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

Transmittal No: 97 LCM-38

Date: May 21, 1997

Division: MSQI

TO: Local District Commissioners

SUBJECT: Federal & State Reimbursement For Foster Care Costs

ATTACHMENTS: A: MODULE 3 OF THE NYSAC CONTRACT (Available on-Line  
B: Agency for Children, Youth and Families - Information  
Memorandum - 89-08 (Available on-line)  
C: Agency for Children, Youth and Families - Information  
Memorandum - 87-28 (Available on-line)

I. PURPOSE

The purpose of this memorandum is to:

1. reemphasize with social service districts the ongoing documentation requirements of the foster care program administered pursuant to Title IV-E of the Social Security Act (SSA) which provides federal participation in the maintenance cost of foster care;
2. note the end of Title IV-A Emergency Assistance to Families (EAF) as a federal funding source for the foster care area and the implications of that fact;
3. remind social services districts that while children can be eligible for SSI, Titles IV-E and IV-A(EAF) simultaneously, they cannot be in receipt of SSI and Titles IV-E or EAF benefits for the same period of time and that they must carefully weigh the benefits of SSI when contrasted with Titles IV-E and IV-A (EAF) in choosing which benefits package to pursue, and
4. advise social services districts of their roles and responsibilities when working with the State's contractor, the New York State Association of Counties (NYSAC) and/or any locally retained contractor in developing eligibility and claiming data for federal reimbursement for foster care cases.

This memorandum addresses those eligibility requirements which the Department has identified as requiring your attention regarding the proper review and documentation of eligibility and claims for federal reimbursement for foster care cases. This memorandum supplements previous releases and does not replace them. The full description of the Title IV-E program and eligibility requirements are to be found in Department Regulations- 18 NYCRR Part 426 and in Department Directive 93-ADM-34. likewise, a full description of EAF program requirements is found in Department Regulations-18 NYCRR Part 372.

This memorandum should assist social services districts in properly determining Title IV-E eligibility as well as considering retroactive EAF benefits. The requirements discussed pertain to eligibility and claiming documentation developed directly by social services districts or by local or state contractors. Please note that social services districts retain final responsibility and accountability for all decisions regarding eligibility and claiming.

The appropriate identification and claiming of federal programs will aid social services districts in managing resources under welfare reform and preserving federal reimbursement in face of audits by the federal agency.

## II. BACKGROUND

The Department believes a reiteration of certain requirements of Title IV-E of the SSA are particularly relevant because of recent:

1. results of eligibility reviews undertaken by the Department of foster care placements;
2. review of Title IV-E and IV-A(EAF) claims submitted to the Department which were developed by the New York State Association of Counties (NYSAC) sub-contractor IHHS;
3. amendments to the SSA which end Title IV-A(EAF) as an entitlement program for federal reimbursement, place funding for that category of expenditures under a block grant, Temporary Assistance To Needy Families (TANF), and revise the eligibility criteria for SSI; and
4. questions raised by social services district staff regarding Title IV-E and IV-A (EAF) requirements and documentation issues arising from cases developed for claiming by the State's contractor NYSAC and its sub-contractor, the Institute for Health and Human Services. Please refer to "NYSAC Module 3" which is Attachment "A" of this memorandum and discusses the roles and responsibilities of NYSAC and, by implication, any contractor retained by a social services district in documenting foster care cases for federal reimbursement.

III. FOSTER HOME CERTIFICATIONS AND APPROVALS

Conditions of eligibility for certifying or approving foster care homes are mandated and detailed in Department Regulations 18 NYCRR Parts 443 and 444. Social services districts are reminded that one of the most basic requirements and safeguards for any foster care placement is that it occurs in a safe, healthy and nurturing environment. Such assurances are documented by the social services district in its home certification and approval process.

With the exception of pre-adoptive family homes children placed in the care and custody or custody and guardianship of the social services commissioners can never be legally allowed to reside in a home that has not been certified or approved. No federal or State reimbursement is permitted for periods of service in a home that is not certified or approved.

IV. TITLE IV-E ELIGIBILITY REQUIREMENTS

The following issues represent those Title IV-E eligibility requirements which need to be stressed to staff of social services districts responsible for determining Title IV-E eligibility or who are reviewing and certifying work submitted by local or State contract workers. Title IV-E is the only source of reliable federal funding for foster care costs and remains uncapped. Social Services districts must take all appropriate steps to assure the proper use of Title IV-E for every applicable placement rather than fall back upon the block grant and capped State funding sources.

