



**AAIA**  
Association on  
American Indian Affairs



# **A Survey and Analysis of Select Title IV-E Tribal-State Agreements including Template of Promising Practices**

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By Jack F. Trope and Shannon Keller O'Loughlin

in partnership with



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**The Association on American Indian Affairs** is a not-for-profit 501(c)(3) corporation with programs that focus on youth and education, cultural preservation, and sovereignty. The Association is governed by an all Indian Board of Directors from all regions of Indian Country and works in close cooperation with Native Americans and other organizations that have similar missions. The Association provides assistance in the area of national policy, as well as working on a grass roots level with Native Americans and Tribes.

**Casey Family Programs** provided the funding for this project and is the nation's largest operating foundation focused entirely on foster care and improving the child welfare system. Casey Family provides technical assistance and resources for tribal child welfare systems and seeks to improve services for American Indian and Alaska Native children and families.

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The Social Security Act's Title IV-E provides funding to states and tribes for foster care and adoption services. One method for tribes to obtain this funding is by entering into an intergovernmental agreement with the state. This survey and analysis summarizes these intergovernmental agreements and the many ways tribes across the country have utilized these agreements to access funding to protect and support tribal children and families.

Along with the survey and analysis, a template for a Title IV-E tribal-state agreement is provided which extracts various tribal-state agreement provisions that exemplify "promising practices" in the field. A Tribe may wish to utilize these "promising practice" provisions in the development or amendment of its own tribal-state agreement.

This full report is available online on the Association on American Indian Affairs website, <http://www.indian-affairs.org/>, the Indian Child Welfare Act website hosted by the Native American Rights Fund, <http://www.narf.org/nill/resources/indianchildwelfare.htm>, and on the Indian Child Welfare Act blog at <http://icwa.narf.org/>. Also available on those websites are the tribal-state agreements reviewed for this project, along with available attachments.

## **I. INTRODUCTION AND SUMMARY OF AGREEMENTS**

The Social Security Act Title IV-E, 42 U.S.C. § 670, et al, provides federal funding for foster care, adoption and guardianship assistance, as well as administration and training funds to support that care. With the passage of the Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351) (the "Fostering Connections Act") on October 7, 2008, tribes were for the first time given the option to obtain Title IV-E funds either through direct funding<sup>1</sup> or through an agreement with the state. The Fostering Connections Act requires states to consult and act in good faith to bring Title IV-E services to tribal children through an agreement when a tribe determines that it would prefer to access Title IV-E through an agreement, rather than through direct funding. 42 U.S.C. § 671(a)(32). Prior to the Fostering Connections Act, states had no legal obligations to develop agreements with tribes to pass through Title IV-E funding for IV-E eligible children under the jurisdiction of a tribe, although some states and tribes did negotiate agreements prior to 2008.

Funding from Title IV-E is significant to tribes, providing critical development of infrastructure – from courts to caseworkers – to support tribal foster care programs. In addition, the funding can pay for the costs of care for the children placed in foster care. Of note, the

Secretary shall provide technical assistance and implementation services that are dedicated to improving services and permanency outcomes for Indian children and their families ... to ... Indian tribes, tribal organizations, tribal consortia, and States seeking to develop cooperative agreements to provide for payments under

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<sup>1</sup> 42 U.S.C. § 679B authorizes tribes to operate a foster care program pursuant to Title IV-E and receive funding directly from the federal government.

this part or satisfy the requirements of section 622(b)(9)<sup>2</sup>, 671(a)(32)<sup>3</sup>, or 677(b)(3)(G)<sup>4</sup>

42 U.S.C. § 676(c)(2).

IV-E has delegated very important aspects of the federal government-to-government relationship with tribes to the states (where tribes prefer that approach) and places an affirmative obligation upon the states. The Act requires the states to:

[N]egotiate in good faith with any Indian tribe, tribal organization or tribal consortium in the State that requests to develop an agreement with the State to administer all or part of the program under this part on behalf of Indian children who are under the authority of the tribe, organization, or consortium, including foster care maintenance payments on behalf of children who are placed in State or tribally licensed foster family homes, adoption assistance payments, and, if the State has elected to provide such payments, kinship guardianship assistance payments under section 673(d), and tribal access to resources for administration, training, and data collection under this part.

42 U.S.C. § 671(a)(32).

IV-E further requires that the Chief Executive Officer of the state to certify that each Indian tribe within a state has been consulted about the programs the state will institute, that the state has made efforts to coordinate its programs with the tribes, that these benefits and services will be made available to Indian children in the state to the same extent as any other child in the state, and that the state will negotiate in good faith with Indian tribes regarding children who are transitioning into adulthood out of foster care. 42 U.S.C. § 677(b)(3)(G).<sup>5</sup>

This report provides a detailed analysis of Title IV-E tribal-state agreements, which includes an overall summary of the status of current Title IV-E agreements, as well as a breakdown of the provisions that can be found in those agreements by subject matter. This report was prepared during a 14 month period between October 2012 and December 2013. It took into account 98

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<sup>2</sup> 42 U.S.C. § 622(b)(9) requires the state to include in its state plan: “a description, developed after consultation with tribal organizations (as defined in section 4 of the Indian Self-Determination and Education Assistance Act[82]) in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.”

<sup>3</sup> 42 U.S.C. § 671(a)(32) is discussed in the following paragraph.

<sup>4</sup> 42 U.S.C. § 677(b)(3)(G) is discussed in the following paragraph.

<sup>5</sup> 42 U.S.C. § 677(b)(3)(G) requires a “certification by the chief executive officer of the State that each Indian tribe in the State has been consulted about the programs to be carried out under the plan; that there have been efforts to coordinate the programs with such tribes; that benefits and services under the programs will be made available to Indian children in the State on the same basis as to other children in the State; and that the State will negotiate in good faith with any Indian tribe, tribal organization, or tribal consortium in the State that does not receive an allotment under subsection (j)(4) for a fiscal year and that requests to develop an agreement with the State to administer, supervise, or oversee the programs to be carried out under the plan with respect to the Indian children who are eligible for such programs and who are under the authority of the tribe, organization, or consortium and to receive from the State an appropriate portion of the State allotment under subsection (c) for the cost of such administration, supervision, or oversight.”

agreements<sup>6</sup> representing 267 Indian Nations from 16 states that pass federal Title IV-E allowable costs to the tribes.<sup>7</sup> During that period, some agreements expired and new agreements were developed. Other agreements were replaced by direct funding programs pursuant to 42 U.S.C. § 679B. Thus, this report does not attempt to provide definitive numbers of current tribal-state agreements or their exact status. Rather, its goal is to provide an overview of the substantive landscape of Title IV-E tribal-state agreements during a particular window of time.

Along with this report is a template providing provisions from the various tribal-state agreements that elucidate promising practices in these agreements.

There is no perfect agreement among the 98 agreements. However, there are several that include unique provisions crafted to meet tribal needs and provide promising practices for the development of these agreements. The components that provide promising practices include provisions that protect sovereignty, and provide funding mechanisms for administrative, training and maintenance funding as contemplated by federal law and do not impose state law. This first section provides introductory and summary information about these 98 tribal-state agreements organized alphabetically by state.

## **A. Alaska**

There are eleven Title IV-E Agreements between the state of Alaska and Alaska Native entities. Seven of these agreements are between Alaska and Regional Alaska Native non-profit corporations, which provide services to a number of federally recognized Alaska Native Tribes. Four of these agreements are between the state and federally recognized Alaska Native Tribes. In total, 180 federally recognized tribes are represented in the 11 agreements:

- Aleutian Pribilof Islands Association, Inc. is a non-profit corporation serving the following 13 federally recognized tribes: Akutan, Atka, Belkofski, False Pass, King Cove, Nelson Lagoon, Nikolski, Pauloff Harbor, Sand Point, St. George, St. Paul,<sup>8</sup> Unalaska, and Unga. This agreement was entered into on April 1, 2002.
- Association of Village Council Presidents is a non-profit corporation serving 56 federally recognized tribes. This agreement has been in effect since October 1, 2001.
- Bristol Bay Native Association is a non-profit corporation serving the following 31 federally recognized tribes: Aleknagik, Chignik Bay, Chignik Lagoon, Chignik Lake,

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<sup>6</sup> Many of the states provided a template or form agreement that is applied to each tribe within that state. Therefore, in several states such as Alaska, New Mexico, Oklahoma, and Montana the tribal-state agreements may be represented by one form agreement that is the same or nearly the same for each tribe within that state.

<sup>7</sup> This begs the question as to the extent of the states' consultation with tribes and whether the federal government has analyzed whether each state has met its tribal consultation requirements. The federal government is ultimately responsible to assure that its legal obligations to tribes are met when it delegates those obligations to the states.

<sup>8</sup> The Aleut Community of St. Paul Island is currently negotiating (November 2013) with the state of Alaska to enter into its own IV-E agreement directly with the state.

Clark's Point, Egegik, Ekuk, Ekwook, Igiugig, Iliamna, Ivanof Bay, Kokhanok, Koliganek, Levelock, Manokotak, Naknek, Newhalen, New Stuyahok, Nondalton, Pedro Bay, Perryville, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, and Ugashik. This agreement was entered into on October 1, 2002.

- Central Council of the Tlingit & Haida Indian Tribes of Alaska is a federally recognized tribe, which includes 21 communities. This agreement has been in effect since October 1, 2000.
- Cook Inlet Tribal Council, Inc. is a non-profit corporation serving 8 federally recognized tribes: Chickaloon Village Traditional Council, Native Village of Eklutna, Kenaitze Indian Tribe, Knik Tribal Council, Ninilchik Traditional Council, Salamatof Tribal Council, Seldovia Village Tribe, and Native Village of Tyonek. This agreement went into effect on May 1, 2000.
- Kawerak, Inc. is a non-profit corporation serving 19 federally recognized tribes: Native Village of Shishmaref, Native Village of Diomedea, Native Village of Wales, Native Village of Brevig Mission, Mary's Igloo Traditional Council, King Island Native Community, Teller Traditional Council, Native Village of Koyuk, Inupiaq Village of Council, Solomon Traditional Council, White Mountain, Chinik Eskimo Community, Native Village of Elim, Native Village of Shaktoolik, Native Village of Unalakleet, Stebbins Community Association, Native Village of St. Michael, Native Village of Gambell, and Native Village of Savoonga IRA Council. This agreement went into effect on July 1, 2002.
- Nome Eskimo Community is a federally recognized tribe that entered into an agreement with Alaska on July 1, 2011. Though the agreement is more recent, it is the same template agreement as the other ten agreements. Prior to July 1, 2011, Nome was receiving IV-E funds through Kawerak, Inc.'s IV-E agreement because it did not have its own IV-B plan, which is required by the state.
- Maniilaq Association is a non-profit corporation serving 12 federally recognized tribes: Kotzebue, Ambler, Buckland, Deering, Kiana, Kivalina, Kobuk, Notak, Noorvik, Port Hope, Selawik and Shungnak. The agreement was executed on January 1, 2002.
- Orutsararmuit Native Council is a federally recognized tribe that entered into an agreement with Alaska on April 1, 2010. Though the agreement is more recent, it is the same template agreement as the other ten agreements.
- Sitka Tribe of Alaska is a federally recognized tribe with an agreement executed on April 1, 2002.
- Tanana Chiefs Conference is a non-profit corporation serving the following 37 tribes<sup>9</sup>:

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<sup>9</sup> Though the Tanana Chiefs Conference website lists 41 federally recognized Tribes it serves (<http://www.tananachiefs.org/contact/village-contacts/>), the IV-E agreement provides services for only 37 Tribes served by Tanana Chiefs Conference.

Alatna Traditional Council, Allakaket Traditional Council, Anvik Traditional Council, Arctic Village Traditional Council, Beaver Traditional Council, Birch Creek Tribal Council, Chalkyitsik Traditional Council, Circle Traditional Council, Dot Lake Village Council, Eagle IRA Council, Evansville Tribal Council, Fort Yukon, Grayling IRA Council, Healy Lake Traditional Council, Holy Cross Traditional Council, Hughes Traditional Council, Huslia Traditional Council, Kaltag Traditional Council, Koyukuk Traditional Council, Manley Hot Springs Traditional Council, McGrath Traditional Council, Medfra Traditional Council, Minto Traditional Council, Nenana Traditional Council, Nikolai Village, Northway Traditional Council, Nulato Tribal Council, Rampart Traditional Council, Ruby Tribal Council, Shageluk IRA Council, Stevens Village IRA Council, Takotna Traditional Council, Tanacross IRA Council, Tanana Tribal Council, Telida Native Village Council, Tetlin IRA Council, and Venetie Traditional Council. The agreement has been in effect since October 1, 2000.

All 11 Alaska agreements are identical form agreements. The agreement includes reimbursement for administrative and training costs, but does not include maintenance funding for tribally licensed foster care. The Alaska Native Tribe or Corporation is required to pay the non-federal match for its administrative and training costs. The Alaska form agreement provides a basic structure of the parties' obligations and its seven appendices provide the procedures for implementing the agreement. Of particular note, Appendix B is the "Tribal Title IV-E Program Manual" which provides program guidelines, references and forms explaining the history, procedures for reimbursement, and other details of IV-E requirements.

Alaska recently finalized a maintenance agreement that will be used separately from the administration and training agreement. One tribe that has its own foster homes intends to utilize the agreement as a pilot program with the state. In the meantime, the Alaska Native Entities<sup>10</sup> must utilize other funding for maintenance costs – or foster care services for tribal children must be certified by the state. However, the majority of Alaska Native Entities do not license their own foster care placements. In addition, the majority of Alaska Native children go through the state courts. Many of the Alaska Native Entities do not have their own tribal courts or lack other parts of the infrastructure required to develop a full foster care program.

The Alaska agreements do not acknowledge tribal sovereignty and in fact, as discussed under the section on sovereignty, require the Alaska Native Entity, if it is a federally recognized tribe, to waive its sovereign immunity and comply with state law. On the other hand, tribal representatives state that the partnership between tribal child welfare staff and the state staff has been productive. The Alaska Native Entities who are involved in Title IV-E meet and work together to share information, and approach the state as a unified whole in the development of their foster care programs.

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<sup>10</sup> "Alaska Native Entities" is the term used in the Alaska agreements and describes the seven non-profit corporations and four federally recognized tribes that have an agreement with the state of Alaska.

## **B. Arizona**

There is one Arizona agreement with the Navajo Nation that was originally executed in January 2007 and has been extended until June 30, 2016. The Arizona-Navajo Nation agreement provides administrative, training and maintenance funding. The Navajo Nation is required to provide the non-federal match. However, the Navajo Nation has yet to receive any IV-E funds from the state. The agreement has not been implemented because the Navajo Nation Department of Child and Family Service's computer system is not compatible with Arizona's database system (called "CHILDS," Children's Information Library and Data Source) that tracks case management information and statistical data about child protective services. The state of Arizona will reimburse the Navajo Nation for administrative and maintenance costs only when the data mandated by Title IV-E and its state plan has been entered into Arizona's computer data system. Also, the state agreed to reimburse the Navajo Nation for costs dating back to 2007 if the Navajo Nation would upgrade its system and become current. However, the Navajo Nation has not had the funding to update its current computer system to meet the state's requirements.

According to contacts at the Navajo Nation, the state of Arizona refused to enter the Navajo Nation's data into the state's computer system or allow the Navajo Nation to enter the data, despite the fact the Navajo Nation received training and is certified to enter information in Arizona's CHILDS computer system. This contrasts with the Navajo Nation's experience in New Mexico – New Mexico does enter Navajo Nation data into its computer system so that the Nation receives maintenance funding.

The Arizona agreement provides brief and concise provisions that speak to most of the components of a Title IV-E program, and cites to provisions of the Act for reference. In summary, the agreement as written is not complicated, relies on federal law and supports tribal sovereignty in the implementation of the program.

The state of Arizona previously had an agreement with the Hopi Tribe that expired in 2011 and was not renewed. The Navajo Nation was recently approved for direct federal funding.

## **C. California**

The California Department of Social Services entered into two agreements, one with the Karuk Tribe on May 14, 2007 and one with the Yurok Tribe on May 28, 2007, to provide administration and maintenance costs. When implemented, the state will provide the non-federal match for these costs. These agreements require the Karuk and Yurok Tribes to follow various state laws, and to provide a "Tribal Child Welfare Services Plan," which mirrors the state plan. Reports from one of the tribes stated that the Tribal Plan required by the state is not feasible and runs contrary to the tribal law. Thus, neither tribe has developed a plan, nor is either tribal agreement currently effective.

The Yurok Tribe states that there are several Indian child welfare cases in the Yurok Tribal Court. The Tribe is handling this casework and is not receiving any reimbursement from the state under the administrative portion of the agreement because it has not developed a Tribal Plan. In addition, the Yurok Tribe cannot fund placements for its children. The Tribe is seeking

funding from the Bureau of Indian Affairs to help with its foster care program. The Tribe received a federal grant in 2010 to begin the process of applying for direct funding and is working toward that goal.

The agreement in general has a strong “purposes” section (see Section II) that supports tribal sovereignty; however the state law requirements seem to impose additional burdens on the tribes that federal law does not require. Moreover, the purposes section states that the agreement “[d]elegate[s] to the Tribe the responsibility that would otherwise be the responsibility of the counties for the provision of foster care and adoption assistance payments....” Such a statement could be viewed as inconsistent with a tribe’s inherent sovereignty to protect its citizens.

#### **D. Iowa**

The Sac and Fox Tribe of Mississippi in Iowa and the Iowa Department of Human Services entered into a IV-E agreement to cover administration, training, and maintenance costs on July 16, 2006. The state provides the non-federal match for maintenance costs, and also provides other child welfare funding that can be used as the non-federal match for administration and training costs and for other child welfare services in addition to IV-E. This agreement continues indefinitely unless terminated with 90 days written notice.

The agreement recognizes the sovereignty of the Sac and Fox Tribe, specifically referencing tribal and federal law and not requiring compliance with state law. The agreement provides that the state and tribe will work collaboratively to develop effective case plans for tribal children and families regardless of whether proceedings are in state or tribal court. The agreement generally provides for mutual and shared obligations in terms of compliance, notification and reporting. The agreement is drafted in a more narrative style and is therefore unique in comparison to the other agreements.

In terms of implementation, the tribe has concerns that some counties will not transfer matters to the tribal court or work with tribal case workers, and the state has not informed or directed the counties concerning the requirements of the tribal-state agreement. The tribe would like to work better with the state and state child welfare staff and is currently looking to revise the tribal-state agreement to address various issues. The tribe is not currently considering direct funding.

#### **E. Michigan**

There are six Title IV-E Agreements between the Michigan Department of Human Services (“DHS”) and the following Indian Nations:

- Bay Mills Indian Community, executed in July 1999 and amended on October 1, 2008;
- Hannahville Potawatomi Indian Community, executed in July 1999 and amended on October 1, 2008;
- Keweenaw Bay Indian Community, executed in November 1999 and amended on October 1, 2008;

- Grand Traverse Band of Ottawa and Chippewa Indians, executed on August 17, 1999 and amended on October 1, 2008;
- Sault Ste. Marie Tribe of Chippewa Indians, executed in 1997, and amended on October 1, 2008; and
- Little Traverse Bay Bands of Odawa Indians, executed on November 19, 2012.

All of the agreements, except for the Little Traverse Bay Bands agreement, are identical and provide maintenance and administrative costs. Maintenance funding to four of these tribes – Bay Mills, Hannahville Potawatomi, Keweenaw Bay and Grand Traverse Band – is paid to the foster care placement directly on behalf of the tribal child. Michigan DHS has stated that administrative funding for these four tribes has not been paid pursuant to the agreement because it costs more to make the claim than the tribe could receive from the IV-E administrative reimbursement. Each of these four tribes does not have enough children being served to make an administrative cost claim worthwhile.

The Sault Ste. Marie Tribe of Chippewa Indians has established its own tribal agency to receive IV-E administrative and maintenance costs from the state. The Sault Ste. Marie is reimbursed for its administrative and maintenance costs.

As explained by representatives of one of the five tribes, pursuant to the agreement, if the tribe finds that there is a tribal child that may be eligible for Title IV-E funding, the tribe would refer that child to the state to make an eligibility determination. After a child is determined to be eligible, the tribe takes control of the case management. If the child is not eligible for Title IV-E funding, the case is returned to the tribe and the tribe funds that child through its own funds. The state and the tribe will collaborate in regard to case management and case review for eligible tribal children. However, one of the five tribal representatives stated that there is in fact little to no such collaboration as required by the agreement.

The Little Traverse Bay Band of Odawa Indians agreement is different from the other five Michigan agreements and provides for maintenance costs only. The Little Traverse Bay Band of Odawa agreement, unlike the other five agreements, acknowledges the sovereignty of the tribe and that obligations under the agreement are mutual and shared between the state and the tribe. The Little Traverse Bay Bands of Odawa have considered direct funding. However, there are currently not enough tribal children in care to make direct funding feasible. The Keweenaw Bay Indian Community received a grant in 2009 to plan and develop a direct funding program and is working toward that goal.

Though training is not included in the IV-E agreement, state staff has indicated that the state provides training to every new tribal social worker.

