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¦ LOCAL COMMISSIONERS MEMORANDUM ¦
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DSS-4037EL (Rev. 9/89)

Transmittal No: 99 OCFS LCM-30

Date: November 24, 1999

Division: Administration

TO: Local District Commissioners

SUBJECT: · TITLE IV-E Notice of Proposed Rule Making (NPRM)
Part 1356 (Proposed Federal Regulations)

ATTACHMENTS: · Notice of Proposed Rule Making
Part 1356 (not available on-line)

I. PURPOSE

On September 16, 1998 the federal Department of Health and Human Services (DHHS) issued a Notice of Proposed Rule Making (NPRM) for Parts 1355 and 1356 of Title 45 of the Code of Federal Rules (CFR). The purpose of this memorandum is to advise social services districts of the proposed requirements and the likely impact of the proposed amendments to Part 1356 on Title IV-E documentation and claiming in the event the proposed regulations are made final as currently written. Proposed revisions to Part 1355 of the NPRM which, among other items, discusses child and family services reviews and related safety and permanency requirements of the Adoption and Safe Families Act (ASFA) does not affect Title IV-E case eligibility and is not discussed in this LCM.

II. BACKGROUND

Social services districts were previously advised in 99 OCFS LCM-7 of the initial results of the Title IV-E pilot review and the consequent need to develop a program improvement plan to address the eligibility documentation and audit response issues raised by that review. The proposed federal regulations would pose significant additional challenges in determining and claiming Title IV-E properly because they would make substantial changes to the documentation requirements. Therefore it is

important to consider the implications and potential consequences the proposed regulations may have. NOTE: The standards set forth in the proposed federal regulations referenced in this LCM are not in effect and, until they become effective, social services districts must continue to comply with the standards currently in effect in Section 18 NYCRR Part 426.

III. Part 1356 of the NPRM

A copy of Part 1356 of the NPRM is attached for your reference. The citations from the NPRM and comments made in this LCM are for informational and planning purposes. The period for public comment ended December 17, 1998 and OCFS took full advantage of the opportunity at the time. We have been informally advised by the federal Administration for Children and Families (ACF) that, in all likelihood, the final regulations will be issued by January 2000 with little or no modification from the NPRM. The regulations may be effective upon issuance, or, ideally, there will be an implementation or phase-in period. However, we can not assume the latter situation and, even if there is an implementation period, it will be very short in duration. We need to plan accordingly.

Part 1356 of the NPRM focuses on documentation requirements. Districts that currently have practices and procedures in place that focus on the securing of and easy accessibility to Title IV-E related documents will have a strong foundation for accommodating the proposed requirements. A social services district's ability to develop or secure Title IV-E documentation in all areas of Title IV-E eligibility, including issues not covered in the NPRM or otherwise discussed in this LCM, such as the Title IV-E requirement of relating to the former Aid to Dependent Children program, is critical to passing Title IV-E reviews and audits.

A. Court Order Language Requirements.

Current federal Title IV-E eligibility requirements include documentation of court determinations that the child's removal from his or her home is in the child's "best interest" (or remaining in the home would be "contrary to the child's welfare") and that the agency made "reasonable efforts" to avoid or reduce the need for placement.

1. "Reasonable Efforts" Determinations

Section 1356.21(b) of the NPRM proposes significant revisions in the reasonable efforts determination requirements, particularly affecting the time frames for securing such determinations, case circumstances requiring such determinations, and impact on Title IV-E eligibility for failure to secure and retain such determinations.

The NPRM defines a non-emergency removal as one done under a court order: the NPRM defines an emergency removal as one done without a court order.

Section 1356.21(b)(1), as proposed, would require that the court order resulting in a non-emergency removal must contain a determination that either the agency made reasonable efforts to avoid the removal or that such efforts were not required. The determination must be documented in the removal order. A court may determine that the agency's decision not to provide services other than foster care prior to removal was reasonable. Districts should document such decisions for the court's determination. Alternatively, the court may determine that reasonable efforts are not required. Such determination must also be documented in the order. Failure to obtain a court determination in the removal order that either reasonable efforts were made or that such efforts were not necessary will result in ineligibility for Title IV-E for the entire placement.