A. LEGAL AUTHORITY FOR FOSTER CARE PLACEMENTS - FEDERAL AND STATE REQUIREMENTS

(1) Placements Made Pursuant to Articles 3, 7 and 10 of the Family Court Act (FCA)

Judicial determinations made pursuant to Articles 3, 7 and 10 of the FCA, that remove a child from his or her home and place him or her in foster care must establish whether it is contrary to the welfare of the child to remain in the home and determine whether reasonable efforts were made, when appropriate, to prevent the placement (see Section 472(a)(1) of the SSA). For these court ordered placements such findings must be expressly set forth in the court order as a condition of federal reimbursement under Title IV-E. State law also reflects the requirement that the court order expressly references these findings. In addition, the responsibility for placement and care of such child must reside with the social service district or with another public agency with which the Department has made an agreement (i.e., Division for Youth, the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities and the Office of Alcoholism and Substance Abuse).

A temporary order (remand) issued pursuant to Article 10 of the FCA removing a child from the home meets the requirement of a judicial determination, provided that the order specifies that it would be contrary to the welfare of the child for him or her to remain in the home, and that reasonable efforts were made, when appropriate, to prevent placement.

(2) Timeliness of Court Orders

Federal reimbursement for court-approved foster care placements may be claimed from the first day of the month in which the Court issued an order approving the placement if all other Title IV-E eligibility requirements have been met. If the Court delays in issuing such an order after a petition to review the appropriateness of a removal is filed, the ability of the social services district to claim the maximum amount of federal reimbursement for the cost of the placement could be jeopardized. Because of this, it is essential that in all social services districts, both program and legal staff, work closely with the Family Court in order to ensure that court orders are expeditiously issued and written to the extent appropriate in accord with the criteria stated above. Each social services district must take whatever steps are necessary in order to avoid delay in the issuance of such orders. These steps may include the modification of internal programmatic and legal practices in preparing petitions and/or draft orders for the Court's signature.

If orders already written and received by the social services district inadvertently lack appropriate language or are in some other manner defective, your social services attorney should be requested to approach the court for a NUNC PRO TUNC order to correct the deficiency. Attachment "B" to this letter discusses the federal agency perspective on NUNC PRO TUNC orders and their applicability to Title IV-E eligibility.

For very short term placements where an order is not issued prior to the child's discharge, or where the order does not award care and custody to the commissioner, State reimbursement may be claimed as long a petition was filed timely in accordance with the provisions of the Family Court Act up to the point the order is issued returning the child home or awarding custody to someone other than the commissioner (or an agency with which the Department has a written agreement.e.g. DFY).

(3) Voluntary Placements Section 358-a Placements

Federal reimbursement is permitted beginning from the first day of the month that a voluntary placement agreement is

signed, assuming all other Title IV-E requirements are met. Likewise, a child who is in care as a result of a transfer of care and custody to the social services official under the provisions of Section 384-a of the Social Services Law may have the cost of care federally reimbursed under Title IV-E.

A voluntary surrender instrument executed pursuant to Section 384 of the Social Services Law and signed by the parent(s) does not meet the requirements of a voluntary placement agreement as defined by Section 472(f) of the SSA and thus cannot be the basis of the legal placement authority for purposes of claiming under Title IV-E.

It is important to note that for purposes of Title IV-E eligibility, the voluntary placement agreement must be signed only by the parent(s) or legally appointed guardian(s) of the child. However, Section 384-a of the Social Services Law authorizes the transfer of care by a person with whom a parent has entrusted care of the child. Such a transfer is legal under State Law but is not recognized by federal standards as a basis for Title IV-E funding.

Federal reimbursement may be claimed for up to 180 days of care, beginning from the date of original placement. If a judicial determination is made under SSL 358-a of the SSL within 180 days that continued placement is in the best interests of the child, the child's placement then can be reimbursed under Title IV-E beyond the 180 days as a court ordered placement. If an order is not issued under Section 358-a of the SSL by day 180 of the placement, no further Title IV-E claiming is permitted for the duration of that foster care stay. However, New York State's requirement under SSL Section 358-a of the SSL (i.e., petitioning the court if the child is to remain in care for more than 30 days) must also be met in order to qualify the stay for State reimbursement.

Consecutive voluntary placements may not be used to avoid the judicial process.

B. CATEGORICAL/FINANCIAL ELIGIBILITY

1. Receipt of Aid to Families with Dependent Children (ADC).

According to Section 472 of the SSA, Title IV-E eligibility was to be connected to the ADC program in one of the following three ways:

- (1) The child shall have been in receipt of AFDC in or for the month in which either the voluntary agreement was entered into, or court proceedings leading to the removal

from the home were initiated (see Section 472(a)(4)(B) of the SSA); or

(2) The child would have received AFDC if an application had been made for such benefits in or for the month in which either a voluntary agreement was entered into or such court proceedings leading to the judicial determination that resulted in the removal from the home were initiated (see Section 472(a)(4)(B)(i) of the SSA; or

(3) The child had been living with a relative specified in 18NYCRR 369.1 within six months prior to the month in which either a voluntary agreement was entered into or court proceedings were initiated, and would have received aid in or for such month if in such month he had been living with such relative and application for such benefits had been made (see Section 472(a)(4)(b)(ii) of the SSA.