## **F. Minnesota**

The Minnesota Department of Human Services (“DHS”) entered into different Title IV-E agreements with each of the following four tribes. The Leech Lake Band of Ojibwe entered into an agreement with the state on December 4, 2007, and amended that agreement on December 2, 2010. This agreement covers administration, training, and maintenance costs. The tribes pay the

non-federal matching costs. The White Earth Band of Ojibwe entered into a Title IV-E agreement with the state on December 3, 2007 for administration, training, and maintenance costs. The Mille Lacs Band of Ojibwe entered into a Title IV-E agreement with the state on September 13, 2011 to cover administration and training costs only. The Red Lake Nation's agreement with the state covers administration and training costs and was executed on January 3, 2008. The Red Lake agreement is relatively basic compared to the other tribal agreements in Minnesota.

The Minnesota agreements replace individual county agreements for placements of tribal children paid for by the counties and ordered by a tribal court.

The Leech Lake Band and the White Earth Band agreements include participation in a state program called the American Indian Child Welfare Initiative ("AICWI"), which is a state funded grant for tribes to provide additional child welfare services and funding. The AICWI's mission is to help tribes build capacity to design and develop tribal approaches that ensure child safety, permanency, and well-being, in addition to transferring responsibility from counties to tribes to deliver a full continuum of child welfare services. Under these two agreements, if the child is eligible for the state AICWI program, he or she will also be eligible for Title IV-E.

In general, the Minnesota agreements are supportive of tribal sovereignty and explicitly acknowledge full faith and credit of tribal court orders pursuant to the Indian Child Welfare Act. The agreements cite to applicable tribal laws, the federal trust responsibility and the scope of tribal jurisdiction. A child's best interests are determined consistent with tribal law.

## **G. Montana**

The Montana Department of Public Health and Human Services ("PHHS") entered into six Title IV-E agreements with the following tribes, although one tribe, the Confederated Salish & Kootenai Tribes of the Flathead Reservation, has since been approved for direct federal funding:<sup>11</sup>

- Blackfeet Nation,
- Chippewa-Cree Tribe of Rocky Boy Montana,
- Confederated Salish & Kootenai Tribes of the Flathead Reservation,
- Crow Tribe of Montana,
- Fort Belknap Indian Community, and
- Northern Cheyenne Tribe.

The agreements are identical, and based off a template agreement that was negotiated in 2011 with terms no longer than seven years. The agreements cover administration, training, and

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<sup>11</sup> As of August 2013, the State of Montana is in the process of entering into an agreement with Fort Peck Assiniboine & Sioux Tribes, which is not the same template agreement as the other Montana-tribal agreements.

reimbursement to the tribe for maintenance costs. The state has agreed to pay the non-federal matching costs for maintenance. The state will pay non-federal matching costs for administration and training out of state general funds up to a capped amount until the state funding is expended. The agreements provide mutual and shared obligations between the parties.

The Confederated Salish & Kootenai Tribes' agreement includes one significantly different provision -- a requirement that the Tribe will receive 1/12th of its historical Title IV-E budget as an advanced payment. This advancement will be recovered by the state proportionately each month over the remaining 11 months of the state's fiscal year. The Salish & Kootenai were recently approved for direct federal funding, and thus their tribal-state agreement has been superseded.

There are several attachments with these tribal-state agreements that provide detailed Title IV-E requirements and processes for implementation, including forms. The attachments include detailed guidelines on eligibility, foster care, subsidized guardianship, and subsidized adoptions, the methodology for reimbursement of administrative costs with an example of a monthly statement, the process for claiming training reimbursements, a child and family services policy manual, and reporting system requirements. Each tribe includes additional attachments specific to the tribe, such as the tribe's foster care licensing requirements and tribal job profiles.

## **H. Nebraska**

There are three Title IV-E agreements from the Nebraska Department of Health and Human Services, Division of Children and Family Services (DHHS). Those agreements are with the Omaha Tribe, the Santee Sioux Nation, and the Winnebago Tribe and are effective July 1, 2010 through June 30, 2013.

The agreements for each tribe are identical and provide maintenance funding only directly to the foster care provider. The state provides the non-federal matching costs for maintenance funding. The agreements include a "cap" on funding for each tribe (the amounts vary by tribe), even though Title IV-E is an open-ended entitlement program. Thus, the agreements may limit the number of tribal children receiving assistance or the type of maintenance assistance given.<sup>12</sup> The agreement requires the tribe to provide all information necessary for the state to fulfill its administrative and eligibility determinations under Title IV-E, but these administrative activities are not funded by Title IV-E.

A representative from one tribe stated that the main issue with its agreement is that the tribe is understaffed and undertrained and that the tribe has its own court system and manages foster care cases, but receives no administrative or training funding through Title IV-E. Further, it appears that one part of the state government is making implementation of the agreement impossible. A tribal representative stated that tribal foster care homes were unable to receive

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<sup>12</sup> Tribal children in foster care not provided for by the state may obtain funding through tribal, Bureau of Indian Affairs, or Indian Child Welfare Act sources.

maintenance funding because the state police would not enter into an agreement with the tribe to perform background checks on its behalf; background checks for foster care licensing are a federal requirement for IV-E funding.

The Nebraska agreement is a vendor agreement entered into prior to the 2008 Fostering Connections Act and does not acknowledge tribal sovereignty or the government-to-government relationship.

## **I. New Mexico**

The New Mexico Department of Children, Youth and Families entered into eleven Title IV-E Agreements with the following pueblos and tribes:

- Navajo Nation
- Jicarilla Apache Tribe
- Taos Pueblo
- Picuris Pueblo
- Zuni Pueblo
- Acoma Pueblo
- Santa Ana Pueblo
- Cochiti Pueblo
- Nambe Pueblo
- Santa Clara Pueblo
- Pojoaque Pueblo

The agreements for each pueblo and tribe are substantively identical, covering maintenance costs only. The agreements were entered into in 1997 and are still in effect. The state pays the full amount of Title IV-E eligible maintenance costs directly to the foster care home in care of the tribe, including the non-federal matching share. Though the tribes and pueblos provide case management, record keeping, and eligibility information to the state, they do not receive administrative funding for performing these functions. There are nine attachments to the agreement that provide checklists for eligibility requirements, specialized foster care assessments, foster care provider information, and other information sheets on reimbursement rates and adoption assistance. In addition, New Mexico is in the process of vetting a new Title IV-E agreement to provide to the tribes and pueblos.

As written, the New Mexico agreement is a direct and simple agreement that supports sovereignty. The attachments also provide straight-forward checklists and information. Several of the tribes and pueblos stated they have a productive working relationship with the state's Title IV-E staff. However, one tribe is currently not receiving any maintenance funding pursuant to its agreement and believes administrative and training funding would assist in building the infrastructure of the tribe. Moreover, the tribal representative stated that the tribe does not have a productive relationship with the state, and that the state and tribal staff have not spoken in several years.

The Navajo Nation was recently approved for direct federal funding.

## **J. New York**

The New York State Department of Social Services, Office of Children and Family Services (OCFS) and the Saint Regis Mohawk Tribe's Department of Social Services entered into a Title

IV-E agreement to cover reimbursement of administrative and maintenance costs to the tribe. The agreement was first effective on April 1, 1994, and amended on April 22, 2005.

The agreement acknowledges Saint Regis Mohawk's sovereignty, states that the state and tribe agree to work cooperatively to supervise activities contemplated in the agreement, and generally refers to all applicable law, including tribal law. However, the specifics of the agreement enumerate a litany of New York State Code requirements.<sup>13</sup> Moreover, the agreement does not give any detail on how the state will reimburse the tribe and what the tribe must do to receive such reimbursements.

Unique in the Saint Regis Mohawk agreement is a provision requiring that the tribe will ensure that its foster care will maintain cultural and tribal values, including temporary care with extended family or clan members. In addition, a person designated by the traditional Chiefs of the Mohawk Nation Council (which is different and separate from the constitutionally elected officials of the Saint Regis Mohawk Tribe) will be contacted about placement within the child's traditional clan.

## **K. North Dakota**

The North Dakota Department of Human Services ("DHS") has entered into four Title IV-E Agreements with the following tribes:

- Devils Lake Sioux Tribe/Spirit Lake Sioux Tribe original agreement dated September 30, 1983 with an addendum dated January 8, 2004 and a supplemental agreement dated February 15, 2012 which outlines a 30 day process to address deficiencies;
- Standing Rock Sioux Tribe ("SRST") original agreement dated October 25, 1983 with a first addendum dated February 1, 2001 and a second addendum dated May 28, 2003;
- Turtle Mountain Band of Chippewa Indians original agreement dated September 30, 1983 with a first addendum dated April 9, 2001 and a second addendum dated March 8, 2003; and
- Three Affiliated Tribes (Mandan, Hidatsa and Arikara Nation) original agreement dated September 29, 1983 with a first addendum dated December 15, 2000 and a second addendum dated July 1, 2003.

These agreements cover administration, training and maintenance costs. Administration and training costs are reimbursed to the tribe. Maintenance costs are paid directly to foster care

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<sup>13</sup> Though the U.S. Congress has passed legislation that grants the State of New York criminal jurisdiction over offenses committed by or against Indians on Indian reservations (25 U.S.C. § 232), and concurrent civil jurisdiction in civil actions and proceedings between Indians and others in state court (25 U.S.C. § 233), Congress has not diminished the regulatory jurisdiction of the Saint Regis Mohawk Tribe, or any other tribe within the boundaries of New York State. Thus, only with a tribe's consent may a state impose its regulatory jurisdiction within the exterior boundaries of a reservation. See Robert B. Porter, *The Jurisdictional Relationship between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 Harv. J. Legis. 497 (1990).

homes and the state provides the non-federal share of the foster care and adoption assistance payments for all Title IV-E eligible children.

The agreements require the tribes to work with the county governments. Unfortunately, as reported by a tribal representative, there have been very few tribal children that are determined eligible for Title IV-E because the counties require the tribe to provide information to support eligibility within 30 days, which has been a difficult and nearly impossible burden for the tribes to meet: gathering the information and obtaining the court orders often takes longer than 30 days.<sup>14</sup> In addition, the county inputs data into the state system and the tribes do not have access to the data systems.

Three of the four agreements include the original agreement and two addendums. The original agreements are the same among three of the tribes and the addendums were added in response to changes in the law. The Standing Rock Sioux Tribe's original agreement is more substantive. For example, the Standing Rock Sioux Tribe agreement requires the state to make foster care maintenance payments on behalf of Standing Rock Sioux children and that the Standing Rock Tribal Court will maintain administrative and judicial supervision over the children while the DHS and tribe coordinate efforts. The other three original agreements merely recite that the parties are concerned that proper supervision be exercised over children to assure services are not duplicated.

In summary, the North Dakota agreements are broad agreements that do not provide a great deal of detail but provide general requirements that cover the basics of what is necessary for an agreement. The agreement is missing provisions regarding adoption and guardianship assistance payments, records, monitoring and audits, and technical assistance.<sup>15</sup>

## **L. Oklahoma**

The state of Oklahoma has 34 tribal-state agreements with the following tribes:

Absentee Shawnee Tribe	Alabama Quassarate Tribal Town
Apache Tribe	Caddo Nation
Cherokee Nation	Cheyenne Arapaho Tribe
Chickasaw Nation	Choctaw Nation
Citizen Band of Potawatomi	Comanche Nation
Muscogee Creek Nation	Eastern Shawnee Tribe
Fort Sill Apache Tribe	Iowa Tribe

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<sup>14</sup> In March 2013, the State of North Dakota amended its policy to allow 45 days to complete a foster care application. If the documentation is not provided within that time frame, the file is close. The file may be reopened as soon as all the required application documentation is received.

<sup>15</sup> Children who are in foster care under a IV-E tribal-state agreement are eligible to receive adoption assistance. If the state has opted to participate in the Title IV-E Guardianship Assistance Program, then the tribe may also be included in that program.

Kaw Nation	Kialagee Tribal Town
Kickapoo Tribe	KiowaTribe
Miami Tribe	Modoc Tribe
Osage Nation	Otoe-Missouria Tribe
Ottawa Tribe	Pawnee Nation
Peoria Tribe	Ponca Nation
Quapaw Tribe	Sac and Fox Nation
Seminole Nation	Seneca Cayuga Tribe
Tonakawa Tribe	United Keetoowah Band
Wichita & Affiliated Tribes	Wyandotte Nation

Most of these agreements expired on June 30, 2013 and several of the tribes are in the process of negotiating new agreements with the state of Oklahoma. Currently, 16 new agreements have been executed by the state and tribes.

The Oklahoma-tribal agreements are based on a template form drafted by the state and provided to each of the tribes for review and revisions. The majority of the final agreements have not yet been obtained and reviewed for inclusion into this report.<sup>16</sup> Of the agreements reviewed, all but two only cover maintenance costs. The Cherokee and Chickasaw Nations' agreements cover administration and maintenance costs. The tribes may receive training as provided by the state, which is not reimbursable. The Sac & Fox and Chickasaw Nations have received plan development grants for direct federal funding in 2009 and 2010, respectively.

The agreements overall are very detailed and meet Title IV-E requirements by duplicating the language of the Act. The agreements also provide detailed processes and specify how the state and the tribes share roles and responsibilities.

## **M. Oregon**

The Oregon Department of Human Services ("DHS") entered into six Title IV-E Agreements with the following tribes:

- Confederated Tribes of the Warm Springs Reservation, executed in May 2010;
- The Klamath Tribe; executed in May 2010;
- Confederated Tribes of the Umatilla Indian Reservation executed in May 2010;
- Confederated Tribes of Siletz Indians executed in June 2010;

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<sup>16</sup> The Title IV-E agreements with the following tribes have been reviewed: Cherokee Nation, Choctaw Nation, Citizen Potawatomi, Kaw Nation, Kialagee, Modoc, and Otoe-Missouria.

- Confederated Tribes of the Grande Ronde Community of Oregon executed in September 2010; and
- The Coquille Indian Tribe executed in June 2010.

All six agreements are identical and closely follow Title IV-E requirements. The agreements' terms expire on June 30, 2020 unless extended. The agreements provide administration, training, and maintenance costs and the state pays the tribes' non-federal match for those costs. The agreements are comprehensive and cover a robust IV-E program. The Confederated Tribes of Siletz Indians received a grant to prepare for direct funding in 2009 and is planning to transition to direct funding next year.

The agreement authorizes the tribes to participate in the State's Title IV-E waivers, which allow for non-relative guardianships and for greater flexibility in the use of Title IV-E funds for innovative services that prevent foster care placement of children or reunify children with their families.<sup>17</sup> The tribe must comply with the criteria of the Title IV-E waivers. The Oregon-tribal agreements are the only agreements that provide this flexible funding for child welfare demonstration projects.

## **N. South Dakota**

The Department of South Dakota Social Services Division of Child Protection entered into Title IV-E Agreements with the following four tribes: the Flandreau Santee Sioux Tribe, the Lakota Oyate Wakanyeya Owicankiyapi (LOWO),<sup>18</sup> Standing Rock Sioux Tribe, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation.

The four agreements are substantially similar and provide reimbursement for administration and training costs to the tribes. Maintenance costs are paid directly to foster families. The agreements provide capped dollar amounts to be allocated to each tribe. The state does pay some of the non-federal match under the LOWO and Sisseton-Wahpeton agreements for administrative costs. A "Program Addendum" incorporates additional information into the agreements, mostly repetitive, including a definitions section and foster care rates for the 2013 fiscal year. All agreements expired on May 31, 2013.

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<sup>17</sup> The authority under section 1130 of the Social Security Act to conduct state child welfare demonstration projects involving the waiver of certain requirements of Titles IV-B and IV-E of the Act began in 1994 with the passage of Public Law 103-432 and was later expanded in 1997 through the Adoption and Safe Families Act, which allowed the U.S. Department of Health and Human Services to approve up to 10 new waiver project each year. In 2012, the waiver authority was reauthorized pursuant to P.L. 112-34, which allows HHS to issue up to 10 waivers each year from 2012 through 2014. Waivers cannot exceed five years in duration or end after 2019, including waivers enacted under previous legislation. States conducting waiver demonstrations may use Title IV-E funds for benefits and activities beyond foster care maintenance and administration, including services that protect children from abuse and neglect, preserve families, and promote permanency. The State of Oregon was the first state to receive a flexible funding waiver in 1996 for its state program.

<sup>18</sup> Lakota Oyate Wakanyeya Owicankiyapi, Inc., Oglala Lakota Integrated Tribal Child and Family Services Agency, is a privately chartered tribal child welfare agency organized pursuant to the laws of the Oglala Sioux and provides services to Oglala Sioux children and families on the Pine Ridge Reservation.

Generally, the agreements are one-sided vendor agreements, and do not explicitly recognize tribal sovereignty or a government-to-government relationship. Tribal representatives stated that the agreements were not negotiated with the tribes. The Flandreau Santee Sioux Tribe currently receives no money under this agreement because no tribal children are in tribal foster care. Several tribal staff of different tribes were not aware that they could receive administrative and training funding under the agreement. LOWO states that it is not adequately funded for administrative and training costs. The LOWO are considering a move to direct funding.

## **O. Texas**

The Texas Department of Family & Protective Services (“DFPS”) entered into one Title IV-E agreement with the Alabama-Coushatta Tribe of Texas on April 12, 2012. It will expire on April 12, 2014. Tribal representatives stated that the agreement took 10 years to negotiate and the state refused to include administrative funding in the agreement. The tribe is required to provide all the judicial findings, information to support eligibility determinations to the state, provide case plans for each tribal child, maintain all records and be subject to audits and review, though it receives no administrative or training costs through Title IV-E to support these activities.

While this agreement covers maintenance costs only, it is very comprehensive. There are 12 exhibits included. These exhibits cover areas such as judicial requirements, policy, templates for the “Adoption Assistance” and “Permanency Care” applications, and provides state rules for foster care, adoption assistance, and permanency care/guardianship.

The state has agreed to pay the non-federal share of foster care, permanency care assistance and adoption assistance payments. The agreement expressly recognizes tribal sovereignty and divides obligations and duties between the tribe and state, and enumerates the parties’ shared responsibilities. As of February 2013, the tribe has not actually implemented the agreement because they have no relevant cases in tribal court.

## **P. Washington**

The Washington Department of Social and Health Services, Children’s Administration, entered into Title IV-E agreements with the Lummi Nation, the Makah Nation and the Quinault Indian Nation in July 2009. The agreements remain in effect until terminated. The agreements include reimbursement to the tribes to cover administration, training, and maintenance costs. The state pays the non-federal share of maintenance costs; the tribes pay the non-federal share for administrative and training costs. The Lummi Nation received a plan development grant for direct funding in 2010. The State of Washington previously had an agreement with the Port Gamble S’Klallam Tribe dated September 30, 2005. Port Gamble was the first tribe to obtain direct federal funding, on April 1, 2012, and its agreement with the state is no longer in force.

The Title IV-E Agreements are divided into two separate sub-agreements for each tribe. The “Program Agreement” describes the general purpose of the Agreement, defines the terms, and explains the various provisions required by the Title IV-E statute. The “Operational Agreement” (“OA”) sets forth terms and conditions of the duties and responsibilities of each party for Title

IV-E services to children under tribal jurisdiction. The agreements provide a great deal of detail and specifics regarding processes for implementation of the agreement.

What is unique about the Washington agreements is that the state has agreed to reimburse the tribes 40% of the state's savings in foster care maintenance funding that would have been paid by the state in state funds for eligible children were it not for the agreements. There are no other state-tribal agreements that provide such reimbursement.

## II. RECOGNITION OF SOVEREIGNTY AND SELF-DETERMINATION WITHIN TRIBAL-STATE AGREEMENTS

Prior to the passage of the Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351) (the “Fostering Connections Act”) on October 7, 2008, the federal government had no statutory mechanism to directly fund tribal foster care programs through Title IV-E, and states had no legal obligations to develop agreements with tribes to provide Title IV-E funding for IV-E eligible children under the jurisdiction of a tribe, although some states voluntarily negotiated such agreements. The Fostering Connections Act, among other things, amended Title IV-E of the Social Security Act to authorize federally recognized tribes, tribal organizations, or tribal consortia to operate a Title IV-E program either through direct funding or through an agreement with the state receiving IV-E funds.

Since October 7, 2008, when a tribe asks a state to develop an intergovernmental agreement, to provide IV-E funding to children under the jurisdiction of the tribe, the state must negotiate in good faith. 42 U.S.C. § 671(a)(32) mandates that the state’s Title IV-E Plan approved by the Secretary,

*Provides that the State will negotiate in good faith with any Indian tribe, tribal organization or tribal consortium in the State that requests to develop an agreement with the State to administer all or part of the program under this part on behalf of Indian children who are under the authority of the tribe, organization, or consortium, including foster care maintenance payments on behalf of children who are placed in State or tribally licensed foster family homes, adoption assistance payments, and, if the State has elected to provide such payments, kinship guardianship assistance payments under section 473(d), and tribal access to resources for administration, training, and data collection.*

(Emphasis added.)

IV-E, however, does not mandate how the relationship between a tribe and state should manifest in a tribal-state agreement. Nor does it express how the federal government’s fiduciary and its government-to-government relationship with tribes is to be realized through this delegation of IV-E responsibility through federal funds to the states.

In several of the tribal-state agreements, states have recognized their obligation to deliver federal funding to tribes on a government-to-government basis and included language supporting Indian Nation sovereignty, self-determination, and federal law and policy regarding Indian children. For example, the Arizona-Navajo Nation Agreement provides:

*Whereas, the State and the Nation recognize that Navajo Children are citizens of the State and further recognize the need to coordinate their efforts with respect to these children to ensure that the Title IV-E payments and care is in accordance with the federal standards set forth in Title IV-E;*

...