Section 1356.21(b)(2) would require that, for emergency removals, the agency must secure a court determination at the first full hearing after the removal, or no later than 60 days after the removal, that reasonable efforts to avoid the removal were made or that such efforts were not necessary. Failure to obtain a determination documented in the removal order that reasonable efforts were made or that such efforts were not necessary would result in Title IV-E ineligibility for the entire placement.

Whether for emergency or non-emergency removals, if the court cites any of the reasons detailed in the State statute that implemented ASFA, i.e. Chapter 7 of the Laws of New York of 1999, as to why reasonable efforts are not required, a permanency hearing for the child must be held within 30 days of that determination. Examples of such reasons are the "aggravated circumstances" enumerated in Chapter 7 and the involuntary termination of parental rights for a sibling of the child.

The NPRM also contains two new reasonable efforts requirements.

Section 1356.21(b)(3) of the NPRM would require that, for cases with a permanency goal of reunification with the family, the court make a determination within the first 12 months of the placement * that the agency has made reasonable efforts to achieve reunification. The court must renew such determination every 12 months thereafter as long as the child remains in care. Under the State's current regulations, these requirements would be met as a result of the holding of a permanency hearing. Failure to secure such determinations timely will result in the loss of Title IV-E eligibility until such determination is made in a court order.

Likewise, section 1356.21(b)(4) of the NPRM would require that, for cases with a permanency goal other than reunification, the court make a determination no later than 12 months after the permanency goal has been established that the agency has made reasonable efforts to achieve that goal. The court must renew such a determination every 12 months thereafter. Under the State's current regulations, these requirements would be met as a result of the holding of a permanency hearing. Failure to secure this determination timely will result in the loss of Title IV-E eligibility until such determination is made in a court order.

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* see the NPRM section 1356.21 for the definition of when a child begins foster care.

2. "Best Interests" or "Contrary to the Welfare" Determinations

The NPRM Section 1356.21 (c) would continue the requirement that the court order contain a determination to the effect that the child's "best interests" are met by his or her removal from the home or that it would be "contrary to the welfare" of the child for him or her to remain in the home. Prior ACF reviews, Department Appeals Board (DAB) decisions as well as ACF's commentary on the NPRM indicate that a court determination that a child is at "imminent risk" or "in need of placement or treatment" in effect meets the requirement of the "best interests" determination. We understand that there will be no change in the ACF policy that such various phrasing in an order will continue to be accepted for meeting this requirement. However, it is recommended that districts pursue a conservative approach and always secure the court order language as provided by the Family Court Act and as found in the proscribed court orders issued by the Office of Court Administration (OCA). The most current version of the OCA mandated forms can be found in the OCFS public folder on Exchange under "ASFA-Family Court Forms".

Sections 1356.21 (c) (1) and (2) of the NPRM would make the time frames for the court to make "best interests" determination more stringent. In instances of a removal made in a non-emergency situation, the court must determine in the removal order that the child's "best interests" are met by removing the child from his or her home. For emergency situations, i.e. a removal order was not issued prior to the removal, the court must determine in the first order issued after the removal that the child's "best interests' were met by the removal from the home - even if that order is a remand. Failure to obtain a "best interest" determination within these time frames would result in Title IV-E ineligibility for the entire placement.

The NPRM would not make any changes in Title IV-E documentation regarding voluntary placement agreements. For purposes of Title IV-E eligibility, placements made pursuant to a voluntary placement agreement have not been subject to reasonable efforts determinations even when a court approves the placement agreement. However, the court's review and approval of a voluntary placement agreement that the placement is in the child's "best interests" by day 180 of the placement remains a condition of Title IV-E eligibility.

3. Documentation Standards

Section 1356.21(d) describes documentation standards for the judicial determination that would be accepted for establishing Title IV-E eligibility. ACF is proposing to prohibit the use of court records, other than certified transcripts of court proceedings, as a substitute for court order wording to document determinations of "reasonable efforts" or "best interests". This would exclude "nunc pro tunc" orders, citations of State law, and bench notes for this purpose.