If a child is found to be ineligible for AFDC for the month specified above, i.e. the month legal proceedings leading to the child's removal were initiated, Title IV-E foster care eligibility cannot be derived at any point in the future for that particular placement. However, if a case was mistakenly found ineligible for Title IV-E or was coded improperly so that Title IV-E reimbursement was not claimed, such claims can be submitted retroactive for twenty-four months from date of payment. The reason for the retroactive claiming must be clearly documented in the case record.

a. Child in Receipt of ADC at placement.

Under federal welfare reform, the AFDC program no longer exists as a federal program. The AFDC program has been replaced by a federal welfare block grant, The Temporary Assistance to Needy Families (TANF) program. For purpose of Title IV-E eligibility, however, the federal welfare reform legislation requires the use of the AFDC program as it existed on June 1, 1995 as a condition of eligibility for all placements occurring after the implementation of TANF in a state. For New York, the implementation date is December 4, 1996. The Department is developing procedures for documenting Title IV-E eligibility for children in receipt of TANF funding (formerly AFDC). In the interim, for children placed into foster care and in receipt of the State's continuing AFDC program in the month the legal proceedings leading to removal was initiated, WMS printouts documenting this information should be retained in the case record for future audit purposes. Such printouts should include a copy of the ABEL budget reflecting the child's receipt of AFDC in that month, and a

case composition screen from WMS. An alternative form of documentation acceptable to the federal reviewers would be the grant reduction notice to the household caused by the child's removal. Such documentation must be included in all cases developed for Title IV-E by State contract staff as a condition of the contract.

b. Child Not in receipt of AFDC in the month of Placement

For a child not in receipt of AFDC in the month the removal proceedings were initiated, eligibility for AFDC must be established as a condition of eligibility for Title IV-E by the social services district staff or by any contractor awarded the work of documenting eligibility.

All eligibility factors for ADC must be met and documented in determining Title IV-E Foster Care eligibility with the exception of the specified relative test discussed on p. 8 "Living With a Specified Relative". However, federal audit practices to date, (which are reflected in the terms of the NYSAC contract) have allowed certain flexibility in documenting the financial eligibility requirements for ADC. Federal reviewers have, to date, allowed, for those cases that would have been ADC eligible had they applied, an ABEL budget calculation using the standard of need for the case at the time of removal to suffice for documenting need. Verification of income by means of SSA award letters, copy of a V.A. benefits check or a typical wage stub for the pertinent month have been accepted. Statements from responsible relatives regarding their means of support are used to supplement verification of income. Statements of no income have been allowed when supported by case worker observations of living circumstances, or statements of support received from non-legally responsible relatives and friends.

If the child is removed from a specified relative's home, other than the parent(s) (i.e., a non-legally responsible relative), the income and resources of this relative will not be considered in determining the ADC eligibility of the child. (18NYCRR Section 369.2)

Attempts by districts to verify income should be documented in the case record.

For children in receipt of Home Relief Assistance (including cases categorized as PG-HR or PG-ADC) a deprivation factor must be documented in the case record in order to establish Title IV-E eligibility as well as the receipt of Home Relief (PG-ADC or PG-HR)..

2. Living with a Specified Relative

The child must have lived in the home of a specified relative (includes any relation by blood, marriage or adoption who is within the fifth degree of kinship to the dependent child) at some time within the six months prior to the initiation of court proceedings or when a voluntary placement agreement was signed. There must be documentation in the case needed to document "specified relative", e.g., case narrative, IM records, probation reports.

When the child is placed with a kinship foster parent, that relative cannot also be considered to be the specified relative from whose home the child was removed in meeting the removal criteria of Title IV-E.

The child born to a mother who was a hospital patient or prison inmate would be considered to be living with the mother at the time of birth, and if placed in foster care would be removed from the home of the relative (the mother). The definition of "home" is applicable to the hospital or prison setting.

3. Other Eligibility Factors Affecting IV-E

All other factors of Title IV-E eligibility, e.g. age and school attendance must be evaluated and documented. See 93-ADM-34 for specific criteria.

V. EMERGENCY ASSISTANCE TO NEEDY FAMILIES (EAF)

As of October 1, 1996 the Emergency Assistance To Needy Families (EAF) no longer exists as an entitlement program or as a separate source of federal reimbursement. EAF has never been a primary source of foster care funding and should not be used as a substitute for Title IV-E. However, the Department anticipates that a portion of the federal TANF block grant awarded to New York will be set aside in the State's budget for SFY 97-98 to help meet a limited portion of foster care and other children services' expenditures that would have been otherwise eligible for EAF funding if the federal welfare reform program had not been enacted. Future releases will address the specifics once the state budget is enacted.