Whereas, consistent with the Government-to-Government Policy provisions under the Intergovernmental Agreement entered into by the State and the Nation the interactions between the State and the Nation are predicated on a government-to-government relationship and carried forward in a spirit of cooperation, coordination, communication, and good will.

The Oregon-tribal Agreements state:

The purpose of this Agreement is to provide the Tribe federal funding under the Title IV Part E Federal Payments for the Foster Care, Subsidized Guardianship Assistance, and Adoption Assistance program...to facilitate intergovernmental cooperation; to provide for the best interest of Indian Children; and to meet the policy goals of the Indian Child Welfare Act of 1978.

The Karuk-California Agreement states:

The Karuk Tribal Court is an integral component of the Tribe's sovereign authority, and is crucial to the effective meeting of the policy goals here articulated.

The agreement between the Sac and Fox Tribe of the Mississippi in Iowa and Iowa specifies:

Whereas, the Sac and Fox Tribe of the Mississippi in Iowa is a federally recognized Indian Tribe and is the beneficial owner of, and government for, the lands owned by the Sac and Fox Tribe of the Mississippi in Iowa located in the State of Iowa; and

Whereas, the State of Iowa and the Sac and Fox Tribe of the Mississippi in Iowa are separate sovereigns and each respects the laws of the other sovereign; and

...

Whereas, the public policy of the Tribe is reflected in its Constitution, statutes, ordinances, and administrative rules; and

...

Whereas, the Sac and Fox Tribe of the Mississippi in Iowa and the state of Iowa have a mutual interest in entering into an agreement which will: permit the Tribe to obtain federal and state foster care funds for the foster care placements of children who are residents of Iowa and are within the jurisdiction of the Tribal Court, allow the Tribe to request and access State-funded child welfare services for children under court orders and jurisdiction of the Tribal Court, and indicate the mutual agreement of the parties concerning other child welfare matters, such as access to state child welfare training, monitoring of child welfare expenditures for Tribal children, and other issues.

Some tribal-state agreements are silent concerning the government-to-government relationship, Indian nation self-determination and sovereignty. Generally, these tribal-state agreements are

contract or vendor agreements and treat the Indian nation as a contractor and not as a separate sovereign government.

Whether there is express recognition of Indian nation self-determination and sovereignty or not, there are several agreements where issues between the state and the tribe have prevented implementation of the IV-E agreement. Often, the tenor of the working relationship may be dependent more upon how state child services staff choose to collaborate with tribal child services staff than the terms of the agreement.

This section describes three ways the tribal-state agreements express the relationship between the tribe and the state – either protecting Indian Nation self-determination and sovereignty, or ignoring Indian Nation status. First, the tribal-state relationship expresses itself in the form or type of agreement. Second, self-determination and sovereignty are shown through express statements of sovereignty, federal Indian law and tribal laws and policies. Third, the relationship can be examined through how liabilities and risks are managed between the parties, including waivers of tribal sovereign immunity.

## **A. Express Recognition of Tribal Sovereignty in the Tribal-State Agreement**

### **1. Forms of Agreements**

Indian Nations often contract with states to provide services to Indian Nation citizens. Simply, these vendor or contractor agreements treat the Indian Nation as a private entity doing business with the state, and not necessarily as a sovereign Indian Nation government. Indian Nation governments must first ask themselves how they wish to establish relationships with the state and state program; sometimes a tribe will find that a simple vendor or contractor type of arrangement is commensurate with the services to be provided. Indian Nations may also negotiate with the state concerning significant matters between governments, which require express language about the Indian Nation's sovereign status. These agreements are not vendor agreements but are – in tone and in effect – agreements between sovereigns.

Whether it is a vendor agreement or a negotiated government-to-government agreement, an Indian Nation remains a sovereign government and does not waive its status as such unless it expressly does so.<sup>19</sup> However, when a state has chosen to enter into a vendor or contractor agreement with an Indian Nation, it may be indicative of the state's reluctance to want to deal with the tribe as a sovereign entity and its unique status under federal law. There were three states – Alaska, Nebraska, and South Dakota – of 16 states total that utilized a vendor agreement format for their IV-E relationship with the Indian Nations.

The South Dakota agreements with LOWO, the Sisseton Wahpeton Oyate, the Standing Rock Sioux Tribe, and the Flandreau Santee Sioux Tribe are vendor agreements effective June 1, 2012

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<sup>19</sup> "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (citation omitted).

through May 31, 2013; thus, these agreements came after the 2008 Fostering Connections Act amendments and the good faith requirement of the state to negotiate with tribes. The agreements are fairly generic and generally state that the “vendor” must follow all applicable federal, state, county, city or local laws. As for foster care licensing, the tribes are required to meet the standards of national organizations as required by Title IV-E and state law is not imposed. In fact, state law is not expressly mandated anywhere in the agreements except that the agreements are to be construed in accordance with the laws of South Dakota and any lawsuit is to be brought in the state court. The only recognition of sovereignty within the South Dakota agreements comes from statements that tribal children will be under the jurisdiction of the tribal court.

The Nebraska agreements with the Winnebago Tribe, the Santee Sioux Tribe and the Omaha Tribe are form vendor agreements effective July 1, 2010 through June 30, 2013. These agreements also originated after the 2008 Fostering Connections Act amendments. Tribes are required, as a “contractor,” to “comply with all Nebraska statutory and regulatory law” and the agreements shall be interpreted in accordance with Nebraska law and issues resolved in a Nebraska forum. The agreements further require the tribes to comply with Nebraska nonresident income tax withholding, but we are not aware whether any of the Nebraska tribes comply with this requirement, to what extent, or what federal or state laws Nebraska asserts require the tribes to withhold nonresident income tax.<sup>20</sup>

The eleven Alaska Native Entity agreements are also identical form vendor agreements. However, seven of the agreements are between Alaska Native non-profit corporations organized under Alaska laws. These seven agreements are distinguishable from agreements between a state and a federally recognized tribe because these non-profit corporations are formed under state law and do not hold the same special sovereign status and cannot exercise the same sovereign immunity as a federally recognized tribe. On the other hand, four of the agreements are between the state of Alaska and federally recognized tribes.

The Alaska agreements are titled “Provider Agreement” and the Alaska Native Entities, including the four federally recognized tribes, are required to obtain a State of Alaska Business license for implementation of the agreement. There is no recognition of tribal sovereignty, the government-to-government relationship or Indian Nation self-determination in the agreements with the four federally recognized tribes. Moreover, the State of Alaska requires the four federally recognized tribes to expressly waive their sovereign immunity, and the state provides the tribes with a form of waiver. The broad scope of this waiver is discussed below in section C.4.

All but two of the Alaska agreements are dated between 2000 and 2002. The Orutsaramiut Native Council is a federally recognized tribe with an agreement dated 2010, and the Nome Eskimo Community is a federally recognized tribe with an agreement dated 2011. However, these two agreements are the same template agreement as the 2000-2002 agreements, which

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<sup>20</sup> Generally, state law, including state authority to tax, is not applicable to an Indian Tribe within its territory, absent the consent of Congress. *Worcester v. Georgia*, 31 U.S. 515, 562-563 (1832).

were executed prior to the 2008 Fostering Connections Act amendments, and have not been revised to consider the effect of those amendments. The agreements are not clear on the division of obligations or activities between the non-profit corporations and the federally recognized tribes represented by the corporations.

It should also be noted that although the Michigan and New York agreements are not vendor agreements, they do not explicitly recognize Indian Nation sovereignty and the agreements expressly proclaim that the tribes are obligated to follow state law to receive federal funds. The remaining 11 states with tribal-state agreements are government-to-government agreements recognizing tribal sovereignty in various ways.

## **2. Sovereignty and Tribal Laws**

Many agreements generally acknowledge sovereignty and self-determination of Indian Nations. Other agreements go further and recognize specific tribal laws and tribal jurisdiction. There are 11 states that expressly mention Indian Nation sovereignty including Arizona, California, Iowa, Minnesota, Montana, North Dakota, New Mexico, Oklahoma, Oregon, Texas, and Washington.

The Minnesota agreements explicitly recognize the role of the federal government's trust responsibility to the tribes, thereby correctly identifying that the state does not usurp the important role of the federal government. The Minnesota agreement says that the state is carrying out a federal program where the federal government has a trust responsibility to the tribe and that nothing in the IV-E agreement between the state and tribe shall abrogate that trust responsibility, and that "The State...shall not require an Indian tribe or band to deny their sovereignty as a requirement or condition of a contract with the State or agency of the State."

The Preamble of the Montana-tribal agreements recognizes that the tribes are sovereign nations and that a "unique government-to-government relationship exists between the [tribe] and the State of Montana." It further states that the agreement is to be performed in good faith and with a genuine spirit of cooperation to provide available IV-E foster care services to eligible Indian children. The New Mexico agreements also state that "the interactions between the State and the Pueblo [or tribe] are predicated on a government-to-government relationship and carried forward in a spirit of cooperation, coordination, communication, and good will."

The state of Texas expressly recognizes the Alabama-Coushatta Tribe as a sovereign entity, and that the state has interests in protecting Indian children and the cultural heritage of Indian tribes in the state for long-term survival of those tribes. Other states also recognize the importance of Indian Country and tribal children to the state's health and welfare.

A few states expressly recognize the application of tribal laws, in varying degrees. Washington recognizes the authority of the tribe's constitutions and bylaws. The State of California recognizes the tribal Code to the extent it does not conflict with state law. Michigan recognizes tribal Court Orders and referrals. In several of the Minnesota agreements, the state recognizes and respects the authority of the tribe to care for children under tribal jurisdiction, and that a child's case plan shall refer to applicable tribal law in order to be consistent with tribal placement. The Iowa agreement goes much further and expressly recognizes tribal law without limitation and expressly states that "The Code of the Sac & Fox Tribe on Child Welfare,

including Titles 6 and 7, provide procedural and substantive laws which meet the minimum requirements of the Act.”

In addition to the recognition of tribal laws, the majority of the agreements state that the tribe must meet all applicable federal laws related to IV-E compliance and follow the state’s IV-E plan approved by the federal government. Those states include, but are not limited to, California, New Mexico, South Dakota, Texas and Washington.

The tribal-state agreements in Oregon confirm tribal sovereignty while balancing the state’s need for its plan to be followed:

The Tribe asserts that it is generally exempt from the application of state laws under Public Law 83-280. DHS, in accepting federal funds that are part of financial assistance paid to Tribe under this Agreement, must comply and exercise best efforts to cause its sub-grantees to comply with federal requirements and applicable requirements and assurances in the State Title IV-E Plan applicable to the delivery of services. Tribe agrees, as DHS’ sub-grantee, to comply and exercise best efforts to cause all providers to comply with all federal laws applicable to the delivery of services and to comply with those state laws and rules that are a basis of the State Title IV-E Plan and necessary for the delivery of Services under this Agreement.

Oregon-tribal agreements, section 16.11. It also states that “Nothing in this Agreement shall be construed as a diminishment or abrogation of the tribe’s rights under the Indian Child Welfare Act, any other federal law, or its treaty.” See section 16.07.

### **3. Issues of Jurisdiction**

The majority of the agreements do not describe matters of jurisdiction, including personal jurisdiction – who is subject to the tribe’s jurisdiction; and territorial jurisdiction – what are the boundaries of the tribe’s assertion of jurisdiction. Most agreements do not describe the geographic or political area comprising the territorial jurisdiction of the tribe, though many generally provide that the agreement applies to children under tribal court jurisdiction and/or tribal children within the boundaries of the reservation.

There are a few more expansive descriptions of the scope of jurisdiction. The Minnesota and Mille Lacs Band of Ojibwe agreement specifically details personal jurisdiction as including all children who are residents of or domiciled on the reservation, as well as children who are members of the tribe living outside the reservation, children living outside the reservation who are eligible for tribal membership, or children who are in the legal custody of a person or an agency pursuant to an order of the tribal court. The tribe’s personal jurisdiction of members living off the reservation is subject to parental objection, tribal court denial of jurisdiction, or an assertion of good cause.<sup>21</sup>

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<sup>21</sup> In essence, this is a restatement of 25 U.S.C. §1911(b), which is part of the Indian Child Welfare Act.

The Minnesota and Leech Lake Band of Ojibwe and White Earth Band of Ojibwe agreements state that the tribes have jurisdiction over children (1) recognized by the tribes as members and who are residents of or domiciled on the reservation, (2) who are eligible for membership under the Indian Child Welfare Act but not necessarily residing within the reservation, and (3) who are wards of the tribal court, or otherwise subject to the jurisdiction of the tribal court, as set forth under the tribe's judicial code.

The tribal agreements in New Mexico describe jurisdictional matters as opportunities for cooperation between the tribe or pueblo and the state:

In most situations in which the Pueblo has custody, the action will be in Pueblo Court or in the process of being transferred to Pueblo Court. In any case in which the Pueblo has custody, but the action is being maintained in State court, or the child is placed in a foster home outside of the Pueblo, a staffing between the appropriate Pueblo representatives and Department representatives, including the Children's Court Attorney, will be necessary to coordinate responsibilities relative to the State court proceedings.

Santa Ana Pueblo-New Mexico Agreement, Article VIII.1.

#### **4. Recognition of ICWA**

The Indian Child Welfare Act of 1978 (ICWA) (Pub.L. 95-608, 92 Stat. 3069, enacted November 8, 1978, codified at 25 U.S.C. §§ 1901-1963) applies to Indian children in state child custody proceedings, including foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. 25 U.S.C. § 1903(1). ICWA's mandates are inapplicable to Indian child custody proceedings in tribal court except where the statute specifically mentions tribal court proceedings.<sup>22</sup>

Title IV-E does not require recognition of the Indian Child Welfare Act in agreements between tribes and states, though many of the agreements do cite to the Act. The following states recognize ICWA in some fashion within the provisions of their IV-E agreements: Alaska,<sup>23</sup> Arizona, California, Michigan, Minnesota, Montana, New York, North Dakota, Oklahoma, Oregon, South Dakota, and Washington. Iowa, Nebraska, New Mexico and Texas do not mention ICWA.

California recognizes ICWA's preference that Indian children should be placed in Indian homes and cases are presumptively heard in tribal court, citing to 25 U.S.C. § 1902. Michigan recognizes that ICWA supports that an Indian tribe has exclusive jurisdiction over any child custody proceeding involving any Indian child who resides or is domiciled within the exterior boundaries of the reservation and over any Indian child who is a ward of the tribal court. The

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<sup>22</sup>There are only a few sections in ICWA which reference tribal courts. These include a provision that Indian tribes have exclusive jurisdiction over wards of the tribal court, 25 U.S.C. §1911(a), and a section requiring tribal courts to give full faith and credit to child custody orders of other tribal courts if certain circumstances are present. See 25 U.S.C. § 1911(d).

<sup>23</sup> The Alaska agreement requires that the "Provider is responsible for assuring compliance with ... ICWA..."

South Dakota agreements state that the parties shall construe “reasonable efforts” required by IV-E in a manner consistent with the active efforts requirement of ICWA.

Montana recognizes ICWA, and that the tribe will provide ICWA services to IV-E eligible children and will adopt written tribal policies and procedures which describe the tribes’ ICWA services provided to IV-E eligible children. Since ICWA sets forward jurisdictional rules relating to Indian children, and does not apply to the tribe or tribal Courts, the reference to “ICWA” may have been in error and may actually mean “child welfare” services generally, or foster care services, and not “ICWA services.”

## **5. Full Faith and Credit**

States recognize Indian nation sovereignty through expressly providing “full faith and credit” for tribal court judgments. Though federal common law is not consistent in terms of whether a state court must give full faith and credit to a tribal court judgment, there are federal statutes that require full faith and credit. One of those statutes is ICWA.<sup>24</sup> Tribal IV-E agreements from the states of Minnesota, Texas, and Washington explicitly recognize full faith and credit of tribal court actions and therefore support self-determination and sovereignty, and the mandates of ICWA.

The Texas and Alabama-Coushatta agreement provides that the courts of both parties agree to recognize full faith and credit to the public acts, records and judicial proceedings involving child protection whether conducted by a tribal court or a state court. In contrast, the Michigan-Little Traverse Bay Bands of Odawa Indians agreement provides that the state will give full faith and credit to tribal policies and procedures as long as they are consistent with the state’s obligation to operate Title IV-E in accordance with federal regulations.

## **6. States’ Requirements for Personnel and Staffing of Tribal Programs**

The federal requirements for personnel and staff of a IV-E program are very broad, and provide no authority for the federal government to become involved in personnel decisions. Title IV-E requires that a state will “use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods.” 42 U.S.C. § 671(a)(5).

The Alabama-Coushatta and Texas agreement reiterates this broad requirement. Several of the agreements require the tribe merely to inform the state when there are changes in staffing (i.e., Oklahoma). Alaska requires the resumes, job descriptions and licensing or credentials of all tribal staff. The Sac & Fox Tribe of the Mississippi in Iowa and the State of Iowa have mutual

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<sup>24</sup> 25 U.S.C. § 1911(d) provides, “The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.”

requirements that both shall hire qualified staff in accordance with personnel policies and procedures.

The Washington agreements require the tribe to hire qualified staff in accordance with tribal personnel policies and procedures and that the tribe's personnel policies and position descriptions include at least minimum educational requirements, specialized skills, criminal background clearance requirements and staff training plans.

The Oklahoma agreements provide that the Indian nation shall employ the staff necessary to provide child welfare services during the term of the agreement and provide notice of who the staff are. The agreements further provide that the state shall inform the tribes of changes to staff. Also, the tribe must do a fingerprint records check of staff prior to employment.

The Nebraska agreements require the tribes to use a federal immigration verification system to determine the work eligibility status of new employees, but make no other mention of IV-E's personnel standards.

The New Mexico agreement is the only agreement that states that nothing in the IV-E agreement shall prohibit the tribe from adhering to Indian preference in employment.

## **B. Risks and Liabilities**

As stated earlier, Title IV-E does not mandate the manner in which states and tribes should interact. Thus, there is nothing in IV-E that requires an agreed-upon resolution process where there are disputes. However, parties to a contract or agreement will generally include some form of resolution procedures in case there is a dispute or a party does not perform its contractual obligations. The most common method in the agreements is termination of the contract where a party has not fulfilled its obligations, and the tribe agrees to pay any disallowance<sup>25</sup> of financial assistance resulting from its own actions. In addition to these general provisions, the tribal-state agreements may also handle disputes through several mechanisms: alternative dispute resolution, simple termination, indemnification and hold harmless provisions, insurance, and waivers of sovereign immunity to bring disputes to administrative or judicial resolution.

### **1. Alternative Dispute Resolution**

Several tribal-state agreements provide informal-type alternative dispute resolution processes that are consistent with the good faith required of the states in negotiating IV-E agreements. The Yurok and Karuk agreements in California state that the parties will strive to ensure that a

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<sup>25</sup> For example, in the New Mexico agreements, the pueblo or tribe agrees to repay any monies expended by the state if the payment has been disallowed, where the disallowance is based upon the acts or omissions of the pueblo or tribe that violate applicable federal statutes or regulations. It further states: "Each party shall be solely responsible for fiscal or other sanctions occasioned as a result of its own violation of requirements applicable to the performance of this agreement." See also the Oregon-tribal Agreements, Section 17, "Recovery of Financial Assistance."

dispute will not disrupt services to Indian children and families. The California agreement initially provides for an informal meet and confer process:

If a dispute arises with respect to this Agreement involving the interpretation, implementation or conflict of laws, policies and regulations, the Tribe and CDSS will meet and confer in good faith at the Tribal and Department staff level, commencing with communication between the designated Tribal/State CWS Program Contacts, and attempt to resolve the dispute in a manner consistent with Tribal, federal and state laws and consistent with Section II of this Agreement.

If the informal meet and confer process does not resolve the dispute, the parties will agree to “settle the dispute by mediation administered by the Judicial Arbitration and Mediation Services (JAMS) or other mediation service as mutually agreed to by the Parties.” The mediation provisions further state that “Any laws, processes or protocols identified by CDSS and/or the DHHS as contrary to the laws and/or policies of Title IV-E and that are either substantially likely to subject the Tribe’s program to ineligibility for Title IV-E funding or cause serious risk of harm to children served under this Agreement” are not matters subject to mediation. The Parties may consider termination for unresolved disputes or for matters not subject to mediation.

Five of the six tribal agreements with Michigan (excluding the Little Traverse Bay Bands of Odawa Indians) provide that the tribe and state shall meet and attempt in good faith to resolve disputes by negotiation. The tribe must provide a notice to the state of its intent to pursue a claim and cannot commence a suit until after 90 days of notifying the state. During those 90 days, the tribe and the state must meet to attempt resolution of the dispute.

The Minnesota agreement with the Mille Lacs Band of Ojibwe states: “The parties agree that, upon request of any party, disputes arising between any signatory Tribe and the Department concerning the application and interpretation of this agreement shall be referred to a duly designated representative (or representatives) of the Department and the Tribe for a good faith effort to resolve the dispute. If a resolution is reached, the decision shall be binding upon the Department and upon the participating Tribe.”

The tribal agreements from Montana require the parties to first meet and confer to resolve any disputes, and if resolution is not possible, the parties agree that venue for enforcement of the terms of the agreement lies in a court of competent jurisdiction.<sup>26</sup> The tribes agree to continue performance under the Agreement unless the state explicitly waives the tribes’ performance.