It is recommended that social services attorneys discuss the proposed requirements with family court judges and staff to begin considering any changes that may be needed to meet requirements for Title IV-E eligibility and claiming. Courts and social services attorneys should currently be using the recently released OCA court order forms noted above. The

documents do require, as always, appropriate editing and preparation but are useful when properly completed. Such efforts will reduce the incidence of non-compliance with State plan requirements and forfeiture of Title IV-E reimbursement. State law has been amended to accommodate these requirements. OCFS staff can assist social services districts in providing data and guidance as requested when they review these issues with family court judges and staff. The court order forms may need to be amended once ACF promulgates their final regulations.

The above-cited sections of the NPRM could have potentially serious negative consequences on a district's ability to document Title IV-E eligibility. Social services districts and the family courts need to be prepared to implement on a timely basis any changes required by the final regulations.

B. Renewing Legal Authority For Placement

The NPRM would affect the time frames for renewing legal authority because of the mandated annual determinations of "reasonable efforts" to reunify the child with his or her family or to achieve alternate permanency goals. For example, the NPRM would require permanency hearings every 12 months for voluntary placement agreements, Article 3 (Juvenile Delinquents) and 7 (Persons In Need of Supervision) placements to document the mandated court order language necessary to maintain Title IV-E eligibility. The State Legislature, through Chapter 7 of the Laws of 1999, enacted corresponding changes in the Family Court Act and Social Services Law to accommodate these requirements.

C. Removal Of The Child From The Home

Part 1356(k)(iii) of the NPRM proposes limited recognition for meeting the Title IV-E removal requirement where the child had been living with a relative on an interim basis before the initiation of legal proceedings leading to foster care and that relative becomes the foster parent. According to the commentary released with the NPRM, ACF proposes to recognize that the Title IV-E removal criteria to have been met in cases where the parent also lived in the relative's home within the six month period preceding the month the legal proceedings leading to the child's removal were initiated.

ACF provides examples in their commentary, two of which are summarized below.

> 1) A child is left with a relative for a week by his or her parent. However, the parent does not return for the child. Two months later the relative contacts the social services district, who then files an Article 10 neglect petition against the parent. The resulting court order gives care and custody to the social services district which places the child in the relative's home who they have approved as a kinship foster parent. The placement passes the removal criteria for Title IV-E because the child had been living with the parent within six months of the district initiating court proceedings. If the petition had not been filed within the six months following the month the child last lived with

the parent, the case would fail the removal test and would not be Title IV-E eligible for the entire duration of the placement.

2) A parent and the child live together in the same residence as the parent's mother. The parent leaves the home and does not return. After caring for the child for five months, the grandmother notifies the social services district. The district files an Article 10 petition and issues an emergency kinship approval for the grandmother's home the next day. The court issues a remand giving care and custody to the commissioner. This case also passes the removal test. If the district had not filed the petition within six months after the month the parent last lived with the child, the case would fail the removal test.

It is critical that social services districts adequately document the child's living arrangements prior to his or her entry into foster care in order to demonstrate whether or not the removal criteria has been met.

D. Provider Eligibility

Federal ASFA legislation requires that the State and social services districts complete criminal record background checks (CRBC) on prospective foster and adoptive parents. ASFA specifically prohibits states from issuing a final license to prospective foster and adoptive parents until the criminal background check is successfully completed. This requirement is the first time that federal law or regulation specifies requirements and processes for meeting foster care home licensing standards.

The proposed section 1356.30 and ACF's commentary stress the need to document the certification and approval processes as a condition for qualifying payments to the home as eligible for Title IV-E reimbursement. ACF has also emphasized their position that Title IV-E claims may not be made until final licensing of a foster home is completed and documented. As ASFA requires the CRBC be completed as a condition of final licensing, ACF's position precludes Title IV-E claiming on payments to homes granted an emergency approval or certification. This includes the emergency or 24 hour kinship approval which had been recognized as Title IV-E compliant for the first 60 days of care. ACF issued this opinion even before the regulations under Part 1356 have been revised and made final.