Claiming of federal EAF funds on a retroactive basis is still available for expenditures for services provided prior to October 1, 1996. Foster care placements made pursuant to Article 10 of the Family Court Act or through a voluntary placement agreement and tuition costs of Title IV-E children in settings with on-campus schools are among the items eligible for EAF funding. All eligibility and documentation standards for EAF eligibility in effect as of 9/30/96 must be met. These standards are discussed in prior releases, notably 93-ADM-39 and 94-LCM-52. As noted

in these publications, EAF claiming was not intended to supplant Title IV-E as the program of choice in federal foster care funding. In addition and similar to the Title IV-E eligibility and claiming process, social services districts retain sole responsibility for documenting eligibility requirements, including EAF authorizations processed as a result of work undertaken by local or state contract staff. The authorization of services under the EAF program does not relieve social services districts from complying with the specific child welfare program requirements including legal and case management responsibilities such as court orders reviewing the placement, case plans (UCR's), and foster care home approvals.

#### VI. SUPPLEMENTAL SECURITY INCOME (SSI)

Some foster children will be eligible for both Title IV-E and the SSI program. However, the current federal policy is that concurrent payment under both programs is not allowable. In these cases, a district must determine under which program reimbursement is most advantageous. Districts should consider the overall Title IV-E reimbursement as contrasted to the SSI standard amount when determining which program would be most cost beneficial for a foster child who is eligible for either program. Children in foster care receive the SSI Benefit Level of "living with others", which as of January 1, 1997 was \$484 per month. This benefit level is the same for all foster care placements: foster family care, group home care, agency operated boarding homes, or institutional care.

There is no local share in this SSI payment of the current \$484 monthly benefit. If the foster care maintenance costs for an SSI child exceed \$484 monthly, the balance would be shared 50/50 between the State and local district. All administrative costs for an SSI foster child would be 50% state/50% local.

Title IV-E Foster Care reimbursement reimburses 50% of the cost of care. Title IV-E also reimburses 50% of the administrative costs, clothing costs, and many special items of need, for a Title IV-E eligible child. Generally, whenever a child is in a congregate foster care program, Title IV-E will provide the greater reimbursement.

Similar considerations should be made when evaluating an SSI case for EAF funding with the additional caveat that the EAF program is no longer an available federal funding source as of October 1, 1996.

All SSI children must be reviewed for Title IV-E eligibility and authorized accordingly. It is only when claims are made for reimbursement under that program that the SSI benefit will be affected.

#### VII. CASES DEVELOPED FOR FEDERAL CLAIMING BY NYSAC OR OTHER CONTRACT STAFF.

The NYSAC-3 Module (Attachment A to this Memorandum) details the responsibilities of the contractor in substantiating eligibility and

claims for Title IV-E and EAF for Foster Care cases. Underlying the terms of the module are three basic principles.

1. Social services districts retain sole responsibility for all authorizations and claims for Title IV-E or Title IV-A developed by the contractor;
2. The provisions of the Social Security Act, the New York State Social Services Law and Title 18 of NYCRR govern and supersede all terms of the contract, and;
3. The contractor is to provide all cases and claiming material in sufficient time for social services district staff review.

The Department, in an effort to minimize the disruptive impact of the contractor on social services district activities has agreed to provide certain services to the contractor. These include: identifying of FNP cases based on information drawn from WMS, issuing User ID's and Passwords to the sub-contractor's staff to access WMS/CCRS; providing programmatic and policy guidance; sharing statistical data and preparing claiming schedules for local social services signature.

The Contractor is required to secure and share with the Department written agreement of the social services district for conducting reviews and approving the release of case data. In addition, the contractor is to request social services district staff to direct policy and program questions to the Department.

Social services districts are invited to take advantage of the opportunities of the contract, but the Department emphasizes that the local social services district must be fully assured of the propriety of any and all eligibility and claim documentation submitted by the Contractor before authorizing and attesting to their validity.

If you have any questions regarding Title IV-E or IV-A (EAF) eligibility as discussed in this LCM, please contact John Conboy, Office of Quality Assurance and Audit at 1-(518) 402-0147 or via OFISLINK e-mail; User ID 90b061.

For questions regarding the State contract with NYSAC, or the contractor's performance, please contact Mr. Richard Rocco of the Bureau of Revenue Enhancement at 1-(518)-474-8164.