In New Mexico, if a dispute cannot be reconciled between tribal and state staff, then the dispute shall be presented to a mutually agreed upon panel of tribal and department officials. If issues

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<sup>26</sup> A “court of competent jurisdiction” is not defined in the Montana template agreement. However, the parties agree that the Agreement shall be governed and interpreted according to applicable federal, state, and tribal laws and regulations. The court where a case is brought would determine whether it is a court of competent jurisdiction, which is dependent on an analysis of personal and subject matter jurisdiction, among other things.

remain unresolved, then they shall be submitted to arbitration as outlined in the “November 26, 1991 Memorandum on Dispute Resolution from the Office of the Attorney General of New Mexico.”<sup>27</sup>

The Alabama Coushatta-Texas agreement first requires informal discussions between liaison staff for the tribe and state agency. If informal discussions do not resolve the dispute, then presentation of the issues shall be made to a panel of management representatives from the tribe and the state. If management is unable to resolve the dispute, then the parties will follow procedures in the Texas Government Code, section 2260, which requires notice and negotiation, and a hearing with a state administrative law judge if negotiation does not resolve the dispute.<sup>28</sup> Damages are limited to direct monetary damages pursuant to the agreement; the Texas code does not provide resolution for personal injury or wrongful death and consequential damages.

In the Washington-tribal agreements, before a party can terminate the agreement, the terminating party must make a good faith effort to discuss, renegotiate and modify the agreement to resolve any disputes. The Oregon-tribal agreements simply require the parties to negotiate in good faith and without delay in all matters requiring negotiation.

The Nebraska-tribal agreements do not provide any procedures for dispute resolution. If an audit finds any issues, the tribe is required to correct those issues and the state may request a written assurance from the tribe. The tribe may be liable for breach of contract if it does not perform.<sup>29</sup>

## **2. Insurance**

Another way to diminish risk in a contract is for the parties to insure themselves against any risk. Alaska requires that the Alaska Native Entities maintain appropriate levels of insurance necessary for the responsible delivery of services under their agreement, which shall include Workers Compensation Insurance, Commercial General Liability Insurance with \$300,000 combined single limit per occurrence, and may include Commercial General Automobile Liability Insurance and Professional Liability Insurance.

Washington State certifies that it is self-insured for all exposure. The three Indian nations in Washington State certify that either they are self-insured or that they shall maintain commercial liability at \$1,000,000 per occurrence and \$2,000,000 aggregate. The tribes waive all rights against the State of Washington and its Department of Social and Human Services for the recovery of damages to the extent they are covered by insurance.

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<sup>27</sup> This 1991 Memorandum is attached to the New Mexico agreements as Exhibit F. However, this Exhibit was not provided and could not be located through on-line research.

<sup>28</sup> This Texas Code can be viewed at <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2260.htm> (last viewed on August 21, 2013).

<sup>29</sup> However, see section on “Waiver of Sovereign Immunity” below. The tribes did not provide an express waiver of sovereign immunity so Nebraska may be left without a remedy. As provided in this section, there are many contractual options to protect state and tribal interests when a dispute arises, without the need for a waiver of sovereign immunity by the tribe.

South Dakota requires that the tribes have commercial general liability, business automobile, workers' comp, and professional liability. The six tribes in Montana must maintain general liability and automobile insurance.

A few of the state-tribal agreements recognize the Federal Tort Claims Act, whereby claims against tribes and their employees for activities carried out under self-determination contracts or self-governance compacts with the United States may be brought against the United States under the Act and the United States will defend and indemnify the tribe in such actions. 25 U.S.C. § 450f(d).<sup>30</sup> In the Arizona-Navajo Nation agreement, the agreement states that the Navajo Nation is insured under the Federal Tort Claims Act. It further states that each party is responsible for its own negligence.

The California agreements also recognize that the tribe is an employee of the federal government for purposes of the Federal Tort Claims Act, but where the tribe may not be covered by the Act, the tribe must have an insurance policy, including commercial general liability. The insurance must include the state and counties as additional insured and remove any exclusion that limits coverage for sexual abuse, molestation and related claims. Failure to maintain insurance is grounds for termination of the agreement by the state.

### **3. Indemnification and Hold Harmless Provisions**

Many of the agreements provide that the tribe shall agree to hold the state harmless, indemnify and defend the state from any matters arising from the tribe's performance under the agreement. These agreements include tribal agreements in Alaska, Arizona, South Dakota, Montana and Iowa. In Montana, the provision provides a mutual agreement to hold the other party harmless:

The Tribe agrees to indemnify, defend, and hold harmless the State of Montana, its officials, agents, and employees from any breach of this Agreement by the Tribe, from any matters arising from the performance of this Agreement or from the Tribe's failure to comply with any Federal, State or local laws, regulation and ordinances applicable to the services or work to be provided under this Agreement. The State agrees to indemnify, defend, and hold harmless the Tribe, its officials, agents, and employees from any breach of this contract by the State, from any matters arising from the performance of this contract, or from the State's failure to comply with any Federal, State, or local laws, regulations or ordinances applicable to the services or work to be provided under this Agreement. This indemnification applies to all claims, obligations, liabilities, costs, attorney's fees, losses or suits resulting from any acts, errors, omissions or

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<sup>30</sup> Compare *Hinsley v. Standing Rock Protective Servs.*, 516 F.3d 668, 672 (8th Cir. 2008) (applying FTCA to action brought against tribal child protective social services agency operating under self-determination contract), with *Hebert v. United States*, 438 F.3d 483 (5th Cir. 2005) (FTCA does not cover tribal police officer engaged in actions not pursuant to contract or commission with Bureau of Indian Affairs). Title IV-E contracts are pursuant to a state-tribal intergovernmental agreement and not a self-determination contract and is not a directly funded federal grant.

negligence, whether willful or not, of the Parties, their employees, agents, subcontractors or assignees and any other person, firm, or corporation performing work, services or providing materials under this Agreement.

However, it is not clear how truly effective these provisions may be where there is no waiver of sovereign immunity. As discussed below, the state of Montana and the tribes in Montana have granted a mutual limited waiver of sovereign immunity. Each state has its own laws where it will allow limited waiver for certain types of actions. For example, in Nebraska's agreement, it states that Nebraska's liability is limited as provided by the Nebraska Tort Claims Act and Contract Claims Act. For Indian nations, waiver of sovereign immunity must be express and clear.

#### **4. Waiver of Sovereign Immunity**

Indian nations are immune from suit in both state and federal courts unless Congress has authorized the suit or the tribe has expressly waived its immunity. See Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 7.05 (2012). As the Supreme Court has stated, Indian nation sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Id.*, citing *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986).

Only two states have required Indian nations to waive sovereign immunity so that the Indian nation can be sued for damages arising out of the IV-E agreement: Alaska and Montana. The majority of states, as discussed previously, have found other ways to limit risks. The State of Alaska is the only state requiring tribes to waive sovereign immunity for any claim arising out of activities relating to the agreement and to consent to suit in Alaska state courts or in a state administrative agency proceeding. Four of the Alaska agreements are between the state of Alaska and federally recognized tribes and the state requires each federal recognized tribe to provide an express and written waiver; the state even provides a form of waiver. The Alaska waiver is extremely broad and will allow any cause of action including claims for misapplication of funds, as well as negligence and tort claims, allowable interest, costs and attorneys' fees. The waiver further allows the state to levy and execution of any judgment against all property and funds of the tribe, however held and wherever located.<sup>31</sup>

The six tribal agreements from Montana, contrary to the Alaska agreements, are very narrow. These agreements provide a limited waiver that is also mutual: the state and the tribes have agreed to waive immunity for contract actions arising out of the agreement, and the tribes' waivers are limited for the sole purpose of enforcement and recovery of damages:

The State has waived its sovereign immunity from suit for contract actions arising under this Agreement. See Montana Code Annotated, Title 18, Chapter 1, part 4. For the purposes of this Agreement, the Tribe expressly grants a limited

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<sup>31</sup> It is the authors' understanding that the State of Alaska is in negotiations with Alaska Native Tribes and Corporations to amend the IV-E agreements to an inter-governmental type of agreement that does not require the Alaska Native Tribes to waive their sovereign immunity.

waiver of sovereign immunity from suit for the sole purpose of enforcement of the Agreement by the Department and recovery of damages for breach of the terms of the Agreement. The Parties to this Agreement agree that no word, phrase, sentence, paragraph, or section, in whole or in part, separate or together, contained in this Agreement may be interpreted, other than expressly provided in this provision, as an express or implied waiver generally of the sovereign immunity of the Tribe.

But the majority of the agreements do not require tribal waivers of sovereign immunity. Several of the agreements explicitly state that the agreement does not include a waiver of sovereign immunity. In the Arizona agreement with the Navajo Nation, the agreement states: "Nothing herein shall be construed as a waiver, express or implied, of the Navajo Nation's Sovereign Immunity." The Texas and Iowa agreements are similar. In the California agreements with the Karuk and Yurok, there is a type of hybrid provision that states that the tribes' insurance shall not assert the tribes' defense of sovereign immunity, but the tribes do not waive their immunity beyond the scope of the insurance coverage.

Many of the agreements provide for termination of the agreement in the event of a breach of the agreement. For example, the Nebraska agreements provide for termination of the agreement if the tribe will not provide assurances or correct a breach. Nebraska may then contract for services to complete the contract and pursue "other remedies for breach of contract as allowed by law." The law, however, does not allow a lawsuit as a remedy against a tribe unless that tribe has expressly waived its sovereign immunity to suit.

The state of Oregon provides a unique method of recovery where there has been a failure of the tribe to perform under the agreement. Oregon will obtain recovery from collecting assistance funding from future payments to the tribe where the tribe has failed to perform under the contract. Oregon also limits such recovery to actual direct costs, not indirect, incidental, consequential or special damages. The Iowa agreement also permits the state to withhold the amount of an overpayment from future payments.

### **III. FUNDING AND FISCAL ARRANGEMENTS**

#### **A. Administrative, Training and Maintenance**

Title IV-E federal funds can provide assistance for administrative, training and maintenance costs. Not all of the 98 tribal-state agreements provide assistance for all three categories of costs. As stated in the previous section, prior to October 7, 2008 when the Fostering Connections Act was passed, states were not required to negotiate in good faith with an Indian tribe to develop an agreement for the administration of Title IV-E funds. Today, however, the state is required to consult with all tribes within the state and to “negotiate in good faith with any Indian tribe, tribal organization or tribal consortium in the State that requests to develop an agreement with the State *to administer all or part of the program* under this part on behalf of Indian children who are under the authority of the tribe.” See 42 U.S.C. § 676(c)(2). Thus, the state is required to negotiate in good faith with a tribe for administrative, maintenance and training funding, or less than these three funding parts, as requested by the tribe.

##### **1. Administrative**

###### **a. Administrative Costs Generally**

Out of 98 tribal-state agreements, only 50 provide administrative funding for tribal administrative costs to run the tribal foster care program, including agreements with the following states: Alaska, Arizona, California, Iowa, Michigan (except for Little Traverse), Minnesota, Montana, New York, North Dakota, the Oklahoma-Chickasaw and Cherokee agreements, Oregon, South Dakota, and Washington. Administrative costs can be the largest part of the funding needed to develop and implement a tribal foster care program. The remaining 48 tribal-state agreements do not offer administrative funding to tribes; Michigan-Little Traverse agreement, Nebraska, New Mexico and Texas, and 32 agreements from Oklahoma, do not provide federal assistance to tribes for administrative costs.

A state plan must identify what administrative costs are allocated for its program. This means that the tribe that enters into a IV-E agreement with the state should be aware of what administrative costs can be reimbursed from the state plan. See 45 C.F.R. § 1356.60(c). Administrative costs may include the following: determination and redetermination of eligibility, referral to services, preparation for and participation in judicial determinations, placement of the child, development of the case plan, case reviews, case management and supervision, recruitment and licensing of foster homes and institutions, rate setting, fair hearings and appeals, a proportionate share of related agency overhead, costs related to data collection and reporting, and other costs directly related only to the administration of the foster care program. Administrative costs reimbursed by Title IV-E may not be claimed under any other section or Federal program. Allowable administrative costs do not include costs of social services provided to the child, the child’s family or foster family, or counseling or treatment to ameliorate or remedy personal problems, behaviors or home conditions.

Generally, the tribal-state agreements describe administrative costs with language that reiterates the language of 45 C.F.R. § 1356.60(c). For example, the Alaska and Washington

agreements duplicate the description of allowable administration costs as stated in the regulations, 45 CFR § 1356.60(c).

The federal government pays 50% of allowable administrative costs. The percentage of reimbursement is reduced by the tribe's penetration rate, i.e., the percentage of children served who are IV-E eligible. The remaining non-federal share must be paid by the tribe or the state. The tribes pay the non-federal share of administrative costs in the agreements with Alaska, Arizona, Minnesota, Oklahoma Cherokee and Chickasaw agreements, South Dakota for the Standing Rock Sioux Tribe and Flandreau Santee Sioux Tribe agreements, North Dakota, and Washington. The states of California, Iowa, Montana, Oregon, and South Dakota for the Sisseton Wahpeton Oyate and Lakota Oyate Wakanyeja Owicankiyapi (Oglala at Pine Ridge) agreements pay the non-federal match for administrative costs on behalf of the tribes.<sup>32</sup>

South Dakota puts a cap on the tribes' administrative (and training) costs as follows:

Lakota Oyate Wakanyeja Owicankiyapi (Oglala at Pine Ridge) – Total amount of administrative and training reimbursement will not exceed \$796,366, which includes \$736,366 for personnel services and operating expenses and \$60,000 for reimbursement of IV-E allowable administrative claims.

Sisseton Wahpeton Oyate – Total amount of administrative and training reimbursement will not exceed \$220,287, which includes \$180,287 for personnel services and operating expenses and \$40,000 for IV-E allowable administrative claims; the payment for personal services and operating expenses will be billed monthly in the amount of \$15,023.92.

Standing Rock Sioux Tribe – Total amount of administrative and training reimbursement will not exceed \$70,000.

Flandreau Santee Sioux Tribe – Total amount of administrative and training reimbursement will not exceed \$20,000.

If a tribe seeks indirect costs for reimbursement under administrative costs, then generally the tribe is required to provide a letter from the federal government concerning the tribe's indirect cost rate, or "federally established indirect rate" (FEIR). The Washington, Montana and Iowa agreements expressly require the tribes to provide the FEIR to the state. The Oklahoma Cherokee and Chickasaw agreements provide for indirect costs but do not mention the FEIR.

### ***b. Time Studies***

Time studies are used to allocate allowable Title IV-E administrative costs and are an integral part of the tribal Title IV-E reimbursement program. Time studies determine the percentage of Title IV-E allowable activities a tribe's staff provides to children and families. These time study percentages are part of the calculation method used to determine the amount of Title IV-E funds the state will reimburse to the tribe.

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<sup>32</sup> The New York agreement merely states that the state "agrees to reimburse for reasonable and actual expenditures" and does not say explicitly that New York will pay the non-federal match for the Saint Regis Mohawk Tribe.

The following state agreements expressly require the tribe to do time studies to support its administrative costs: Washington, Montana, Alaska, California, Oregon, Iowa, Minnesota, North Dakota, and South Dakota. Though the states of Arizona, New York, and the Oklahoma Chickasaw and Cherokee agreements include reimbursement for administrative costs, the agreements do not include any statement that the tribes must provide time studies. Following are some examples of time study provisions in tribal-state agreements.

The Washington agreements with the Quinault, Makah and Lummi Nations generally describe that the tribes shall perform a Tribal Time Study. The Tribal Time Study shall be the basis for the allocation of the tribe's expenditures attributable to Title IV-E allowable activities. All staff spending part or all of their time on Title IV-E allowable activities shall participate in a time study described in the federally approved DSHS/CA Cost Allocation Plan. "These time studies shall identify, by position, the amount of time spent on Title IV-E activities. The Tribe further agrees to provide to the Department the results of such time studies with the Tribe's quarterly claim for reimbursement."

Montana states that it will provide technical assistance to a tribe claiming IV-E administration costs. Each tribal worker whose position is paid for by the Title IV-E agreement must complete a time sample for 5 consecutive working days of every month. Time sample data must be recorded at the time the work is actually being performed. The tribal social service supervisors are not allowed to instruct their staff to complete time samples to achieve certain IV-E percentages, to alter information recorded, or to select specific weeks for the sample to ensure certain results. The time sample is broken down into 15 minute increments and an activity code must be provided for each 15 minute increment. This process and the activity codes are described in Attachment J of the Montana agreements.

The tribes in Oregon receive administrative cost reimbursement based on the number of Title IV-E eligible children on the monthly Average Daily Population (ADP) report and the average cost per child per month, or an agreed upon monthly rate. The tribe will calculate the tribe's average cost per child based on the tribe's administrative expenditures by (1) completing 2 weeks of time studies for each quarter, randomly selected by the state, (2) providing a list of all children in the care and custody of the tribe regardless of the child's IV-E eligibility status in order to calculate the tribe's Penetration Rate, (3) providing the annually negotiated FEIR, and (4) providing the quarterly costs for properly administering the foster care or adoption program. The state will use this information to calculate the tribe's cost per child per month and will adjust the tribe's administrative reimbursement based on the use of the tribe's actual ADP. A description of how to perform the time study portion of this analysis is not provided in the agreements.

California attaches a Fiscal Addendum to provide standards and procedures for payment of costs. California requires "a continuous time study" to be completed during the middle month of each quarter; staff time is to be allocated to the "appropriate claiming categories" to the closest 15 minute interval. There is no further direction in the agreement regarding time studies, except references to attached sample forms, which were not provided for this review.

Alaska provides description and direction regarding time studies in its attached Manual, Exhibit B to the agreements. The Corporations are required to submit quarterly time studies for four consecutive weeks of every quarter. The Corporations are notified of each time study period approximately 3 weeks before the quarter begins. Staff must document activities in 15 minute increments. The tribe's program manager will review all time studies, compile and transfer them within 10 days after the end of the time study period. The time study codes and definitions, as well as the form the tribes use to enter data, is included in the Manual.

South Dakota merely requires the tribes to submit: "Complete time studies on a quarterly basis in order to capture the daily Title IV-E activities completed by staff during the assigned time study month if the provider chooses to submit claims for reimbursement of Title IV-E administrative activities."

The Minnesota agreements provide that the tribes shall appoint a coordinator to act as the "administrator, trainer, and fiscal reporting agent for purposes of operating the Social Services Administration Tribal Time Study (SSATTS)" and lists the duties of that coordinator. The coordinator shall identify time study participants, and train participants in activity code selection, and complete log sheets. The tribe shall maintain an accounting and management system to support its claims for reimbursement. There is nothing in the agreement that further describes what is included in the time study, and how often a time study is performed, other than all reports the tribe submits "will provide information as needed by the department to properly administer the SSATTS, and comply with all applicable federal and state laws, rules and regulations."

Sac & Fox Tribe of the Mississippi in Iowa is required to participate in the time study described in the federally approved state department of human services cost allocation plan. The state's cost allocation plan was not provided or reviewed for this report. North Dakota, similarly, will allocate administrative costs based on a tribal social service time study in accordance with the state's federally approved cost allocation plan.

## **2. Maintenance**

Title IV-E provides federal assistance for foster care maintenance and adoption assistance<sup>33</sup> payments pursuant to 42 U.S.C. § 672 and 45 C.F.R. § 1356.60. Each state with a Title IV-E plan approved by the federal government "shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative" into foster care if (1) the removal and foster care placement meets the requirements of IV-E<sup>34</sup> and (2) the child, while in the home, would have met the 1996 Aid to Families with Dependent Children (AFDC) eligibility requirements of the state in which the child resides.<sup>35</sup>

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<sup>33</sup> Adoption assistance is treated separately in Section V.

<sup>34</sup> The requirements of eligibility, removal and foster care placement are dealt with separately in Section V.

<sup>35</sup> The AFDC eligibility requirement is explained at 42 U.S.C. § 672(a)(3).

Maintenance funding may cover the basic levels of service, including the cost of providing food, clothing, shelter, daily supervision, school uniforms and supplies, a child's personal incidentals, a child's special events gifts, liability insurance with respect to the child, and reasonable travel to the child's home for visitation. 42 U.S.C. § 675(4) and 45 C.F.R. § 1355.20. In the case of institutional care, maintenance funding may pay reasonable costs of administration and operation of the foster care institution as are necessarily required to provide the other daily necessities listed. *Id.* When foster parents work, maintenance funding may pay for day care for a young, disabled or sick child during the day. *Id.* A state may also provide higher rates than the basic level of service rates, such as difficulty of care rates, as well as other specialty rates such as medically fragile and therapeutic foster care rates and payments for supportive activities such as family counseling.

Since the 2008 amendments to the Foster Connections Act, the tribal Federal Medical Assistance Percentage (tribal FMAP) rates can be used instead of state FMAP rates to determine the amount of federal reimbursement for maintenance costs.<sup>36</sup> The tribal FMAP rate is based on the per capita income of the service population of the Tribe compared with the U.S. per capita income. Tribes are able to submit supplemental data related to per capita income to the Office of Grants Management at the Administration for Children and Families (ACF) for review. The tribal FMAP rate can vary between 50 and 83 percent, but cannot be lower than the state FMAP rate. This formula produces higher federal matching rates for jurisdictions with lower per capita incomes relative to the U.S. as a whole and is often advantageous to the tribes. There are only two states whose tribal agreements expressly mention the use of the tribal FMAP: Washington and Minnesota.

