanent plan or goal is reunification. If such a judicial determination regarding reasonable efforts to reunify is not made, the child becomes ineligible under title IV–E from the end of the twelfth month following the date the child entered foster care or the most recent judicial determination of reasonable efforts to reunify, and remains ineligible until such a determination is made.

(ii) When, in accordance with paragraph (b)(5), the court determines that reasonable efforts to reunify the child and family are not required, the State must hold a permanency hearing within 30 days of such a determination, unless the requirements of the permanency hearing are fulfilled at the hearing in which the aforementioned determination was made.

(4) *Judicial determination of reasonable efforts to make and finalize permanent placements other than reunification.* The court must determine that the State agency made reasonable efforts to make and finalize a child's permanent placement at least once every twelve months from the date the permanency goal becomes adoption or placement in another permanent home. If such a judicial determination regarding reasonable efforts to make and finalize a permanent placement is not made, the child will become ineligible under title IV–E from the end of the

twelfth month following the date the alternate permanency goal was established or the most recent judicial determination of reasonable efforts to make and finalize a permanent placement, and will remain so until such a determination is made.

(5) *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:

(A) committed 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) committed 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) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

(D) committed 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 to a sibling have been terminated involuntarily.

(6) Reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts to reunify.

(7) The State may use the Federal Parent Locator Service to search for absent parents in order to facilitate the permanency plan.

(c) *Contrary to the welfare determination.* Under section 472(a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interests, of the child.

(1) *In nonemergency situations.* When a child is removed from home pursuant to a court order, the court must make the ''contrary to the welfare'' determination prior to the removal of the child from home. The judicial determination must be documented in the court order which removes the child from home. If such a judicial determination is not made prior to the removal, the child is not eligible for title IV–E foster care maintenance payments for the duration of his/her stay in foster care.

(2) *In emergency situations.* When it is necessary to remove a child from home prior to obtaining a court order, 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 his/her stay in foster care.

(d) *Documentation of judicial determinations.* The judicial determinations regarding ''contrary to the welfare'' and ''reasonable efforts'' to prevent removal, reunify the family, make and finalize a permanent placement, and that reasonable efforts are not required must be explicit 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 which reference and rely on State law to substantiate that judicial determinations have been made 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 must not exceed six months in duration, unless a longer visit is ordered by a court. 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 a foster care setting, that placement must then be considered a new placement and title IV–E eligibility must be re-established. Under these circumstances, a new court order removing the child from the home, including judicial determinations regarding ''contrary to the welfare'' and ''reasonable efforts'' to prevent removal, is 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 time the State agency assumes responsibility for providing services including placing the child; and

(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 interest and special needs of the child; and

(4) Include a description of the services offered and the services provided to prevent removal of the child from the home, to reunify the family, and 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.

(This requirement has been approved by the Office of Management and Budget (OMB) under OMB control number 0980–0140)

(h) *Application of permanency hearing requirements.* (1) If a State chooses to claim Federal financial participation (FFP) for the costs of foster care maintenance payments, it must, among other requirements, comply with those in section 475(5)(C) of the Act.

(2) The provisions of this paragraph and section 475(5)(C) of the Act apply to all children under the responsibility of the title IV–E State agency for placement and care, except for a child with special needs or circumstances which prevent his or her return to the home or being placed for adoption. If this child is placed in a court-sanctioned permanent foster family home with a family caregiver specified by the court, no permanency hearings are required during that specified permanent placement. If the foster care placement of this child is subsequently changed, the State is again required to hold permanency hearings, the first of which must be held within three months of the date of such change.

(3) In accordance with paragraph (b)(5) 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 aforementioned determination was made.

(4) If the State concludes, after considering other permanency options, that the most appropriate permanency plan for a child is placement in a permanent foster family home, the State must document, to the State court, the compelling reason which prevented the child from being placed in an adoptive home, with a relative, or with a legal guardian. An example of a compelling reason for establishing such a permanency goal is the case of an older teen who specifically requests that such a goal be established.