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Wallace Watson  
Director  
Office of Quality Assurance and Audit

## MODULE - NYSAC 3

CHILD WELFARE SERVICES FEDERAL MAXIMIZATION - (FOSTER CARE ONLY)

This module encompasses activities and projects to be performed by the Contractor to identify expenditures, not otherwise claimed for federal participation through ongoing state initiatives, eligible for federal reimbursement under Titles IV-E and IV-A for services provided by local social services districts as part of the foster care program.

GENERAL CONTRACTOR OBLIGATIONS

Prior to actual work engagement and not less than quarterly, the contractor will provide a detailed project plan which identifies the project manager and staff assigned as well as describes the audit steps, geographic location, required local district interface, other State agency involvement, and any and all other facets of the process. A project plan may be disapproved or modified if the Department determines such a plan will interfere with existing or planned State revenue maximization initiatives or may threaten the receipt of federal financial participation for ongoing State activities. An approved project plan will clearly identify the scope of work and the time periods for review. The Contractor's scope of work is limited to activities strictly stated and authorized in the approved project plan. The scope of work may be changed by the Department, in writing, as determined by and in the best interests of the Department. Project plans will be reviewed and approved prior to the start of each quarter. No claim will be submitted or paid unless an approved current project plan is on file with the Department.

The Contractor must obtain Department staff approval in or for those work areas/audit steps which may involve any of the following:

- 1.) Authorization documents;
- 2.) Local District review responsibilities;
- 3.) Interpretation of Federal Regulations and/or State Plan provisions.

The Contractor will ensure that all claims for federal financial participation made pursuant to any Local District M.O.U. or this State Contract are submitted through the Office of Quality Assurance and Audit - Bureau of Revenue Enhancement. (DSS-3922 for local districts & DSS-3148 for the Contractor)

Any and all data furnished for the purpose of completing the tasks of this module can be used only for the express purpose of completing the work provisions of this module. Any other use of the data, without written consent of the Department, may result in termination of this module.

This Module (NYSAC 3) of the Contract may be terminated, in writing, by either party. Termination may be for lack of activity and/or revenue generation. Adequate notice will be given prior to any

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termination proceeding. Termination for reasons of inactivity and non-performance may not be considered in any period for which an approved current project plan is on file.

### SCOPE

This module covers FNP Foster Care expenditures as well as those cases which are known as "kinship" cases that were categorized as IV-E, even though there was not a physical removal from the home of the kinship relative as referenced in the federal settlement. The Kinship case review is detailed separately.

#### Foster Care

The contractor will be responsible for performing a review of FNP Foster Care cases as provided to them by the Department. Case records will be reviewed and analyzed to establish federal eligibility under Title IV-A (EAF) or Title IV-E. The Contractor will be expected to perform all aspects of the case conversion process from documentation through the federal eligibility decision. Eligibility determinations will be subject to quality assurance reviews which will be monitored/conducted by QA&A.

The universe of cases provided to the contractor will be those clients and expenditures remaining as FNP after all other state initiatives. The universe will be limited to expenditure periods no more current than six-months following the payment dates identified by the Department. The Department will provide the contractor a file of foster care cases active on WMS for the month(s) under review. The file layouts are described in module appendix 3.1.

The provider will review local social services case records, including to the extent that it is necessary, those maintained by voluntary agencies contracted by the district to provide foster care, in order to obtain relevant documentation of IV-E and/or EAF eligibility.

The provider will use work sheets and authorization documents that have been approved and/or developed with by the Department's contract manager. Template work sheets are attached (module appendices 3.2 & 3.3) which demonstrate the required documentation elements. The Criteria section of this module delineates the appropriate eligibility criteria and minimal documentation requirements.

As consistent with Federal and Departmental policy, all FNP cases reviewed by the contractor must first be reviewed for IV-E eligibility and then for EAF as applicable. All cases reclassified to IV-E will also be reviewed for EAF eligibility in order to assure that additional claiming opportunities that may exist under

EAF are identified. Such opportunities include, but are not limited to, tuition costs not covered by Title IV-E. Any and all areas of additional claiming opportunity must be clearly identified for and approved by the Department prior to claim preparation and submission. However, no costs which may be new to the State may be included.

For those cases which the contractor initiates a new EAF authorization, the contractor will provide the Department a copy of that authorization and provide an electronic data file that will facilitate the Department's ability to update its master EAF authorization file. The file layout is described in module appendix 3.4.

The contractor will also provide to the Department specific files of all FNP cases converted to Title IV-E. The file layout is described in module appendix 3.5. In addition, the contractor will provide this information in a format agreed to by local social service districts for purposes of updating WMS.