There are 87 agreements out of the 98 agreements total that provide for maintenance funding on behalf of tribal children: Washington, Minnesota, Arizona, California, Iowa, Montana, Nebraska, New York, North Dakota, New Mexico, Oklahoma, Oregon, South Dakota, Texas, and Michigan. Some of these agreements reimburse the tribe directly for maintenance costs of its foster care providers: Arizona, California, Minnesota-Leech Lake and White Earth, Montana, and Washington. The other agreements, Iowa, Minnesota-Red Earth and Mille Lacs,<sup>37</sup> Nebraska, New York,<sup>38</sup> North Dakota, New Mexico, Oklahoma, Oregon, South Dakota, Texas and Michigan, make payments directly to the foster care placement. It is assumed that if the state is making maintenance payments directly to the foster care placement, the state is providing the non-federal share of maintenance costs. This is discussed further in section B, Matching Funds, below.

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<sup>36</sup> See Tribal FMAP Reference Table for fiscal year 2013-2014 at: [http://www.acf.hhs.gov/sites/default/files/cb/tribal\\_fmap\\_reference\\_table.pdf](http://www.acf.hhs.gov/sites/default/files/cb/tribal_fmap_reference_table.pdf) (last visited November 15, 2013).

<sup>37</sup> In particular concerning the Mille Lacs agreement, the state of Minnesota reimburses the relevant counties for maintenance costs when such costs are paid by the county and ordered by the tribal court. See Section I of the agreement.

<sup>38</sup> The New York agreement merely states that the state "agrees to reimburse for reasonable and actual expenditures" and does not say explicitly that New York will pay the non-federal match for the Saint Regis Mohawk Tribe.

Several of the states providing maintenance funding only provide for maintenance funding and not for administrative or training costs. Nebraska is one, and has capped the total amount that can be paid for maintenance funding for tribal foster homes. For example, the Winnebago Tribe agreement is capped at \$484,861; the Santee Sioux at \$100,000. These funds are paid by the state directly to the foster care provider “at the rate determined by DHHS.”

Unfortunately in Nebraska, the tribes have been unable to obtain background checks in order to complete the licensing of their foster care homes. (The state’s own protocol will not allow the State Patrol Office to enter into an agreement with a tribe to perform background checks on behalf of the tribe.) Therefore, unless the tribal foster care is also licensed by the state, eligible children have not been able to receive maintenance funding pursuant to the tribal-state agreement—maintenance is paid fully by the tribe in these circumstances.

In California, Iowa, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, and Washington the state expressly pays the non-federal share of maintenance costs. The New York-Saint Regis Mohawk Tribe includes no information about the description of or process for obtaining maintenance funds; the Montana and Michigan agreements include very little information.

The following information summarizes how some tribal-state agreements handle various maintenance cost issues:

The California agreements with the Yurok and Karuk Tribes state that the amount the tribes are entitled for maintenance payments is based on the rates described in California Code and Foster Family Home Rates included in the state’s Manual of Policies and Procedures. *See* California agreements, Fiscal Addendum.

The state of New Mexico, and its policies and procedures, will determine the rates of reimbursement, and will pay the non-federal and federal share of the maintenances costs. The state will provide the reimbursement check to the foster home in care of the tribe, and the tribe shall distribute the payments.

For the South Dakota agreements, foster care maintenance payments include the foster care basic rate, and may include the special rate and/or allowable maintenance payments per 42 C.F.R. §§ 1355, 1356 and 1357. The state is responsible for setting rates. In the Alabama-Coushatta and Texas agreement, the rates are based on the basic service level. The basic service level is defined by Texas law and consists of a supportive setting, preferably in a family that is designed to maintain or improve the child’s functioning, which includes with persons that will “maintain a sense of identity and culture.”

Oklahoma provides maintenance costs to tribally-approved foster homes, as well as Difficulty of Care payments<sup>39</sup> and Therapeutic Foster Care for those tribal children meeting those criteria.

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<sup>39</sup> Difficulty of Care payments are defined under the Internal Revenue Code at 26 U.S.C. § 131(c): “The term ‘difficulty of care payments’ means ... compensation for providing the additional care of a qualified foster individual which is— (i) required by reason of a physical, mental, or emotional handicap of such individual

In Oregon, maintenance funding is provided in full by the state and made by the state to the foster care placement. However, any maintenance funds collected by the state based on retroactive eligibility that the tribe has reimbursed directly to the provider for the time prior to the determination of eligibility will be reimbursed to the tribe directly.

Oklahoma further provides a “Kinship Startup Stipend” where a child is placed with a relative before the home receives foster home approval, if the tribe implements procedures that ensure the safety of the child. The stipend is available if the child is in a home of a relative for 14 days and can be approximately \$400-500 to pay for initial expenses.

The tribal agreements in Oregon describe terms and conditions required for maintenance payments and types of maintenance payments. The agreement further states that “Foster care maintenance payments made under this Agreement shall be equal in amount to the payments DHS would make for these children if the children were in the care of DHS under state court jurisdiction.” The state is responsible for setting maintenance cost rates. It also provides supplemental payments for a child’s enhanced supervision needs and for personal care services.

The state of Iowa pays the foster care individuals or institutions directly on behalf of the IV-E eligible tribal child. Iowa maintains a list of children receiving maintenance funding, the amount of federal and state payments made on behalf of that child, and other information, and provides that report to the Sac & Fox quarterly. “The Tribe shall provide IDHS with necessary information to allow IDHS to complete the foster care payment rate assessment or determine the group care rate, and to allow IDHS to assess the need for other allowable child welfare services for the child that may be needed during the period of the child’s placement or change of placements.”

Washington provides more information about maintenance funding. The Lummi, Makah and Quinault Nations pay the foster care placement and the state of Washington then reimburses the Tribes for those payments. Reimbursement is paid on a monthly basis in accordance with state foster care rate schedules. The tribes are required to provide necessary information to allow state social workers to complete the foster care rate assessment or determine the group care rate and other allowable services that need to be authorized at placement. The Washington-tribal agreements also use the tribal FMAP and the state agrees to “reimburse the Tribes 40% of the state’s savings in foster care maintenance funding that would have been paid by the state in all state funds for eligible children. The exact amount of reimbursement to the Tribe will vary, depending on the number of eligible children in paid placement. Reimbursement will occur after receipt of the Tribe’s costs of allowable Title IV-E child welfare services.” The Quinault agreement adds that state will notify the tribe when reimbursement has been generated.

In Minnesota, the Leech Lake and White Earth Bands of Ojibwe are reimbursed by the state for maintenance costs, including Difficulty of Care payments. In regards to the Red Earth Nation

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with respect to which the State has determined that there is a need for additional compensation, and (ii) provided in the home of the foster care provider.

and the Mille Lacs Band of Ojibwe, the counties covering those tribal jurisdictions pay maintenance costs directly to foster care and are reimbursed through IV-E mechanisms under the state's plan; the counties are responsible for maintenance costs when tribal foster care is ordered by the tribal court. Maintenance payments made by the county for tribal children under tribal court jurisdiction shall be equal to those payments made if those children were under state court jurisdiction. In the Mille Lacs agreement, the county is also responsible for Difficulty of Care payments; the Red Earth agreement does not mention Difficulty of Care payments.

The Leech Lake and Mille Lacs agreements provide continued maintenance funding for youth until age 21. These Minnesota agreements mention that it will notify the youth of these continued benefits when the youth meets certain education or employment requirements. If the youth does not wish to remain in extended care, the tribe will "work with the youth to develop and execute a personalized transition plan."

The Leech Lake and White Earth agreements utilize the tribal FMAP. The state determines the tribal FMAP rate in mutual agreement with the tribes as to whether the tribal or state FMAP percentages are more advantageous to the tribes: "Upon mutual agreement between the band and the department to use the Tribal FMAP in place of the state FMAP rate, the band and the state will work collaboratively to ensure that the band is able to claim federal Title IV-E foster care maintenance using the specified rate."

In addition to basic foster care payments, the Montana agreements provide funds for specialized foster homes and supplemental support services.

### **3. Training**

Title IV-E provides federal funding for costs of education and training for certain individuals associated with the administration of the tribe's foster care program. Training may include long-term and short-term training of tribal staff, and ongoing training for those licensed to provide foster care, and for adoptive parents. See 45 C.F.R. §§ 235.63-66 and 45 C.F.R. § 1356.60(b). The federal financial participation (FFP) is available at the rate of 75% times the penetration rate. To receive this funding, all training activities and costs must be included in the State's training plan for Title IV-B. 45 C.F.R. § 1356.60(b).

There are 46 agreements in ten states that receive training costs reimbursements, including Alaska, Arizona, Iowa, Michigan, Minnesota, Montana, North Dakota, Oregon, South Dakota, and Washington. The majority of these agreements recite the basic requirements found in the federal regulations with only slight variations and additions.

Under the federal regulations, a Title IV-B "Child Welfare Services Plan" is required before Title IV-E funding can be approved. Six of the states specifically mention that the tribes must include all training activities and costs in their Title IV-B plan. This is due to the fact that the state must include all of its training costs in its IV-B plan. Tribes in Alaska, North Dakota, and Washington must obtain prior approval from the state's child welfare or human services department for reimbursable training costs. The Sac & Fox Tribe of the Mississippi in Iowa may amend their training plan throughout the contract period with approval from the Iowa Department of

Human Services, and that approval cannot be unreasonably withheld. This tribal-state agreement also includes a provision that consultants may be funded to provide training.

Eight states have set up reimbursements for training expenses on a quarterly basis with slight variances. Montana is the only state that requires monthly reimbursement billing in their tribal-state agreement. Montana's reimbursement process for training is Attachment K of the Montana agreements. The Alaska Village Corporations must submit claims for reimbursement within 30 days of the billing quarter ending, and the Sac & Fox Tribe must submit claims within 60 days. The four tribes in North Dakota are required to submit reimbursement claims by the 15th of the month after the quarter ends. The Red Lake Nation agreement specifically requires that the quarterly billing cycles end on the last day of March, June, September, and December. The Mille Lacs agreement with Minnesota permits reimbursement claims to be submitted up to 15 months after the quarter ends and South Dakota allows 2 years. The South Dakota agreements specifically mention they will not reimburse claims submitted after 2 years from the date the training cost was incurred.

The Alaska agreements specify allowable training topics, including reimbursement for and participation in judicial determinations, case management and supervision, referral to service, development of the case plan, placement of the child, case reviews, recruitment and licensing of foster homes and institutions, cultural competency related to children and families, Title IV-E policies and procedures, social work practice, such as family centered practice and social work methods including interviewing and assessment, permanency planning including kinship care as a resource for children involved with the child welfare system, effects of separation, grief and loss, child development and visitation, foster care candidate determinations and pre-placement activities directed toward reasonable efforts if the training is not related to providing a service, communication skills required to work with children and families and other training topics.

Due to the complexity and specificity of training costs reimbursements under the federal regulations, some tribes and states have simply agreed to allow tribal staff to attend state child welfare trainings to avoid the complex administration for training cost reimbursement. The Sac & Fox Tribe of the Mississippi in Iowa agreement provides that Iowa will keep the tribe informed of the state child welfare training courses and allow tribal staff to attend at no cost in addition to Title IV-E training reimbursements. The tribes in Oklahoma do not receive reimbursement for training from the state, but tribal staff may participate in state training courses on a limited basis. Tribal foster parents are also permitted to participate in training provided by the state of Oklahoma. In the Oklahoma agreements, the state guarantees three spaces for tribal workers to participate in designated trainings, and tribal staff can enroll and participate in other state trainings as desired. There are other states as well that provide state training and technical assistance to a tribe without the tribe incurring training costs.

Several state agreements also provide "technical assistance" for the tribe to assure that the tribe is in compliance with Title IV-E, and as an opportunity for collaboration. In the current agreements, this is not a reimbursable training expense but more so a part of monitoring and compliance. The New Mexico agreements provide that the state shall monitor the pueblo and tribes' cases and assist with training personnel and giving reasonable technical assistance.

South Dakota has also agreed to provide technical assistance to assist in the correction of any problem areas identified through state monitoring.

## **B. Matching Funds**

Title IV-E administrative, training and maintenance funding requires non-federal matching funds at percentages discussed above. Although not required under Title IV-E, a few states pay the matching funds on behalf of the tribe. States may do this for a variety of reasons including supporting tribal infrastructure to manage these cases and in order to treat all children equally within its borders. Some states provide matching funds for some costs, like maintenance costs, and not others.

- There are 16 agreements total from the states of Alaska, Arizona, and Minnesota, in which the tribes are responsible to pay non-federal matching funds.
- In Iowa, Montana, Oregon, and for the South Dakota-Sisseton Wahpeton Oyate and Lakota Oyate Wakanyeya Owicankiyapi (LOWO) agreements, the state pays the non-federal share of administrative, training and maintenance costs. Montana and South Dakota's non-federal share of administration and training costs is capped.
- The California agreements provide for maintenance and administration costs and California pays for the non-federal share for both.
- In Washington, North Dakota, and for the South Dakota-Flandreau Santee Sioux and Standing Rock Sioux Agreements, the tribes are required to pay the non-federal share for administrative and training costs, but the state will pay the non-federal share of maintenance costs.
- The Oklahoma-Cherokee and Chickasaw agreements, and the five Michigan agreements excluding Little Traverse, provide administrative and maintenance funds in which the state provides the non-federal share for maintenance costs only.
- The remaining agreements, which include Nebraska, New Mexico, the remaining 32 Oklahoma agreements, Michigan-Little Traverse, and Texas agreements provide for maintenance costs only, but the states pay the non-federal share.
- The New York State agreement is silent on the issue as to whether the state or the tribe provides non-federal matching funds for administration and maintenance costs.

Some of the agreements provide state general funds for other child services in addition to IV-E administration, training and maintenance costs. In California the agreement provides state general funds for administrative and service costs for non-IV-E services associated with the state's tribal child welfare services program based on an agreed upon cost methodology. Montana provides state general fund monies for supplemental support services for child care, clothing, diapers and transportation, depending upon the availability of funding. Iowa also provides state funding for other Sac & Fox child welfare services based upon a formula. The Saint Regis Mohawk Tribe and New York agreement mentions funding for adult protective services, child protective services, and preventive services for children, day care, homemaker services, parent training, transportation, clinical services, crisis respite for families with HIV/AIDS, housing services, and other services.

The Leech Lake Band of Ojibwe and the White Earth Band of Ojibwe agreements with Minnesota provide for participation in a state program called the American Indian Child Welfare Initiative. This program provides for other child welfare services and funding outside of foster care. If a child is eligible for the American Indian Child Welfare Initiative, he or she will also be eligible for IV-E; the American Indian Child Welfare Initiative standards for assistance equate to Title IV-E standards of eligibility.

Several of the agreements enumerate other potential funding the tribe may use for the non-federal match, including Indian Child Welfare Act funds, Self-Determination Act funds, gaming, tribal business profits, private foundation contributions and other allowable tribal, state or federal funds. The Arizona, Alaska and Washington agreements provide this language. The Minnesota-Leech Lake agreement requires the tribe to assure that the non-federal funds it is using are not federal funds or are permissible federal funds.

## **C. Other Funding Issues**

### **1. Maintenance of Effort and Funding Formula**

Maintenance of effort provisions require recipients of federal funds to maintain their level of non-federal spending from one year to the next in order to continue receiving federal funds. Title IV-E does not require “maintenance of effort.” However, the Washington-Lummi Nation agreement includes a maintenance of effort requirement which was requested by the Lummi Nation:

The intent of the “Title IV-E Reimbursement Program,” Title IV-E Participation Agreement and this Agreement is to assist the Tribe in the development and strengthening of its child welfare infrastructure. Accordingly, the Tribe agrees not to reduce the amount of money from calendar year 2008, from January 1, 2009 to December 31, 2009, of tribally administered revenue sources that is available for or is spent on Child Welfare services. This provision {4e(2)} is at the Tribe’s request.

Similarly, the Arizona-Navajo agreement also provides that the IV-E funds would “supplement existing program funds and shall not be used to supplant those funds.”

### **2. Funding Formula**

The Iowa and Sac & Fox agreement includes a provision titled “Creation and Maintenance of State Child Welfare Funding Allocation for Children under Tribal Court Jurisdiction.” In contrast to the maintenance of effort provision in the Lummi Nation agreement, the Sac & Fox agreement establishes a formula governing state funding for the tribe’s child welfare program:

The IDHS and MFS [Meskwaki Family Services] will work cooperatively to identify a list of Tribal children and families that have received child welfare services through IDHS. This information will be used to identify an estimated total amount of Federal and State-funded child welfare services, including both placement and non-placement interventions, historically provided for Tribal children and families. Once information on historical spending for child welfare

services to Tribal children and families has been gathered and analyzed, IDHS and MFS agree that:

A. An estimated annual child welfare service amount per child, based on historical spending patterns, will be established. The per child amount shall be adjusted annually to reflect increases or decreases in the costs of providing the described services, based upon statewide statistics.

B. The IDHS agrees to make a maximum of this per child amount available to MFS for expenditure on state-funded child welfare services for each Tribal child under Tribal Court order and jurisdiction who requires child welfare placement or services funded under this agreement.

C. MFS may spend this per child allocation of child welfare service funding for services funded through the Department.

D. The IDHS will regularly report to the Tribe on expenditures for child welfare services funded by the state for Tribal children.

Needless to say, the inclusion of the Iowa maintenance of funding type provision is highly supportive of strengthening and maintaining services to Indian children.

### **3. State Charging Costs to Administer Agreements**

There are two states that require the tribes to pay the state for the state's overhead or administrative costs. Alaska requires the tribe to give 8% of its federal share for administrative fees to the state. In all four of the Minnesota Agreements, 10% of each tribe's earned IV-E dollars will be deducted and held by the department as a set-aside to repay the special revenue maximization account for state expenses exclusively for the purpose of administration of the SSATTS. Unused set aside funds will be returned to the tribe on an annual basis.

### **4. Medicaid Coverage**

42 U.S.C. § 671(a)(21) requires that the state provide health insurance coverage, including the state's Medicaid plan, subchapter XIX, for any child who has been determined to be a child with special needs, for whom there is in effect an adoption assistance agreement, and who the state has determined cannot be placed with an adoptive parent or parents without medical assistance because such child has special needs for medical, mental health, or rehabilitative care, among other things. Section 673(c)(1)(B) further elaborates that Medicaid coverage is specifically required for children who cannot be returned to their parents and would not otherwise be able to be placed for guardianship or adoption by reason of their "ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps..." 42 U.S.C. § 672(h) provides that children receiving foster care payments are within the class of individuals who are Medicaid-eligible.

The following states include reference to Medicaid in their tribal-state agreements:

- New Mexico expressly provides that Medicaid cards shall be provided to children in the pueblo or tribe's custody and sent to the foster parent;
- Oklahoma agreements state that if a child in tribal custody does not meet IV-E requirements, the tribe may make application for XIX medical services for the child;
- Washington, Iowa, Oregon, North Dakota and South Dakota restate the law's categorical eligibility requirement that all children who are eligible for IV-E retain categorical eligibility for XIX as stated in the state's Medicaid plan;
- Oregon, in stating that the child retains his/her categorical eligibility, also cites to its own law, section 414.737, which states that a person who is an American Indian and Alaska Native is excluded from mandatory enrollment in prepaid managed care health services organizations;
- Texas will make a referral for Medicaid for children eligible for IV-E monthly assistance payments; and
- California agreements state that if it is necessary, the state will work to seek federal approval for Title XIX administrative costs incurred by the tribe.

### **5. Certification of expenditures**

Generally, the states must certify expenditures for reimbursement from the federal government. Several of the states therefore require the tribes to certify tribal expenditures. Washington requires the tribes to provide a certification on a form provided by the state of the tribe's actual administrative and training costs within ninety days after the end of each quarter. North Dakota, Minnesota, Alaska, and Iowa require certifications for expenditures. California and New Mexico require broader certifications that the tribe is providing accurate documentation regarding expenditures and other information.

### **6. Waiver of IV-E Requirements**

42 U.S.C. § 1320a-9 allows the federal government to approve proposals by states or direct-funded tribes to waive certain requirements under Title IV-E in order to conduct demonstration projects that meet the objective of Title IV-E to increase positive outcomes in foster care services. Waivers can provide greater flexibility in the use of IV-E funds for innovative services that prevent foster care placement of children or reunify children with their families.

The Oregon-tribal agreements allow the tribes to participate in the state federally-approved waiver programs. Specifically, the programs involve the use of non-kinship guardianships and funding of innovative programs that prevent foster care placement or reunify children with their families. In the event that the IV-E waiver program ends, the non-relative caretaker guardianship arrangements will remain the financial responsibility of the state.

## IV. COMPLIANCE

States possess primary responsibility for compliance with Title IV-E for state-administered programs.<sup>40</sup> Where the state has entered into an agreement with the tribe to provide IV-E funding to the tribe, the state may assign its obligations for Indian children (as citizens of the state) to the tribes through the tribal-state agreement, as discussed in the subsections below. However, the state remains ultimately responsible for its compliance with its state plan and federal laws. Furthermore, the state has affirmative duties to negotiate in good faith with the tribe and provide access to resources that it obtains through Title IV-E and its state plan. 42 U.S.C. § 671(a)(32). Therefore, it is important for a state to work collaboratively with tribes to assure its own compliance with Title IV-E.

### A. General Compliance Responsibilities between States and Tribes

Generally, most agreements require that tribes comply with the requirements of Title IV-E that pertain to the receipt of IV-E funding by the tribe. Many agreements recognize compliance with relevant tribal laws and policies. Some of the agreements require the tribes to comply with the state plan. Some agreements require the tribe to follow state laws; a few require the Tribes to give primacy to state law over federal and tribal laws. These issues were discussed in Section II regarding sovereignty of tribes.