OCFS does not agree with ACF that payments to homes granted an emergency approval or certification issued pursuant to State regulations would be ineligible for Title IV-E funding. Criteria for emergency licensing in specific situations is provided in Office regulations Parts 443 and 444. The processes for completing the mandated CRBC are discussed in detail in 99 OCFS INF-7. However, ACF policy impacts our claiming instructions and procedures. Social services districts have been advised regarding the claiming requirements in 99 OCFS LCM-8 and subsequent correspondence from OCFS related to Chapter 7 of the Laws of 1999. Because ACF continues to insist that Title IV-E claims can not be made on new homes (homes that were not in final license status as of January 1, 1999), we must continue the special claiming requirements for otherwise eligible Title IV-E payments made to new homes undergoing initial licensing pursuant to the emergency regulations.

Authorized agencies and social services districts must make and retain copies of any and all certifications and approvals that they issue, including those issued on an emergency basis pursuant to regulations. Agencies must maintain the copies in their provider records for up to six years after their expiration for purposes of documentation as it is essential for meeting foster care audit standards.

E. Other Issues

There is one clarification announced in the NPRM which is not related to the findings from the pilot review but which will impact Title IV-E claiming. Section 1356.21(e) provides for six months trial discharge status if the court order providing care and custody remains in effect. This would allow for administrative expenses related to the trial discharge to be reimbursed under Title IV-E. If the trial discharge goes beyond the six month maximum and the child then returns to a foster care setting, the placement is considered to be a new one for purposes of Title IV-E eligibility and all elements of eligibility must be re-established, including a new court order for placement containing appropriate determinations.

The proposed revisions also discuss time frames and requirements for filing a petition to terminate parental rights. This requirement is not a Title IV-E eligibility issue but is a state plan requirement. Social services districts were advised of these changes in 98 OCFS INF-3.

IV. The Program Improvement Plan (PIP) Requirements

Part 1356.71 of the NPRM proposes significant changes in the procedures for future Title IV-E eligibility reviews. The reviews will be Statewide and not restricted to or focused on selected social services districts. There potentially would be two phases to the review. The review period would be 6 months rather than the current practice of auditing one or more federal fiscal years. For the first time, there would be a tolerance level in both phase I and phase II of the review. ACF would continue to use payments claimed as Title IV-E as its source for review. Cases opened in years preceding the review period but still active at least one day during the period would be subject to review. Thus it is essential that the Title IV-E documentation, which in many areas are based on events and records of the time of the child's initial placement, be maintained for audit purposes.

Phase I of the review would entail an 80 case sample with an over sample to account for cases listed in error. If the case and payment ineligibility rates for the State were determined to be no more than 10%, the State would be determined to be in substantial compliance and only the specific cases found ineligible would be disallowed from Title IV-E claiming.

If either the payment or case error rate exceeds 10%, the State would be determined to be in non-compliance. Section 1356.71(i) of the NPRM requires that the State develop a Program Improvement Plan which would be subject to review and approval by ACF. The federal agency also would be required to provide technical support in the development of the plan. The State would have at least one year to implement the plan. A Phase II review of 150 cases would be required after the plan was implemented and had time to be effective. If the State was found to be in non-compliance in this

second review, disallowances would be assessed Statewide based on statistical extrapolations. This could result in significant disallowance of federal reimbursement unless the State, the social services districts and the family courts work together to correct the documentation, eligibility and claiming problems indicated in the earlier pilot review. This cooperative effort is all the more important with the advent of ASFA and the federal regulations when they are made final. OCFS staff are available to provide technical assistance to social services districts in planning and implementing any changes that result from the final regulations.

V. CONTACTS

If you or your staff have questions regarding this LCM or wish to request assistance, please contact Mr. John Murray at (518) 474-0131 or Mr. John Conboy at (518) 402-0147.

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Deputy Commissioner for Administration