#### Kinship

This module will cover a category of FNP cases that are currently categorized on WMS as Title IV-E, which have been claimed or paid, at least in part, as a "kinship" payment by the Child Welfare Administration of the City of New York's Human Resource Administration for the period October 1, 1986 through June 30, 1994 and which have been denied federal financial participation by the Department of Health and Human Services, Agency for Children and Families (ACF) (see module appendix 3.6). In addition, the contractor will review all kinship placements occurring after July 1, 1994 to determine what cases fail the removal criteria and would have been a part of the claims adjustment except that their placement into foster care occurred after the period of the settlement.

The Department will provide the contractor a listing of kinship cases paid during the period of federal audit and within the scope of the kinship settlement, and at the Department's discretion, any other related listings.

The contractor will secure case records from HRA in order to determine whether such cases fail the federal IV-E removal test identified in the Criteria section of this module. Only cases which fail the removal test will be eligible for reclassification to EAF under the provisions of this contract. The Contractor will use the worksheet outlined in module appendix 3.7 in determining removal.

For those cases which the contractor initiates a new EAF authorization, the contractor will provide the Department a copy of that authorization and provide an electronic data file that

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will facilitate the Department's ability to update its master EAF authorization file. The file layout is described in module appendix 3.4.

The contractor will also provide to the Department specific files of all IV-E failed kinship cases that have been reclassified to a category other than IV-E. The file layout is described in module appendix 3.8.

#### CRITERIA

The Department must approve the criteria, documentation and format of any IV-E eligibility decision for federal participation. Title IV-E and EAF program eligibility tests and claims submission must conform to the Department's expressed policies and local directives.

The Contractor must obtain all appropriate Department approval for the following:

1. local district case review process
2. documentation of EAF verification/authorization form
3. application of State Plan criteria.

All approvals must be secured through the office of the Department's contract manager located in the Office of Quality Assurance and Audit - Bureau of Revenue Enhancement.

For purposes of IV-E eligibility, the federal criteria found in Social Security Act Section 472 and State criteria found in Department Regulations Section 426 will govern. In particular, any case classified as IV-E must have legal authority for care and custody awarded to the local social services commissioner by an order of the family court with appropriate court order language or a voluntary agreement signed by the child's parent or legal guardian. For cases entering care under a voluntary agreement, a court review of the agreement and an order continuing care and custody with the commissioner must be obtained by day 180 of the placement if the child remains in foster care for that length of time. In addition, eligibility conditions of age, living with specified relative within prescribed time periods and ADC eligibility for the appropriate month of legal activity must be met. For requirements other than legal documents governing placement and to the extent retrievable, WMS printouts will suffice for purposes of documentation. Copies of relevant court orders or voluntary agreements governing placements must be available in the contractor's records to establish documentation.

For kinship cases, the contractor must provide the basis of IV-E ineligibility related solely to failing the IV-E removal test. This will include providing documentation, on a case by case basis, from the universe of cases provided to the contractor. The removal test will use the time periods, documentation standards, legal events, and

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demographic data as proscribed in the exemplar checklist attached (module appendix 3.7) including the glossary of terms. All facets of IV-E eligibility will be presumed correct except for the removal test for purposes of the kinship portion of this module.

For cases having no previous EAF authorization, the contractor will secure the following documentation of EAF:

1. there is at least one eligible child under the age of 21;
2. the child lived with at the time of placement (or had lived with in at least one of the proceeding 6 months) a qualifying relative as defined in Department Regulation 369;
3. there is no ineligibility for the family based on a caretaker's refusal of employment or training;
4. the emergency did not arise from the caretaker's mismanagement of the PA grant;
5. the service provided is in response to a qualifying emergency situation as defined under New York's State Plan;
6. the family qualifies under the financial criteria for EAF eligibility as defined in 93-ADM-39 and 94-LCM-52 (see module appendices 3.9 & 3.10)

The contractor will document the eligibility on form DSS QA-638 (or RES-1 in NYC) as provided by the Department which will require sign-off by the commissioner of the appropriate local social services district or his designee.

For cases identified by the Department as having an existing EAF authorization which may suffice to authorize EAF for the service(s) under review, the Contractor must document that:

1. the case/individual is one and the same as the authorized individual and;
2. the foster care placement under review were incurred as a result of the emergency situation necessitating the existing EAF authorization. For services not meeting this requirement for which not more than 12 months has transpired between the completion of the authorization and onset of the reviewed emergency, no additional EAF authorization can be written nor can any EAF claiming be made. If more than 12 months has expired between these two events, the Contractor will be responsible for documenting eligibility and securing local district authorization for EAF.

FNP-FP ELIGIBILITY/PAYMENT CONVERSION PROCESSING

The contractor will be required to provide the specific eligibility data concerning converted cases no later than the last day of the middle month of the quarter. The Contractor will provide a record of the cases to be converted to FP in a format prescribed by the Department to update/annotate its files. The file layout is described in module appendix 3.11.