In the Nebraska agreement, compliance seems to rest fully with the tribes: “The Contractor shall...[a]ssure that all requirements of the Social Security Act...pertaining to children for whom payment is requested are met.” Other states frame compliance issues as a collaborative undertaking with tribes; several states expressly provide training and technical assistance to tribes for the purpose of assuring IV-E compliance by the state and the tribe.

The Karuk and Yurok Tribes are expected to comply with the California state plan by adopting a Tribal Plan that mirrors the state plan. The Yurok Tribe is working toward direct funding because this arrangement with the state was problematic, as well as for other reasons.

The Oklahoma agreements require the tribal child welfare services to promote child safety, permanency and well-being as defined in the Adoption and Safe Families Act and conform to

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<sup>40</sup> Title IV-E requires a myriad of compliance responsibilities. Some of those responsibilities include: determinations of eligibility, 42 U.S.C. § 672; provide data reporting systems, 45 C.F.R. § 1356.40; make “reasonable efforts” to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured, 45 C.F.R. § 1356.21(b); make judicial determinations that the child’s continued residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child, 45 C.F.R. § 1356.21(c); meet case review and case plan requirements, 45 C.F.R. § 1356.21(f) & (g); confirm that criminal records checks have been conducted with respect to prospective foster and adoptive parents, 45 C.F.R. § 1356.30; provide foster parents and preadoptive parents or relatives notice of hearings and the opportunity to be heard, 45 C.F.R. § 1356.21(o). State plans approved by the federal government set forth specific state responsibilities. Sample state plans can be found on-line, for example: California, [http://www.childsworld.ca.gov/res/pdf/2002TitleIV-EStatePlan4\\_03.pdf](http://www.childsworld.ca.gov/res/pdf/2002TitleIV-EStatePlan4_03.pdf); and Texas, [http://www.dfps.state.tx.us/About\\_DFPS/Title\\_IV-E\\_State\\_Plan/2012\\_State\\_Plan/default.asp](http://www.dfps.state.tx.us/About_DFPS/Title_IV-E_State_Plan/2012_State_Plan/default.asp).

Titles IV-B and IV-E and, generally stated, other relevant provisions of state and federal law. In Arizona, the Navajo Nation will administer a program that meets all applicable requirements of Title IV-E that pertain to the Nation's receipt of IV-E funds, including applicable federal and state statutes.

The Alaska agreements explicitly provide that the state is responsible for assuring that the Alaska Native Entities are in compliance with all the requirements of IV-E. The Alaska Native Entities are responsible for assuring compliance with Title IV-B, ICWA and all the requirements of the Adoption and Safe Families Act.

The Minnesota-Leech Lake Band of Ojibwe agreement expresses compliance as a cooperative undertaking. The state agrees to provide appropriate forms, technical assistance, consultation and monitoring to enhance the tribe's compliance, will use the same laws, policies and procedures as it does with the counties, and will give the tribe the same opportunity to correct any deficiencies.

Montana agrees to provide consultation and technical assistance to enhance tribal compliance with IV-E and state policies and procedures. In addition, the state and tribes mutually agree to comply with the mandates of the Social Security Act and all other applicable federal, state and tribal laws, rules and policies, including but not limited to human rights, civil rights, employment law and labor law. The attachments to the Montana agreements provide a framework for detailed IV-E compliance by the state and the tribes.

Many of the agreements explicitly or implicitly require the tribe to have its own child welfare infrastructure to comply with IV-E.

## **B. Eligibility Determinations**

An initial determination of a child's IV-E eligibility must be made in order for the child to receive IV-E maintenance funding. In order to be eligible, the child must be removed from the home<sup>41</sup> and meet 1996 AFDC eligibility requirements.<sup>42</sup> 42 U.S.C. § 672(a)(1). The majority of states perform eligibility determinations on behalf of tribal children: Alaska, Arizona, Iowa, Michigan, Montana, Nebraska, North Dakota, New Mexico, Oklahoma, Oregon, South Dakota, Texas, and Washington. These states require the tribes to provide all information necessary for the state to make its eligibility determination and redetermination, meaning that the tribe must provide information that shows the child has been removed from the home as mandated by 42 U.S.C. § 672(a), and documentation about the financial status of the child and his or her family.

In New Mexico, the tribe or pueblo must first refer the child to the state if it believes the child is eligible for IV-E funding, and include completed forms, a copy of the court order, the case plan, a copy of the child's birth certificate, social security card, the name and address of the child's

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<sup>41</sup> The removal and placement of the child must be the result of either a voluntary placement agreement entered into by a parent/legal guardian, or a judicial determination that continuation in the home would be contrary to the welfare of the child and that reasonable efforts have been made to prevent removal. 42 U.S.C. § 672(a)(2).

<sup>42</sup> The AFDC eligibility requirement is explained at 42 U.S.C. § 672(a)(3).

placement and a copy of the foster home license. The New Mexico agreement provides straightforward forms and information to assist with gathering information for the eligibility determination. The tribe or pueblo must certify that all such information is correct. New Mexico states it will notify the tribe or pueblo of its eligibility determination in 15 days of receipt of the referral, or whether additional information is required.

The tribes perform eligibility determinations in the remaining states: California, Minnesota<sup>43</sup> and New York. The Red Lake Band of Chippewa Indians in Minnesota share joint responsibility for making eligibility determinations with the relevant county. In New Mexico, though the state makes the initial determination of eligibility, the tribe or pueblo is responsible to make the redetermination<sup>44</sup> of the child's eligibility at 6 month intervals.

Where the state makes eligibility determinations, the agreements are diverse concerning how long those determinations may take. In Arizona the state must make the initial determination within 45 days after receipt of information from the tribe. The Montana agreements state that the state shall make every effort to make an eligibility determination within one business week. The Iowa-Sac & Fox agreement states that the state will give the tribe notice of its eligibility determination in a "reasonable time." Nebraska states that it will make the determination "with reasonable promptness" and if anything prevents its action within 45 days, the worker will document the reasons for the delay, and the delay shall be taken into account when determining the date of eligibility.

The Alabama-Coushatta Tribe designates tribal staff persons to be trained on eligibility requirements who can work with tribal families and the state to gather the information to support eligibility determinations. The tribe must certify to the accuracy of documents that support eligibility. The South Dakota agreements list the documents and actions required by the tribes for the state to make eligibility determinations.<sup>45</sup> Where the application cannot be completed, the tribe must show how every effort was exhausted to find the information or documentation. The Little Traverse Bay Bands of Odawa Indians' agreement states that it is not liable for Michigan's incorrect eligibility determinations unless the tribe provides incorrect information.

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<sup>43</sup> The Minnesota-Leech Lake agreement states that the tribe is responsible for determining Title IV-E foster care eligibility for children participating in the American Indian Child Welfare Initiative and for any other children under the band's legal and financial responsibility. Eligibility determinations for children not identified previously shall remain the responsibility of the "county of financial responsibility."

<sup>44</sup> Under the AFDC Program, an eligibility redetermination is a state plan requirement and not a factor affecting the child's eligibility. 45 C.F.R. § 206.10 (a)(9)(iii). There is no IV-E statutory requirement concerning the frequency of eligibility redeterminations. However, redeterminations should be carried out periodically in order to assure that FFP is claimed properly. The child must meet the requirements of 42 U.S.C. § 672 in order to receive maintenance payments.

<sup>45</sup> The South Dakota agreements require the tribes to provide or show: the Temporary Emergency Custody Order, with specific language regarding reasonable efforts and best interests; the child's physical removal; the foster care placement is licensed; and that the child is within the legal jurisdiction of the tribe.

The eligibility requirements are also dependent on funding and other services received by the child. In New Mexico, the tribe or pueblo agrees to apply for other benefits, and if such benefits are available, the state will make a re-determination as to whether or not the child will continue to be eligible for IV-E payments. In Oklahoma and Washington, the tribe must notify the state if there are other funds or benefits available for the child from the tribe, which may reduce IV-E funding. The Alabama-Coushatta Tribe shall notify Texas of the source and amount of benefits an eligible child receives or is eligible for, including child support, survivor's benefits, Veterans benefits, SSI, third party insurance or similar benefits. The same requirement is included in the South Dakota agreements.

In addition to these administrative procedures to make a determination of eligibility, certain legal determinations are required to initiate and maintain a child under Title IV-E.

### **C. Removal, Contrary to Welfare and Reasonable Efforts Determinations**

Courts are significant actors in the determination of eligibility of an Indian child and are required to make specific legal determinations upon a child's removal from his or her home, including "contrary to welfare" and "reasonable efforts" determinations.

There must be a judicial finding in the initial court order removing the child from the home (even if the removal is temporary) that continuation in the home would be "contrary to the welfare" (CTW) of the child, or that placement is in the best interests of the child. If the determination regarding CTW is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care. 45 C.F.R. § 1356.21(c).

Within 60 days of removal from the home, a judicial determination is required to show that "reasonable efforts" were made to prevent or eliminate the need for removing the child. A judicial determination is required as to whether reasonable efforts were made, or state where reasonable efforts are not required, such as in cases of aggravated circumstances or where the parent has committed murder or other crimes. *Id.* at § 1356.21(b)(1) and (3). If a RE determination is not made within 60 days the child will never be IV-E eligible for Title IV-E funds during that stay in foster care.

In addition, a judicial determination must be made stating that reasonable efforts have been made to finalize a permanency plan within 12 months of the date the child entered foster care, and at least once every 12 months thereafter while the child remains in foster care. If the determination to finalize the permanency plan is not made as required by the regulations, the child becomes ineligible under Title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made. *Id.* at § 1356.21(b)(2)(ii).

The Oklahoma agreements state that the tribal court (or Code of Federal Regulations court<sup>46</sup>) shall make the required judicial determinations. The Leech Lake Band of Ojibwe and Mille Lacs Band of Ojibwe agreements with Minnesota state that the tribal court has jurisdiction to make decisions for Indian children under its jurisdiction, and lists the judicial determinations as “judicial safeguards” that the tribal court will make to protect its children.

The rest of the agreements discussed below require the tribe to provide court orders from a “court of competent jurisdiction,” court orders that give the tribal social services jurisdiction, or refers to “court orders” in general; they do not mention the tribal court or its jurisdiction specifically. Thus, it is unclear from these agreements the extent to which tribal courts are involved in the legal determinations for removal of Indian children from the home. It is possible that there is not this specificity because it is either assumed that the tribal court is the appropriate court, or because in some instances it may be that both state and tribal courts are involved in these determinations for various reasons.

Several agreements provide recitation of IV-E requirements for removal of the child, reasonable efforts, contrary to the welfare or best efforts. The Arizona, Michigan, Montana, North Dakota, New Mexico, Oregon, Oklahoma, South Dakota, Texas, and Washington agreements restate the regulatory requirements for a finding that the parental home is contrary to the welfare of the child, removal of the child is in the best interest of the child, and reasonable efforts have been made to maintain the child with his or her parents.

The Washington agreements further provide, in any case in which the agency supervising the placement of the child is required pursuant to the ICWA, 25 U.S.C. § 1912(d), to make active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family, the reasonable efforts requirements shall be construed in a manner consistent with the active efforts requirement of ICWA.

Minnesota-Leech Lake, White Earth, and Mille Lacs agreements provide definitions and direction for contrary to welfare and reasonable efforts determinations, voluntary placements, case review system (review hearing every 90 days, permanency hearing every 12 months). However, the Minnesota-Red Lake agreement merely states general language that the tribe agrees to comply with all requirements for case review systems and does not include any language regarding contrary to welfare and reasonable efforts findings.

The Saint Regis Mohawk Tribe’s agreement requires determinations based on state law, but does not provide a description of those state law requirements.

## **D. Termination of Parental Rights**

Most tribal-state agreements reference the applicability of the Adoption and Safe Families Act of 1997 (“ASFA”), which is a part of Title IV-E. ASFA includes procedures for termination of parental rights, which is generally (but not invariably) a component of the legal process towards

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<sup>46</sup> Code of Federal Regulations Courts are established in Indian Country occupied by specified tribes, as provided in 25 U.S.C. § 11.100.

adoption.<sup>47</sup> The ASFA requires that a state or tribe file a petition to terminate parental rights once a child has been in foster care for 15 months of the most recent 22 months, unless certain circumstances or exceptions are present.

The exceptions to a state or tribe's termination of parental rights are: (1) where the child is in the care of a relative, (2) when termination is not in the child's best interests, or (3) when the state or tribe has failed to provide services or make reasonable efforts required by law to attempt reunification of the family. 42 U.S.C § 675(5)(E).<sup>48</sup> The exceptions must be documented for each child on a case by case basis. There is no federal statutory authority for a general exemption for Indian children, even where termination of parental rights may be contrary to traditional cultural practices, common laws or written tribal code;<sup>49</sup> for an exception to apply to the mandatory requirement of termination of parental rights, the exceptions must be documented for each case.

ASFA also allows states and tribes to file immediately to terminate parental rights, without making reasonable efforts to reunify the family, where there has been a judicial determination of aggravated circumstances, i.e., the parent committed murder or voluntary manslaughter of another one of his or her children, or has participated in such crimes, and where the parent has committed a felony assault on the child or another one of his or her children, causing serious bodily injury. 42 U.S.C § 675(5)(E).

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<sup>47</sup> ASFA does not preempt any of the requirements of ICWA. See Simmons and Trope, *P.L. 105-89 Adoption and Safe Families Act of 1997: Issues for Tribes and States Serving Indian Children* (The National Resource Center for Organizational Improvement, 1999) at 6-7.

<sup>48</sup> The language of the Act provides that "case review system" means a procedure that includes: in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless—(i) at the option of the State, the child is being cared for by a relative; (ii) a State agency has documented in the case plan (which shall 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; or (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671 (a)(15)(B)(ii) of this title are required to be made with respect to the child.

<sup>49</sup> See the Child Welfare Policy Manual issued by the Children's Bureau (part of the Administration of Children and Families) at:

[http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/questDetail.jsp?QAId=299](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/questDetail.jsp?QAId=299).

The Minnesota-Leech Lake and Mille Lacs Bands of Ojibwe, the Oklahoma, Oregon, South Dakota and Washington agreements repeat the ASFA requirements that the state or tribe shall file a petition to terminate parental rights for a child that has been in foster care for 15 of the most recent 22 months, and the exceptions to termination. The Minnesota-White Earth agreement provides that the aggravated circumstances provision which allows for expedited termination of parental rights (“TPR”) may be applied “at the option of the Tribe.” Some of the agreements expand upon the meaning of “compelling reasons to not file a Termination of Parental Rights”. For example, the Leech Lake agreement includes “adoption not being the appropriate permanency goal for the child(ren), or no grounds to file a petition to terminate parental rights exist....”

A number of agreements include the alternative of “customary adoption” – adoption without the termination of parental rights. The use of customary adoptions can provide another exception to filing a TPR petition. The White Earth, Mille Lacs and Leech Lake Minnesota, Oregon, Montana, South Dakota and Washington agreements include this alternative. The Mille Lacs Band of Ojibwe and the Leech Lake Band of Ojibwe agreements read as follows:

The [ ] Tribal Court can order, according to tribal law, that the child(ren) can be adopted without a Termination of Parental Rights. When this occurs, all parties must agree that the requirements of Social Security Act 473 (c)(1) will be satisfied so long as the band’s law remains in effect, and the [ ] Tribal Court order has documented valid reasons why the child(ren) cannot, or should not, be returned to their home.

The White Earth Band of Ojibwe includes a provision in the Title IV-E funding agreement that also offers alternative language with the same practical effect as the Mille Lacs and Leech Lake Bands of Ojibwe agreements. The provision titled “Suspension of Parental Rights and Customary Adoption” provides that:

The governing body of the White Earth Band of Ojibwe, the White Earth Tribal Council, has enacted a customary adoption code which provides a unique permanency option for children whose cases are before the White Earth Tribal Court. The customary adoption will be utilized as a permanency option for cases before the White Earth Tribal Court that are included in the American Indian Child Welfare Initiative. *The customary adoption is an acceptable permanency option pursuant to the Adoption and Safe Families Act.*

(Emphasis added.) The provision then repeats the requirements of ASFA including the exceptions for termination of parental rights.

The Washington agreements define “Custom Adoption” as “a traditional tribal practice recognized in Tribal rule or law where the Tribal community formally acknowledges a permanent parent-child relationship between the child and someone other than the child’s birth parent with no termination of parental rights.”

The Washington agreements further provide that in the permanency hearing, it shall be determined whether the child will be placed for adoption and a termination of parental rights will be filed, or if the child may be placed in a custom adoption

that gives the child a permanent parent-child relationship with someone other than child's birth parents even though the child's birth parents' parental rights are not terminated; or the child will be referred for legal guardianship or, in cases where the Tribe has documented to the satisfaction of the Tribal Court a compelling reason for determining that *it would not be in the best interests of the child to return home and that termination of parental rights and/or guardianship are not appropriate*, the child may be placed in another planned permanent living arrangement by determination of the Tribal court.

In other words, the Washington agreement meets the requirements for an exception to ASFA's termination of parental rights by requiring a showing that the termination is not in the best interests of the child, and provides alternatives, including a customary adoption and another planned permanent living arrangement, instead of termination of parental rights.

## **E. Case Reviews and Case Plan Requirements**

Tribal efforts to develop case plans and conduct case reviews are paid for through administrative funding, and are a mandatory part of an approved Title IV-E plan. 42 U.S.C. § 671(4) and (5) provides detailed definitions of "case plan" and "case review," respectively. A case plan includes at least a description of the placement, a plan for assuring safe and proper care, and the health and education records of the child, among other things. A case review system means a procedure for assuring that the placement, the case plan, the child's health and safety record, among other things, are reviewed at enumerated intervals.

Many of the tribal-state agreements reiterate the requirements and criteria of the Act for case reviews and case plans: Alaska, Arizona, North Dakota, Oklahoma and Washington reiterate the criteria of the Act. In the Sac & Fox and Iowa agreement, the state will work collaboratively with the tribe to develop effective case plans for tribal children and families regardless of whether proceedings are in state or tribal court. Where the tribal court has jurisdiction, the tribe has case management responsibility; if the state has jurisdiction, then the state has case management responsibility. In New York, the Saint Regis Mohawk Tribe's case plans must follow state law.

Administrative monies help fund tribal judicial and/or administrative case reviews and the development of case plans. Where administrative funding is not part of the tribal-state agreement, the tribe is required to pull together a patchwork of funding that is often not enough to support its foster care services; a tribe will likely pull from its own resources or other federal monies to fund its administrative costs in that case.

Michigan, Nebraska, New Mexico and Texas do not provide federal assistance to tribes for administrative costs. Nonetheless, the Texas and New Mexico agreements expressly require the tribes to develop case plans and case review systems in order to obtain maintenance funding for its children. The Nebraska agreement merely states that the tribes must "assure that all

requirements of the Social Security Act... pertaining to children for whom payment is requested are met.” The Michigan-Little Traverse agreement, which provides maintenance funding only, states that the Little Traverse shall make a record that supports its maintenance claims, follow Title IV-E and its regulations, and have full responsibility for case management.

## **F. Audits, Monitoring and Records Access and Management**

The Act mandates reviews and audits to assure that activities carried out under the Title IV-E program are in line with the Act and its implementing regulations. First, the state will monitor and conduct periodic evaluations of activities carried out under Title IV-E, and the state is required to arrange an independently conducted audit of the programs assisted under Titles IV-B and IV-E, at least once every three years. 42 U.S.C. §§ 671(a)(7) and (13), respectively.

The majority of the agreements require the tribes to allow the state to monitor its activities to assure compliance with Title IV-E and the state plan, allow the state and the federal government to audit tribal records, and allow the state and the federal government access to relevant tribal records on reasonable notice. Because of these mandates, the states require the tribes to maintain relevant IV-E records, including fiscal records, case files and health records, for varied time periods from three to six years after the agreement has terminated, after the date of final payment or after a particular child’s foster care episode – and longer where there is an audit or litigation.<sup>50</sup>

South Dakota will conduct random sampling for case reviews of eligible children and licensing files on a twice a year basis for monitoring and compliance. Oklahoma performs continuing review over all tribal case plans to assure compliance with the state plan and federal laws. The Sac & Fox Tribe agrees not only that it will provide access to IV-E program related records, but also will give the state access to tribal laws and policies. The Sac & Fox agree that it will “periodically review its cases using Child and Family Services Review process case reading tool developed by IDHS or tool with similar content. IDHS will provide orientation for tribe staff to use.”

Several agreements mention OMB Circulars A-87 and Circular A-133, including Nebraska, Montana, Oregon, and California, and require an independent CPA audit in accordance with these Circulars.

As part of the states’ monitoring for compliance with Title IV-E, several agreements provide “technical assistance” to the tribe, to assure compliance as well as an opportunity to train and

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<sup>50</sup> The state agency is required to maintain its records related to its Title IV-E program for three years. 45 C.F.R. § 92.42(b). If any litigation, claim, negotiation, audit or other action involving these records begins before the end of the 3 years, then the records must be retained until resolution of the issues or until the end of the three year period, whichever is longer. *Id.* In addition, the federal government has the right to access the records as long as the records are retained. *Id.* § 92.42(e). However, because a tribe will be considered a subgrantee of the state when the tribe receives IV-E funding through a tribal-state agreement, the agreement between the tribe and the state will control the length of time for retention of records. 45 C.F.R. § 92.42(a)(2) and § 92.36(i)(10). In other words, the state can require the tribe to retain records for a longer period of time.

collaborate with tribal child welfare staff. The New Mexico agreements state that the state shall provide reasonable technical assistance to the tribe or pueblo “to comply with federal law, policy and regulations for fiscal accountability, program operations, reporting procedures and to comply with the terms and conditions of this agreement.”