(5) 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) Unless one of the exceptions at subparagraph (2) exists, 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 use the date the child entered foster care as defined at section 475(5)(F) of the Act as the date from which the 22 month clock begins for calculating the 15 months in foster care;

(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) to a child once if the State does not file a petition because one of the exceptions at paragraph (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 found, by a court of competent jurisdiction, to have committed one of the felonies listed at paragraph (b)(5)(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 child. Two examples of compelling reasons for not filing a petition to terminate parental rights are:

(A) that adoption is not the appropriate permanency goal for the child; or,

(B) insufficient grounds for filing a petition to terminate parental rights exist; 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 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 title IV–E eligibility under the requirements of section 472(a)(1) of the Act, the term *removal from the home* applies if a child had been living with a parent or other specified relative within six months of:

(i) a voluntary placement agreement entered into by such parent or relative which leads to physical removal of the child from the home;

(ii) a State agency's initiation of court proceedings which results in a judicial removal of the child from such parent or relative; or

(iii)the State agency's physical removal of the child from the home of another specified relative, or a court-ordered removal of custody from the specified relative while the child was residing in the home of an interim caretaker.

(2) Under the circumstances described in paragraph (k)(1) of this section, the act of ''removal from the home'' must have occurred for the purposes of title IV–E eligibility. This does not include 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.

(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), either of the two following situations may apply:

(1) The child was living with and physically removed from the home of the parent or specified relative and was AFDC eligible in that home in the month of initiation of court proceedings, as well as at the time of removal; or

(2) The child was removed from the custody of the parent or specified relative with whom the child had been living within six months of the month in which court proceedings were initiated and the child would have been AFDC eligible in that month if he/she 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 provided such administrative regulation has 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 notice of and an opportunity to be heard in permanency planning hearings and 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 provide a foster parent, preadoptive parent, or a relative caring for the child with standing as a party to the case.

7. Section 1356.30 is redesignated as section 1356.22 and paragraphs (a) and (b) 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(h), (i), and (j); 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 date the voluntary placement agreement was signed by all pertinent parties unless there has been a judicial determination by a court of competent jurisdiction, within the first 180 days of the date the voluntary placement agreement was signed, 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.

8. 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, that 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 children (including child pornography); or,

(4) a violent crime, 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 no criminal records check was conducted, the licensing file for that foster family, adoptive family, child care institution, or relative placement must contain documentation that safety considerations with respect to the caretaker(s) have been addressed.

§§ 1356.65, 1356.70 [Removed]

8. § 1356.65 and § 1356.70 are removed.

9. 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 and scope.* (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.

(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 be responsible for providing 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. If these data are not available or are deficient, an alternative sampling frame 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 first 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 listed in error in AFCARS.

(4) At the completion of the first eligibility 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. (Three years after the date the final rule becomes effective, the acceptable population ineligibility case error rate threshold will be reduced from less than 15 percent (eight ineligible cases) to less than 10 percent (four 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 have been determined to be ineligible.

(5) A State which has been determined to be in ''non-compliance'' (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 second on-site review. For the second review, a sample of 150 cases (plus a 10 percent oversample of 15 cases) will be drawn from the most recent AFCARS submission. Cases from the oversample will be substituted and reviewed for each of the original sample of 150 cases which is listed in error in AFCARS.

(6) At the completion of the second eligibility 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 only for the ineligible cases for the period of time the cases have been determined to be ineligible. The State must provide the payment history for all 165 cases at the beginning of the eligibility review.

(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).

(2) The eligibility of the providers of foster care (see sections 471(a)(20), 472(b) and (c), and 475(1) of the Act).

(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 proper and sufficient documentation to verify a child's eligibility in accordance with paragraph (d)(1), 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, relative, 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 non-compliance are defined as follows:

(i) *Substantial compliance*—For the first review (of the sample of 80 cases), eight or fewer of the title IV–E cases reviewed must be determined to be ineligible. (This critical number of ''errors'', i.e., ineligible cases, is reduced to four errors or less, three years after the final rule becomes effective). For the second 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 first 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 ''errors'', i.e., ineligible cases, is reduced to five or more three years after the final rule becomes effective). For the second review (if required), *noncompliance* means both the case ineligibility and dollar error rates exceed 10 percent.

(3) The ACF will notify the State in writing within 30 calendar days after the completion of the on-site eligibility 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 (i.e., a State will have a maximum period of one year in which to implement the provisions 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 the first review must submit the program improvement plan to ACF for approval within 60 calendar days from the date the State receives the 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's program improvement plan is not submitted for approval in accordance with the provisions of paragraph (i)(1) and (2) of this section, funds will be disallowed

pursuant to the provisions of paragraph (k) 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 first or second 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 determined to be ineligible.

(2) States which are found to be in *noncompliance* during the first 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 second 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 non-compliance 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. 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.

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