CLAIMS PROCESSING

Upon notification by the Department of the amount which has been identified and annotated as contractor initiative, the contractor will be responsible for filing the appropriate claiming instruments with the Department (QA&A\Bureau of Revenue Enhancement) for inclusion in the Quarterly Expenditure Report. Any costs for a claim which is "NEW" to the Department - as defined by the Division of the Budget - will not be eligible for State share reimbursement. In no case shall a County or New York City receive Federal and State participation in an amount greater than the proportionate reimbursement formula established under the relevant State statute.

REIMBURSEMENT

Reimbursement to the contractor shall be determined on and limited to only those cases and expenditures successfully converted from FNP to FP and consistent with the other payment provisions in this contract. Such reimbursement shall be limited to only those expenditures contained in each "project" as provided to the contractor by the Department. Subsequent prospective expenditure conversions related to "project" cases may be subject to reimbursement if upon reaching the time barred quarter the contractors efforts are the only basis of federal eligibility on file.

Provision of certain clients and expenditures does not guarantee contractor reimbursement for cases they may submit for conversion as State and Local conversions performed prior to the close of the two year Federal claiming limitation have precedence. In addition, no reimbursement will be made where the State has met or exceeded federal reimbursement thresholds for capped programs where these costs are federally non-reimbursed, although otherwise eligible.

The Department reserves the right to audit or review the contractors claim(s) and deny any or all of the federal claim and consequently contractor reimbursement.

FEDERAL/STATE AUDITS

The Department reserves the right to audit or review the contractor's claim(s) including all case record documentation and files maintained by the contractor and adjust or reject any of the submitted federal claims and related contractor fees.

The Contractor is required to furnish any and all supporting documentation to substantiate federal eligibility within 30 days of notification of such need. The Contractor will be available to substantiate claims and assist the Department in responding to any federal reviews, deferrals, and/or disallowances.

MODULE MANAGER

For day to day operational issues all contacts are to be through the module manager:

Richard Rocco  
Riverview Center  
c/o NYS Department of Social Services  
40 N. Pearl St.  
Albany, New York 12207  
(518) 474-8164

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1. Log no.: ACYF-IM-87-28  
2. Issuance Date: 10/7/87  
3. Originating Office: Children's Bureau  
4. Key Word: Title IV-E  
Nunc Pro Tunc Orders  
Judicial Determination Requirements  
(Nunc Pro Tunc)

INFORMATION MEMORANDUM

TO : State Agencies Administering or Supervising the  
Administration of Title IV-E of the Social Security Act  
(the Act)

SUBJECT :  
Use of Nunc Pro Tunc Orders to Satisfy the Judicial  
Determination Requirements of Section 472(a)(1) of the Act

LEGAL AND RELATED  
REFERENCES

: Sections 471(a)(15) and 472(a)(1) of the Act

PURPOSE :

The purpose of this Information Memorandum is to clarify the Department's procedure in considering nunc pro tunc orders to meet the judicial determination requirements set forth in section 472(a)(1) of the Act.

BACKGROUND

: Courts have the authority to enter an order nunc pro tunc to supply, for the record, something that has actually occurred, but was omitted from the record through inadvertence or mistake. A nunc pro tunc order, however, may not be used to predate the actual performance of an act that had not taken place. Thus, where a nunc pro tunc order does not simply correct errors or omissions, but actually modifies the substance of a prior ruling or constitutes a ruling not previously made, it cannot be given retrospective effect.

INFORMATION

: This issuance clarifies the Department's procedure for title IV-E financial reviews when a nunc pro tunc order has been issued to satisfy the requirements for judicial determinations as set forth in section 472(a)(1) of the Act.

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In title IV-E financial reviews, for every child for which there is a nunc pro tunc order that is used to meet the statutory requirements in section 472(a)(1), States are required to submit documentation to verify that these findings were in fact omissions from the record through inadvertence or mistake. Requested documentation may include the transcript of court proceedings and/or the agency's report to the court, or any other documentation that would confirm that the information was actually presented to the court at the previous hearing and that the court made the determination(s) at that time.

INQUIRIES TO : Regional Administrators  
Regions I - X

Dodie Livingston  
COMMISSIONER

DMilligan:9/2/87:Document #0683I

Log No.: ACYF-IM-89-08  
 Issuance Date: 04/17/89  
 Originating Office: Children's Bureau  
 Key Word: The Use of Nunc Pro Tunc Orders  
 to Verify Title IV-E Eligibility

## INFORMATION MEMORANDUM

TO : State Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act (the Act)

SUBJECT : Use of Nunc Pro Tunc Orders to Satisfy the Judicial Determination Requirement of Section 472(a)(1) of the Act.