## **G. Data Collection and AFCARS**

Each state that receives funding under Title IV-B or IV-E may institute a data collection system called the State Automated Child Welfare Information System (SACWIS). A SACWIS is a comprehensive, automated case management tool that supports child welfare practice and holds a state’s official case record, which includes a complete, current, accurate, and unified case management history on all children and families served by the state’s Title IV-B and Title IV-E programs. States may receive funding for expenditures related to the planning, design, development and installation of a SACWIS. 45 C.F.R. § 1555.52. SACWIS is federally funded but is a voluntary case management system.

The Adoption and Foster Care Analysis and Reporting System or AFCARS collects case level information from state and tribal IV-E agencies on all children in foster care and those who have been adopted with IV-E involvement. Data collected through AFCARS must be transmitted to the Administration for Children and Families (ACF) semi-annually for all children in foster care or children adopted during that time period. ACF uses AFCARS data for IV-E eligibility reviews and allotment of funds, among other things. There are penalties where a state fails to provide such data. The state must include American Indian children in its data on the same basis as any other child. *Id.* at 1355.40(a)(2).

There are also data collection requirements for youth in foster care who reach 17 years of age in the National Youth in Transition Database (NYTD), provided for at 45 C.F.R. §§ 1356.81-86. This is discussed in Section VI of this report under the subsection regarding the John H. Chafee Foster Care Independence Program.

The tribal agreements in Washington, South Dakota, Montana, and Iowa mention tribal reporting of AFCARS data in the respective state’s system. The Washington agreements require that data should be provided for each child that comes within the jurisdiction of the tribe. The South Dakota agreement requires the tribes to enter data from IV-E eligible children under the placement, care and responsibility of the tribe. The Iowa-Sac & Fox agreement requires the tribe to enter data as federally required. The New York-Saint Regis Mohawk agreement requires the tribe to enter eligible children into the Child Care Review System and the Welfare Management System as required by New York law. The New York agreement does not mention AFCARS. Attachment M of the Montana agreements describe AFCARS and lists the various data elements that are required for the state to submit semi-annually to ACF; it does not mention anywhere in the agreement that the tribes have any obligations to submit AFCARS. Other tribal-state agreements mention data reporting, but do not specifically mention SACWIS or AFCARS.

## **H. Third Party Rights**

There are several Title IV-E requirements concerning rights of third parties, including grandparents, foster parents and other relatives. First, a foster parent, preadoptive parent or relative that provides care to a child must be given timely notice of and an opportunity to be heard in permanency hearings and six-month periodic reviews held with respect to the child. This right does not include the right to standing as a party to the case. 45 C.F.R. § 1356.21(o). In addition the Act requires that, within thirty days after the removal of a child, the state (or the Tribe) shall exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child subject to exceptions due to family or domestic violence that specifies the child is being removed, explains the options the relative to participate in the care and placement of the child, describes the requirements to become a foster family home and the additional services and supports that are available for children placed in such a home, and where kinship guardianship assistance payments are available describes how the relative guardian may receive payments. 42 U.S.C. § 671(a)(29).

Many of the agreements reiterate this language requiring notice and the opportunity to be heard for foster parents, preadoptive parents and relatives, including the Oklahoma, Texas, South Dakota, Minnesota, and Oregon agreements. Only the Texas agreement expressly requires that the tribe shall identify grandparents and adult relatives.

## **I. Other Compliance Requirements**

Most of the agreements require the tribes to comply with a litany of federal laws, some of which may not be otherwise applicable to tribal governments. Examples of these laws include civil rights law, contracting requirements, and labor laws. Many of these are federal laws that are tied to the receipt of federal funding, such as “no lobbying” and drug-free workplace laws.

For example, two important federal anti-discrimination laws expressly exclude Indian tribes. Title VII of the Civil Rights Act of 1964 prohibiting discrimination in employment because of race, color, sex, national origin, and religion, and Title I of the Americans with Disabilities Act of 1990 (ADA) requiring employers reasonably to accommodate qualified disabled employees, exclude Indian tribes from the statutory definition of the term “employer.” In addition to excluding tribes, Title VII also exempts from coverage Indian preference policies adopted by “any business or enterprise on or near an Indian reservation.” Yet some of the agreements reference these laws.

The New Mexico agreements provide one method for dealing with these issues. The New Mexico agreements simply state that the tribes or pueblos are required to follow “applicable” laws regarding non-discrimination, and do not expressly name any particular laws, and further state “nothing in this agreement shall prohibit the Pueblo from adhering to a policy of Indian preference in employment to the fullest extent permitted by law.” Arizona also uses language that the tribe is to comply with “applicable” state and federal statutes and regulations concerning non-discrimination practices. The Nebraska agreement states that a violation of “applicable” local, state and federal civil rights and equal opportunity laws will constitute a

material breach of contract; thus, this raises the importance for a tribe to understand which laws may apply.

Oregon states that it recognizes that the tribes may be exempt from certain provisions of the ADA, but that the tribe recognizes as a subgrantee of the state, the state must ensure its contractors provide services to clients consistent with the ADA. Therefore, the tribes agree to comply with and cause providers to comply with Title II of ADA and regulations in construction, remodeling, maintenance, operation of any structures, conduct of all programs associated with delivery of services; and unless exempting tribes specifically, with the Civil Rights Act, and the Secretary of Labor's equal employment rules and regulations.

Tribes are also expected to comply with a litany of other federal laws that are tied to the receipt of federal funds. Some of these federal laws may include, but are not limited to, 45 C.F.R. 87.1 and 87.2, which prohibits contractors from using direct federal financial assistance to engage in inherently religious activities; the Drug-Free Workplace Act, in which the tribe must certify that it maintains a drug-free workplace environment to ensure worker safety and workplace integrity; and the Anti-Lobbying Act, 18 U.S.C. § 1913, which restricts the use of federal funding for lobbying.

## V. FOSTER CARE, GUARDIANSHIP ASSISTANCE, AND ADOPTION

### A. Foster Care

The majority of the Title IV-E tribal-state agreements define foster care as 24-hour substitute care for a child placed away from his or her parents or guardians and for whom the tribe has placement and care responsibilities. Substitute care may include individual family foster homes, foster homes of relatives, group homes, emergency shelters, residential facilities, childcare institutions, and pre-adoptive homes. Title IV-E of the Social Security Act provides funding to states and tribes to provide safe and stable homes for children until they can be safely returned to their homes, placed with adoptive families, or placed in other permanent arrangements. As an open-ended entitlement grant, Title IV-E can provide reimbursement for foster care maintenance payments including daily care and supervision expenses on behalf of eligible children. This section discusses foster care placement preferences, voluntary placements, and licensing of foster care homes and institutions.<sup>51</sup>

#### 1. Placement Preferences

In order for a state to be eligible for payments under Title IV-E the state shall have a plan approved by the Secretary of Health and Human Services, which among other items requires “the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.” 42 U.S.C. § 671(a)(19). Title IV-E requires that the state “shall exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child (including any other adult relatives suggested by the parents) within 30 days after the removal of a child. 42 U.S.C. § 671(a)(29). The notice must specify that the child is being removed or has been removed, explain options the relative has pursuant to applicable law, describe the requirements to become a foster family home, and if the state has elected to make kinship guardianship assistance payments, explain how the relative can apply to receive those payments. *Id.*

In addition, the state plan shall provide that “reasonable efforts shall be made” to place siblings together, and if not possible, to provide frequent visitation or other interaction between siblings, 42 U.S.C. § 671(a)(31).

ICWA further requires that in state child custody proceedings:

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

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<sup>51</sup> Foster care maintenance payments are discussed in Section III.

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915(b). A tribe may pass a resolution providing a different order of preference, as long as the placement is the least restrictive setting appropriate for the child's needs. 25 U.S.C. § 1915(c). The preference of the child or parent shall also be considered. *Id.*

Only a few tribal-state agreements reference placement preferences pursuant to Title IV-E or ICWA. The Alabama-Coushatta agreement with Texas, and the Michigan-tribal agreements (except for the Little Traverse Bay Bands of Odawa Indians) repeat the Title IV-E requirements for placement preferences. The Saint Regis Mohawk Tribe agreement with New York requires that the placement be in the least restrictive setting and appropriate for particular needs of the child according to New York State law.

The Oklahoma template agreement includes the tribe's placement preferences, requires that both the tribe and state shall cooperate in the placement of tribal children in state custody foster home placements, and that the state will respect the tribe's order of placement for children in Tribal custody. Further, the state agrees to contact the tribe's Indian Child Welfare office to utilize the tribe's approved foster homes and to follow that tribe's order of placement preferences for the duration of a case. The Minnesota and Mille Lacs Bands of Ojibwe agreements also expressly recognize tribal placement preferences according to tribal law. The California agreements with the Karuk and Yurok Tribes recognize ICWA standards for placement preferences.

## **2. Voluntary Placements**

Title IV-E requires that the child be removed from his or her home by court order or a voluntary placement agreement. 42 U.S.C. § 672(a)(2)(A). Voluntary placements are eligible for Title IV-E foster care maintenance funding and require a voluntary placement agreement, which is "a written agreement, binding on the parties to the agreement, between the [tribe] and the parents or guardians of a minor child which specifies, at a minimum, the legal status of the child and the rights and obligations of the parents or guardians, the child, and the agency while the child is in placement." 42 U.S.C. § 672(f). This written agreement must be signed by all parties and can only place the child out of the home for 180 days or less. 42 U.S.C. § 672(e). A judicial determination of the child's best interest is required for placements lasting longer than 180 days. *Id.* See also 45 C.F.R. § 1356.22.

Each Title IV-E tribal-state agreement that includes voluntary placement provisions follows these federal regulations closely; the tribal-state agreements that specifically mention voluntary

placements do not stray from the federal requirements. The Montana tribal-state agreements add that it will be considered a fatal error not to include the signature of all parties in the voluntary agreement, thus rendering the child ineligible for Title IV-E funding.

The Alabama Coushatta-Texas agreement does not apply to children who are the subject of a voluntary placement with the tribe. It is the only agreement that expressly rejects maintenance funding for voluntary placement.

### **3. Collaboration between Tribes and States in Foster Care Placements**

The Oklahoma agreements provide unique and detailed provisions that spell out the roles and responsibilities between the state and the tribes for foster care placements. In provision 5 of the Cherokee agreement, the state and the tribe provide a detailed coordination plan for when a child is in state custody placed in a tribal foster home, or tribal custody in a state foster home; how the parties will cooperate when a child must be removed from a state or tribal foster home; if there is abuse or neglect in the foster home; and, among other things, that the tribe is the decision-maker for Cherokee Nation children in tribal custody, and the state is the decision-maker when a child is within its custody.

In provision 8 of the Cherokee agreement, the state agrees to follow the Cherokee Nation order of placement preference, and the provision further details the collaboration between the state and the tribe to assure that proper placement is made.

Finally, the Oklahoma agreements uniquely provide that the tribal staff may request placement in a state residential group home for a tribal custody child when it is determined that the child's needs cannot be met in a tribal foster home or therapeutic foster home. See provision 12 in the Cherokee agreement. This allows the tribe to provide for the special needs of a child where the tribe may not have the specialized care required in particular cases.

### **4. Licensing of Foster Homes**

The state plan shall designate an authority responsible for establishing and maintaining 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, including standards related to admission policies, safety, sanitation, and protection of civil rights."<sup>52</sup> 42 U.S.C. § 671(a)(10). These licensing standards shall be applied to any foster home receiving funding under Title IV-E and IV-B. *Id.* Thus, a state can defer to a tribal government as an appropriate authority for establishing and maintaining foster home licensing standards within its jurisdiction as long as such standards are in accord with national organizations' standards. In other words, tribal standards do not need to follow state standards as long as the tribe's standards are commensurate with national standards. Furthermore, the ICWA provides that tribally licensed or approved foster homes shall be deemed the equivalent

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<sup>52</sup> The language of this provision is broad and does not formally recognize any particular national organization's standards. This approach has provided states and tribes with flexibility and allows for diverse approaches.

to state licensed homes for the purpose of qualifying for assistance under federally funded programs. 25 U.S.C. § 1931(b).

The majority of the agreements use similar language to acknowledge tribal standards: the tribe shall establish and maintain standards for foster family homes, adoptive homes, and childcare institutions for children under the jurisdiction of the tribal court. North Dakota's tribal-state agreements recognize that the state does not possess jurisdiction to license facilities on Indian lands. New York is the only state to require foster care facilities or homes to be licensed by the state and pursuant to standards set forth in state law.

The majority of the tribal-state agreements recognize the authority of tribes to establish standards for the licensing of foster care homes and institutions on the reservation. The California agreements recognize that authority for homes on or near the reservation.<sup>53</sup> Where a tribe has not yet established standards, a number of the agreements require the foster homes to meet state standards. New Mexico provides an attached Foster Care Provider Information Sheet to be filled out by the tribe so that the provider can receive payment, which includes the date of the licensure. Alaska, Michigan, and Nebraska fail to mention any standards for licensing foster homes by a tribe or state. Only a few of these agreements explicitly recognize in the agreement that only the tribe has the jurisdiction to license on-reservation homes.

## **5. Criminal Background Checks**

Criminal records checks, including fingerprint-based checks of national crime information databases, and child abuse and neglect registry checks, are required as a condition for any prospective foster or adoptive placement pursuant to Title IV-E. 42 U.S.C. § 671(a)(20). The tribal-state agreements generally provide that tribes may establish their own procedures for conducting these background checks. Title IV-E will not make maintenance payments to a foster home where a record check reveals a felony conviction for child abuse or neglect, spousal abuse, crimes against children, any crime involving violence, physical assault, battery, or drug related offense within the past 5 years. The majority of the agreements reflect this federal requirement.

A problem for many tribes is they may not have direct access to these national criminal records databases through the state, or the state child abuse and registry databases, depending on state

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<sup>53</sup> It is clear that tribally-licensed on or near reservation homes qualify for reimbursement under Title IV-E and regulations and that off reservation homes would not qualify (unless they are also licensed by the state) because of the definition of "foster family home" in the regulations. 45 C.F.R. § 1355.20(a)(2). It is worth noting, however, that this definition applies only for the purpose of Title IV-E eligibility. Indeed, the foster care placement provision in the Indian Child Welfare Act provides that the second preferred foster care placement (after a placement with the extended family) is a tribally approved or licensed home. 25 U.S.C. § 1915(b). Nothing in the language of this section suggests that these homes must be on or near the reservation. Since ICWA is a law that by definition applies to all state proceedings, many of which are not located on or near reservations, it is difficult to see how the state can comply with the placement preference provision without utilizing tribally-licensed off reservation tribal homes. Indeed, this power would be part of the tribe's inherent sovereignty.

laws concerning access and distribution of this type of information. The California and Washington tribal-state agreements require the states to respond to or coordinate the process for tribal requests for criminal background investigations. The Little Traverse Bay Bands of Odawa Indians is the only tribe in Michigan to include provisions reflecting state cooperation in providing criminal background checks. Unfortunately, in Nebraska, the tribes are unable to contract with the state to secure background checks to fulfill the foster care licensing requirements. Though Nebraska has requested the State Patrol Office to enter into such agreements for background checks, the State Patrol Office has refused to do so, stating that state law does not allow it to enter into agreements with a tribe because it considers a tribe an entity of the federal government.

Costs to conduct the criminal background checks and other database access may be reimbursable through Title IV-E administrative funds, but most tribal-state agreements do not explicitly include these costs on the list of costs available for reimbursement. Washington is the only state to explicitly provide that it will reimburse tribes for the costs of criminal background checks.

## **6. Home Studies**

42 U.S.C. § 671(a)(26) requires that the tribe or state perform a home study to determine the suitability and safety of the home prior to placement. Very few tribal-state agreements discuss the type of home study prior to placement.

The Cherokee-Oklahoma agreement, Attachment I, provides the following language regarding home studies:

The Tribe approves foster homes according to Tribal standards. [...] The Tribe sends completed home studies to the CFSD Tribal Coordinator. The study must include OSBI and Fingerprint-based Background checks. Studies include identifying information about the family members, family functioning, discussion of their motivation and understanding of providing foster care, discussion of their understanding of children in the system, loss, understanding of birth families, their understanding and willingness to maintain connections for children, and a recommendation that addresses the assessment of the family and their abilities to foster children. The approval must be signed and dated and must include the number and type of children the home is approved to provide foster care. Placement of either Tribal custody or OKDHS custody children should not occur prior to approval of the home. Foster care reimbursement will not be made to any home prior to the date of approval. Foster homes are not approved without a completed foster home study, pre-service training, OSBI and Fingerprint-based criminal record checks. Criminal Background checks are required on all adults in the home, as well as any identified alternate care-givers.

Other agreements mention periodic home visits during placement, but not a home study prior to placement of the child. For example, South Dakota requires periodic case worker visits.

## **B. Guardianship Assistance**

“Kinship guardianship assistance” is monetary assistance for relatives who have been appointed as guardians. 42 U.S.C. § 673(d). The Fostering Connection Act of 2008 gave tribes the option to use IV-E funds for kinship guardianship assistance as part of its tribal-state agreement if the state has opted into the program. Assistance may include monthly payments, Medicaid benefits, and one-time nonrecurring expenses (i.e., legal fees). In order for a prospective relative guardian to receive kinship guardianship assistance, the child must have resided with the relative guardian for the previous six months while also being eligible to receive foster care payments; the relative guardian must meet licensing requirements as a foster family home. The tribe or state must negotiate and enter into a written agreement with the relative guardian for kinship guardian assistance before a court places the child with the relative guardian. Several agreements provide that the tribe negotiates with and provides information to the relative guardian, and the state is the party who actually executes the agreement with the guardian.

Montana, Oklahoma, Oregon, South Dakota, and Texas, provide kinship guardianship assistance. Minnesota and Michigan only briefly mention guardianships as a placement preference. Overall, the Title IV-E agreements define the relevant terms, only slightly modifying the federal definitions, and discuss the process for guardianship payments, closely following the federal law.

Both South Dakota and Oregon use similar provisions for the payment procedures to relative guardians. The state will determine if the child meets the eligibility criteria for guardianship assistance, then the tribal caseworker completes the application prior to the order for guardianship from the court.

The Alabama-Coushatta tribal-state agreement with Texas defines both “guardianship” and “permanency care assistance.” Guardianship is defined as a tribal court-created relationship between the child and caretaker and lists the rights and responsibilities included in that relationship. Permanency care assistance refers to the guardianship assistance payments permitted under Title IV-E. The Alabama-Coushatta agreement clearly enumerates the tribe and state’s responsibilities regarding the permanency care assistance payments for guardians. The tribe agrees to establish and adhere to tribal standards for guardian homes, and perform fingerprint based criminal background checks and child abuse and neglect registry checks on any prospective relative guardian and all adults living in the home. In turn, Texas agrees to provide appropriate child welfare training to guardians and responds to requests from the Tribe for child abuse and neglect registry checks.

In regard to the permanency care assistance, the Alabama-Coushatta Tribe agrees to identify prospective guardians, train staff and inform families of the procedures to receive assistance. Texas agrees to provide staff to receive applications for assistance and answer questions from the tribe, enter into assistance agreements with prospective guardians, negotiate monthly payments based on state criteria, and give notices and provide hearings for applicants denied assistance.

Attachment E of the Montana Agreements addresses Title IV-E Subsidized Guardianship, including kinship guardianship. It provides the general requirements for a guardianship and

kinship guardianship, legal requirements, the minimum powers and duties of a guardian, permanency staffing, home assessment, eligibility including subsidy negotiation between the tribal social services and the prospective guardian, and finally the guardianship petition. The 11-page Attachment provides explanations and directions for tribal procedures as well as IV-E requirements for guardianship and kinship guardianship assistance.

As stated in the maintenance section, Oklahoma provides a “Kinship Startup Stipend” where a child is placed with a relative before the home receives foster home approval.

## **C. Adoption**

Title IV-E provides funding for “adoption assistance” pursuant to the Adoption Assistance and Child Welfare Act of 1980 to encourage adoption of children who have been placed in the foster care system by providing federal subsidies. These subsidies serve to minimize the financial obstacles to adopting children with “special needs.”

A child in the foster care system with “special needs” generally means they have a factor or condition that may involve an ethnic or racial background, age, membership in a sibling group, disability (physical, mental, or emotional) based on birth family history, risk for disability, or any condition that makes adoptive placement more difficult. The Title IV-E statute does not define “special needs,” but requires a child with special needs to meet the following requirements: (1) the child or youth cannot or should not be returned home to his or her parent(s); and (2) an unsuccessful attempt was made to place the child or youth without adoption (financial) assistance (except in cases where such a placement would not have been in the best interest of the child or youth). 42 U.S.C. § 673(c). Criminal record clearances and a check in the state’s child abuse and neglect registry are also required for any prospective adoptive parent. 42 U.S.C. § 671(a)(20).