LEGAL AND RELATED REFERENCES : Sections 471(a)(15) and 472(a)(1) of the Act, ACYF-IM-87-28, dated 10/7/88, and ACYF-PA-84-1, dated 1/13/84

BACKGROUND : Title IV-E eligibility for foster care is based, in part, upon two judicial determinations: (1) that continuation in the home would be contrary to the welfare of the child; and (2) that reasonable efforts were made prior to placement to prevent or eliminate the need for removal of a child from his home. The reasonable efforts determination is an important protection for children living in troubled homes to assure that appropriate services are provided to prevent the separation of the family by the removal of the children and their placement in foster care.

The State agency's role is to provide the appropriate preventive services. The court's role in making the determination that reasonable efforts were made by the agency to prevent removal is critical to the outcome of the case. The Federal agency's role is to confirm, through documentation provided by the court, that the judicial determination was made at the time of removal. If documentation of a timely determination is not available at the Federal review, the State is permitted time to secure evidence from the court that the judicial determination was actually made at the time of removal. Some State agencies have supplied nunc pro tunc orders as such documentation.

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The acceptable use of nunc pro tunc orders for the purpose of meeting the judicial determination requirements set forth in section 472(a)(1) of the Act was described in ACYF-IM-87-28, dated October 7, 1987. This IM is specific about what constitutes an acceptable nunc pro tunc order in the conduct of title IV-E financial reviews. It states that courts can "enter an order nunc pro tunc to supply, for the record, something that has actually occurred, but was omitted from the record through inadvertence or mistake." It further states that "a nunc pro tunc order . . . may not be used to predate the actual performance of an act that had not taken place." Therefore, nunc pro tunc orders have been admissible in title IV-E financial reviews to meet the requirements of section 472(a)(1) only when they are used to correct errors or omissions in the original removal order. If a nunc pro tunc order actually modifies the substance of a prior ruling or constitutes a ruling not previously made, it cannot be given retrospective effect.

Examination of recent nunc pro tunc orders submitted by States to satisfy the judicial determination requirements indicates that there is confusion about the acceptable interpretation of the term nunc pro tunc in the title IV-E program as well as some misuse of nunc pro tunc orders in relation to title IV-E eligibility. The confusion regarding the term may be due to the fact there are two legal interpretations of nunc pro tunc in ordinary use by the courts. In the broader meaning of the term, the court may allow for an action to be taken after the time it should have been taken, with a retroactive effect. The more narrow interpretation allows the court only to supply for the record documentation of an action that had actually occurred. The narrow interpretation, as set forth in ACYF-IM-87-28, is the only acceptable interpretation to satisfy the judicial determination requirements in section 472(a)(1).

We have also found that nunc pro tunc orders have been utilized in some States in a widespread, undifferentiated manner, primarily to maintain eligibility for Federal funds, rather than to focus on the assurance of a judicial determination at the time of removal as a protection to the child and his family.

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The frugal use of nunc pro tunc orders in title IV-E is necessary to assure the integrity of the foster care system and, specifically, to assure that all title IV-E eligible children are afforded the protections to which they are entitled, at the time they are entitled to them, and which are required by the law.

In addition to confusion about acceptable application and misuse of nunc pro tunc orders, there also may be misunderstanding about the necessity for additional documentation to verify that the determination had actually been made at the removal hearing. ACYF-IM-87-28 made clear that the Federal agency may request any documentation that it determines is necessary to verify that the court actually made the determination at the removal hearing. As indicated by that Information Memorandum, it is the Federal agency which determines what documentation will be necessary. The list of examples of what may be requested of the State for verification purposes does not mean that States may choose the one(s) they will submit.

The purpose of this Information Memorandum is to reiterate and clarify existing procedures regarding acceptable documentation/verification of the judicial determination at the time of the removal hearing.

INFORMATION : Nunc pro tunc orders will be admissible in determining the eligibility of a child for purposes of title IV-E financial reviews under certain circumstances. For each nunc pro tunc order that is used to meet the statutory requirements in section 472(a)(1), contemporaneous court documentation must be submitted which will verify that the determinations were, in fact, made but were omitted from the record through inadvertency or mistake.

Acceptable documentation that may be requested by the Federal agency to make such a verification could include court transcripts, bench notes or other court documents which, in conjunction with the State agency's report, would confirm that the information was presented to the court and that the judicial determination(s) had been made at the original removal hearing.

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Documentation such as post-hearing affidavits is not acceptable as verification. The reliability of affidavits executed long after a judicial proceeding is questionable. These limitations are necessary in order to assure children in foster care of the protections to which they are entitled under the title IV-E program.

INQUIRIES TO : Regional Administrators, OHDS  
Regions I - X

Joseph Mottola  
ACTING COMMISSIONER

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Revised 12/29/88/Revised 3-2-89/dab/3-3-89/BS 3-8-89