There are 79 Title IV-E tribal-state agreements that include adoption assistance for foster children from the states of California, Iowa, Minnesota, Montana, New Mexico, New York, Oklahoma, Oregon, South Dakota, Texas, and Washington. These agreements cover legal proceedings for adoptions, adoption assistance payments, licensing of adoptive homes, and fair hearings for applicants denied assistance. The Montana agreements are the only agreements that provide adoption incentive payments. The following information describes how the tribal-state agreements deal with adoption assistance.

### **1. Funding**

Title IV-E adoption assistance refers to the monetary payments and benefits for pre-adoptive and adoptive parents. (This is different than administrative reimbursement that tribes may receive for providing adoption services.) Prospective adoptive parents may enter into agreements directly with the state to receive adoption subsidies. Overall, tribes have included some or all of the following adoption subsidies into their tribal-state agreements: monthly payments to adoptive parents, medical coverage for adoptive child, and reimbursements for nonrecurring expenses or special payments to off-set the costs associated with adopting.

The tribal-state agreements tend to follow a similar process for adoption assistance as they do for maintenance payments. The agreements require that either the tribe or the state's department of social services makes an eligibility determination of the child. If the child qualifies for adoption assistance, then the state will enter into an agreement with the adoptive parents and all benefits and payments will be made directly to the adoptive parents.

In some cases, the agreements are very general. The California, Iowa, New York and Texas agreements state only that adoption assistance is available where a child is "free for adoption." Attachment F of the Montana agreements provides detailed direction for IV-E subsidized adoption and non-recurring adoption expenses, and the medical subsidy. There are no agreements that provide that the tribe will enter into an agreement with the adoptive parents for adoption assistance; the agreements provide that adoption subsidy agreements are executed by the state and the adoptive parents. The Cherokee-Oklahoma agreement merely provides that the Nation will provide information to adoptive families regarding funding and that the state will process completed applications for funding.

Some states specifically recognize the eligibility of customary adoption families for adoption assistance. Oregon provides adoption assistance funding if parental rights have been terminated, or if a child can be "adopted in accordance with tribal law without a termination of parental rights or relinquishment that includes documentation of a valid reason why the child cannot or should not be returned to the home of his or her parents."

The Montana agreements, Exhibit F, simply states:

In some tribes, adoption is legal without a Termination of Parental Rights (TPR) or a relinquishment from the birth parent(s). If a child can be adopted in accordance with Tribal law without a TPR or relinquishment, and is otherwise eligible for adoption subsidy, the Department may enter into an adoption subsidy agreement with the adoptive parents if the tribe has documented the valid reasons why the child cannot or should not be returned home.

The Washington agreements explicitly state that where a child is legally free for adoption or meets the tribe's custom adoption rules, the state will review to determine if adoption assistance payments are appropriate and make those payments to the adoptive parent.

## **2. Right to Fair Hearing**

The Texas and Montana agreements are the only tribal-state agreements that expressly require fair hearings for adoptive parents who are denied adoption assistance. For example, the Alabama-Coushatta agreement with Texas requires the state to "provide a fair hearing to an adoptive parent . . . of a Tribal child if adoption benefits provided under this agreement are denied, delayed, suspended, reduced or terminated, or processing of the application is unreasonably delayed." In both the Texas and Montana agreements, it is the state that makes the eligibility determination and provides the fair hearing.

### **3. Licensing of Adoptive Homes**

There are sixteen Title IV-E agreements from California, Oregon, South Dakota, Texas, and Washington that discuss the licensing of adoptive homes. California, Iowa, and Texas only briefly mention standards for approval of adoptive homes, while the other states are more expansive. Overall, the agreements state that the tribes may establish and maintain standards, and refer to tribal code or law, but they do not include comprehensive provisions on the actual licensing or approval process for adoptive homes. The agreements also require the tribes to establish procedures for criminal background checks and child abuse and neglect checks through a registry maintained by the state and the tribes.

The state of Oregon is the most comprehensive in this area. The Oregon agreements recognize the tribes' authority to establish and maintain standards for adoptive homes under the jurisdiction of the tribal courts. Additionally, the parties agree that tribal standards shall be in reasonable accord with recommended national standards from national organizations. The agreement continues with provisions for establishing tribal standards on fingerprint based FBI criminal background checks and lists grounds to deny approval of applicants.

South Dakota and Washington use similar language on the approval of adoptive homes in their tribal-state agreements, but South Dakota adds additional provisions on criminal background checks and fingerprinting. Both states include language recognizing that the tribes may establish and maintain standards for foster family homes, adoptive homes, and childcare institutions and that these standards are reasonably in accord in with national standards and federal law. South Dakota includes language that federal law requires criminal background checks and details the background check process. The South Dakota agreements conclude the adoptive homes standards section by stating the tribes have authority to license foster homes located within the boundaries of the tribes' reservations and license members of the respective tribe or members of other federally recognized tribes.

California and Texas include brief sections on tribal standards for adoptive homes in their agreements. The states acknowledge that the tribes shall establish and maintain standards for foster homes, guardians, and adoptive homes. Texas adds one additional paragraph that fingerprint based criminal background checks must be complete before any benefits can be provided under the agreement. The California tribal-state agreements have a separate section that details the process for criminal background checks and requires criminal record clearance for any prospective adoptive parents.

## VI. OTHER SIGNIFICANT PROVISIONS

### A. Reporting of Child Abuse

Title IV-E requires the reporting of child abuse to an appropriate agency or official when there are known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child. 42 U.S.C. § 671(a)(9). A majority of the tribal-state agreements require the Tribe to report child abuse. Only one of the agreements, Iowa, mandates that the state will report child abuse to the tribe.

The Oklahoma Department of Human Services and the tribes agree to utilize the notification provisions outlined in the 2003 “Memorandum of Understanding for Reporting and Investigating Child Abuse Criminal Offenses in Indian Country.”<sup>54</sup> In addition, the state shall conform to the provisions of the Indian Child Welfare Act and the Oklahoma Indian Child Welfare Act for notifications to the tribes. The tribes agree to report any suspected abuse or neglect incidents when working with tribal families residing on state lands.

The tribe agrees to report suspected abuse or neglect occurring in tribal foster homes involving state custody children to the DHS. Where there is abuse or neglect involving a tribal child in a foster home, consultation occurs between the state and tribal worker regarding the immediate safety of the child, and if necessary, removal of the child pending completion of an investigation. The tribe makes decisions about children in tribal custody, and the state makes decisions regarding state custody children.

The Lummi, Quinault and Makah Nations shall report all instances of suspected child abuse and neglect in accordance with tribal protocols to the state of Washington. Washington requires that each tribal employee sign and date a statement acknowledging their duty to report abuse. The tribe shall notify the state of any founded allegation of abuse and will participate with other child welfare providers. The South Dakota agreements are similar: the tribe has exclusive jurisdiction to investigate allegations of child abuse or neglect occurring in a foster home licensed by a tribe; and the tribe shall notify the appropriate state contact of any substantiated allegation of abuse.

Iowa has a very robust section on reporting child abuse, including what is required of the notice from the state to the tribe. Where the Iowa Department of Human Services is aware of known or suspected abuse of a child where the child is in custody or domiciled with the tribe, or determined to be a Meskwaki (Sac & Fox) Child, IDHS shall report the instance to the tribe. The Iowa-Sac & Fox agreement expressly states that this is in recognition of tribal sovereignty and the tribal court system, as well as to properly provide information to the tribe. The tribe will also report known or suspected abuse to IDHS of a child in custody of that state or when the child is not a Meskwaki child. Iowa and the Sac & Fox agree that where such report is made,

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<sup>54</sup> The Oklahoma Memorandum of Understanding’s guidelines can be found at <http://digitalprairie.ok.gov/cdm/singleitem/collection/stgovpub/id/10309/rec/4> (last visited on August 14, 2013).

they will develop rules or protocols that define each party's responsibilities and that the parties will share information regarding child abuse assessments.

The California-tribal agreements require the Karuk and Yurok tribal social workers to report child abuse as required by state law. The agreement recognizes tribal social workers as "social workers" covered by the California Child Abuse Neglect and Reporting Act, Penal Code §§ 11164 et seq., and thus tribal social workers must follow state law for reporting abuse. California maintains the tribal reporting in its "Child Abuse Central Index," which is a centralized index of alleged investigation reports of abuse or neglect maintained by the state.

Other agreements simply require the tribe to comply with Title IV-E requirements and report all known or suspected instances of abuse, such as the Texas and Alabama-Coushatta agreement and the Oregon-tribal agreements.

## **B. Confidentiality**

There are several types of confidential information that are required to be protected by Title IV-E. One type of confidential information concerns protected health care information and a second concerns the overall protection of confidential information contained in children's files. Generally, the tribal-state agreements provide that tribes are to maintain safeguards to protect confidential information. Some agreements require that the tribe provide such policies and procedures in writing, and to even comply with state law requirements for privacy. Title IV-E requires compliance with the confidentiality requirements at 42 U.S.C. § 671(a)(8) and other provisions of the Social Security Act.

The Alaska-tribal agreements require specific treatment for transferring documents, including electronic and hard copy files. The Oklahoma and Michigan agreements are similar and require the tribes to keep juvenile proceedings confidential and not to reveal information to anyone who does not need the information in order to exercise the tribes' rights under ICWA, as well as tribal laws. The Navajo Nation in Arizona must have safeguards to protect confidential information and written policy and instructions.

The White Earth-Minnesota agreement requires tribal staff to sign agreements to protect confidential information, and staff are trained on confidentiality and data privacy issues in accordance with privacy requirements under Minnesota law. Nebraska requires that "all information gathered in the performance of this contract, either independently or through DHHS, shall be held in the strictest confidence and shall be released to no one other than DHHS without the prior written authorization of DHHS, provided, that contrary contract provisions set forth herein shall be deemed to be authorized exceptions to this general confidentiality provision. The confidentiality provision shall survive termination of this contract."

Montana, Iowa and Michigan-Little Traverse are the only agreements that acknowledge that both parties – the tribes and the state – share an obligation and responsibility to protect confidential consumer and recipient information obtained and used in the performance of the agreement.

The Minnesota-Leech Lake and Mille Lacs agreements expressly provide that the tribe "agrees to be bound by federal laws 45 CFR parts 160 & 164 commonly referred to as 'HIPPA'

protecting the privacy or information. Agreeing to state laws should not be necessary for this agreement.”

### **C. Interstate Compact on the Placement of Children**

Title IV-E requires “that the State shall have in effect procedures for the orderly and timely interstate placement of children.” 42 U.S.C. § 671(a)(25). The Interstate Compact on the Placement of Children (ICPC) is a uniform state law that has been enacted by all 50 states, the District of Columbia, and the U.S. Virgin Islands. It establishes orderly procedures for the interstate placement of children and fixes responsibilities for those involved in placing the child.<sup>55</sup> Compliance with an “interstate compact” by states meets the requirement in § 671(a)(25).

In short, the ICPC mandates that the sending state agency will retain jurisdiction over the child, including the right to make decisions about the care and custody of the child and the child’s placement. The sending state also continues to have financial responsibility for the support and maintenance of the child. See, e.g., Article 5, Retention of Jurisdiction, Minnesota Statutes, 260.851.<sup>56</sup> If ICPC is not used, then the sending state will generally close its file on the child and the receiving jurisdiction will become responsible for the care of the child.

Tribes are not included in the ICPC and thus it does not apply directly to the placement of children between a state and a tribe, or between tribes.<sup>57</sup> However, states may be willing to work with tribes who want to utilize the ICPC, which may be a useful way to continue state funding for a placement where a tribe does not desire to transfer jurisdiction from the state. Michigan, Minnesota, Montana and Washington tribal-state agreements include the ICPC in their IV-E agreements. Both the Minnesota and Montana agreements state that the Tribe is not legally required to enter into the ICPC when accepting out-of-state placements of Indian children onto the reservation, but that the tribes agree that if they accept a child outside of the ICPC, the tribes may not claim IV-E costs.

Thus, where a tribe seeks to transfer jurisdiction from a state or another tribe in a different state, the ICPC does not prevent that transfer. However, some of the rules that govern IV-E eligibility complicate whether a IV-E file can be opened in another state, and whether IV-E funding is available for that child when he or she is placed by the tribe after a transfer of the case from out-of-state.

The Montana agreement states that the reason why Montana does not pay if a child is placed outside of the ICPC is because of its July 1996 AFDC plan, which is the basis for IV-E eligibility.

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<sup>55</sup> See “Guide to the Interstate Compact on the Placement of Children,” revised 2002 by the Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children, an affiliate of the American Public Human Services Association, at <http://www.childsworld.ca.gov/res/pdf/ICPCGuidebook.pdf> (last visited March 10, 2014).

<sup>56</sup> See <https://www.revisor.mn.gov/statutes/?id=260.851> last visited on March 14, 2014. This is a uniform state law and each state has codified the ICPC with the same language.

<sup>57</sup> See note 20, state law is not applicable to an Indian tribe, absent the express consent of Congress.

The AFDC plan required that a child reside in Montana at the time of removal in order to be eligible for AFDC payments from Montana. See Montana-tribal Agreement Attachment B, Section I.C.<sup>58</sup>

The requirements of the ICPC and possible loss of IV-E funding if the tribe does not consent to the application of ICPC are problematic given the federal ICWA mandate for transferring Indian children from a state to a tribe:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b).

Examples of the use of ICPC within tribal-state agreements are as follows:

- A. For the purposes of the Department's financial contribution for placement of children in out-of-home care under this Agreement, the Tribe agrees to accept children from out-of-state if they are placed according to procedures outlined in the Interstate Compact on the Placement of Children (ICPC), Mont. Code Ann. § 41-4-101 et. seq.
- B. The Tribe agrees that, pursuant to the ICPC, the child's sending State must maintain legal and financial responsibility for the child.
- C. The Parties understand and agree that the Tribe is not legally required to enter into the ICPC when accepting out-of-state placements of Indian children onto the Reservation.
- D. If the Tribe accepts any child without an approved Interstate Compact agreement in effect under which the sending State retains jurisdiction, the Tribe may not presently claim administrative costs for case management services provided with respect to that child and the Department will not make a Title IV-E foster care payment on behalf of the child. The State and the Tribe agree to amend this provision as soon as is practicable if the Federal government notifies the Department in writing that such costs may be claimed. If such costs become Title IV-E allowable, those costs will be allowable for those children transferred to Tribal Court jurisdiction and placed in out-of-home care by the Tribe after the date of receipt of official notification from the Federal government.

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<sup>58</sup> See 42 U.S.C. § 672(a)(3) regarding the AFDC eligibility requirement for Title IV-E Maintenance Payments Program.

E. The Department agrees to process the Interstate Placement of Children requests received from sending States in a timely manner.

Montana-tribal agreement, section 9.

The Washington-tribal agreements state “The Tribe agrees that it will: ... Comply with the ICPC Agreement that Washington has signed with other states in the event the Tribe places a Title IV-E eligible child in an out of state placement through the Interstate Compact on Placement of Children (ICPC).” See Lummi, Makah and Quinault agreements at section 3.

The Minnesota agreements with Leech Lake and Mille Lacs Bands require:

For the purposes of the county or state’s financial contribution under this agreement for placement of youth in foster care, the band agrees to accept children from out-of-state only if they are placed according to the procedures outlined in the Interstate Compact on the Placement of Children (ICPC). The parties understand and agree that the band is not legally bound to enter into the ICPC when accepting out-of-state placement of Indian children into the state, but if the band accepts any child(ren) without an ICPC agreement, the county or state will not participate financially or otherwise in the care of that child. For the purposes of the county’s financial contribution under this agreement for placement of youth in foster care, the band agrees to send or place child(ren) from the state of Minnesota to another state only if they are placed according to procedures outlined in the ICPC. The parties understand and agree that the band is not legally bound to enter into the ICPC when sending or placing child(ren) from the band into another state from the state of Minnesota, but if the band sends or places a child without an ICPC agreement, the county will not participate financially or otherwise in the care of that child. Only if a child(ren) continues under the jurisdiction of another government outside the band and the state of Minnesota does the ICPC apply.

See Leech Lake at XV and Mille Lacs at XII.

What is not reflected in Minnesota’s agreements is the state’s willingness to work with tribes and other states to negotiate different procedures when a child is placed with a tribe that seeks to transfer jurisdiction. On a few occasions, Minnesota has worked outside of ICPC to assist tribes obtain continued financial payments from the sending agency for a limited period of time following the transfer of jurisdiction. In such cases, it is important for the tribe to inform the state(s) before the actual transfer if it would like to arrange for an alternative arrangement outside the ICPC. Of note, an alternative procedure for a tribe would comply with the Title IV-E plan requirement, which merely requires “that the State shall have in effect procedures for the orderly and timely interstate placement of children.” 42 U.S.C. § 671(a)(25).

#### **D. John H. Chafee Foster Care Independent Living Program**

The John H. Chafee Foster Care Independence Program can provide states and tribes with flexible funding to provide services to youth obtaining 18 years of age to transition out of foster

care and into secondary education or the work place, as well as assistance with housing and needs support, and emotional support. 42 U.S.C. § 677. Title IV-E also specifically provides that this funding be available to tribes: “An Indian tribe, tribal organization, or tribal consortium with a plan approved under section 479B, *or which is receiving funding to provide foster care under this part pursuant to a cooperative agreement or contract with a State*, may apply for an allotment out of any funds authorized by paragraph (1) or (2) (or both) of subsection (h) of this section.” 42 U.S.C. § 677(j)(1) (emphasis added).

In addition, the National Youth in Transition Database maintains information about these youth moving out of foster care, and funding is also provided. Any state that administers or supervises the administration of the Chafee Foster Care Independence Program must comply with the requirements of this database. 45 C.F.R. § 1356.80.

There are very few tribal-state agreements that expressly mention the Chafee program. The Texas and Alabama Coushatta agreement requires the tribe to cooperate with the state in the collection of data for the National Youth in Transition Database, which pertains to youth receiving services under Chafee.

Oklahoma agrees that it will provide independent living services to tribal custody youth in the same manner as other Oklahoma youth in accordance with the Chafee Act. The tribes agree to assist the youth in developing an independent living case plan based upon an individual independent living assessment and assist the youth in making application and referrals for those services which will assist the youth to achieve their plan for independent living. The tribes provide this information to the state.

## **E. Language**

The Washington agreement requires the tribes to provide Limited English Proficient clients with certified or qualified interpreters and translated documents and shall provide deaf, deaf-blind, or hard of hearing clients with the services of a certified sign language interpreter at no cost to the client. Where costs of an interpreter are extraordinary costs that create an undue hardship for a , the state will review it on a case by case basis for funding. If the tribe is receiving language line support from the state, the tribe will continue to receive this service. There are no other agreements that touch on language issues.

## **VII. TRIBAL-STATE AGREEMENTS FOR TRIBES THAT RECEIVE DIRECT TITLE IV-E FUNDING**

While tribes that are approved for Title IV-E direct funding are not required to sign agreements with the state – and in many cases, they will choose not to do so – there may be some circumstances where a direct-funded tribe may want to negotiate a tribal-state agreement. Obviously, the focus of such an agreement would be different from what has been described in the preceding sections of this report, but states may have an important role to play in maximizing the tribe’s ability to successfully implement a direct funded IV-E program even if a tribe decides to apply for direct funding from HHS. Among the issues that might benefit from state involvement through a tribal-state agreement are the following:

- Direct-funded tribes can define their own service area. If that service area includes lands that are outside of the tribe’s exclusive jurisdiction, coordination between the tribe and state will be critical to ensure that children receive services from the appropriate entity. Many tribes administering the Temporary Assistance for Needy Families (TANF) program serve populations outside their exclusive jurisdiction.
- Pursuant to the Indian Child Welfare Act, tribes can transfer off-reservation child custody cases to tribal court. Coordination between state and tribal agencies can help to ensure that the child’s access to maintenance payments and services is uninterrupted and to determine the allocation of costs.
- Even direct-funded tribal programs may benefit from training provided by state agencies, universities and consultants. In addition to the increased skills that may result from such trainings, tribes may also be able to claim the training as an in-kind expense which will help the tribe meet its match requirements.
- Any Indian child receiving foster care maintenance payments or adoption assistance payments for which the state is receiving federal matching payments must continue to receive such payments after the tribe begins to directly operate the program. Thus, coordination between state and tribal programs is important if there is to be a transfer of responsibility for the child.
- For tribes currently in tribal-state agreements that want to transition to direct funding, state support could be very helpful. For example, as noted in the analysis, some states are currently providing match money to the tribes. A tribe may not be financially able to take over the program without a continuation of state support. Direct tribal funding may benefit both the tribe (as it will be able to run the program directly and receive reimbursement for certain in-kind costs) and the state (reduced FMAP and transfer of administrative responsibilities can reduce state costs).
- Cross-system coordination is required by the statute between the tribal IV-E agency and the state Title IV-B/IV-E agency and state Medicaid office.
- When tribes decide to pursue direct funding, they are required to operate all components of the Title IV-E program. Some tribes that may want to operate the program directly may not have the capacity or desire to administer certain functions,

e.g., eligibility determinations. In such a case, the state and tribe could sign a contract where the state would be the subcontractor that would administer certain functions – the reverse of what has taken place in many tribal-state agreements to date. There are a number of instances where these types of arrangements are in place, including TANF and federal historic preservation programs.

- Although Title IV-E agreements and Indian Child Welfare Act agreements can be and often are two separate agreements between sovereigns, some Title IV-E agreements have incorporated elements of ICWA compliance. A tribal-state agreement between a direct-funded tribe and a state could likewise include these types of provisions (although in many respects, a separate and comprehensive ICWA agreement will normally be a more effective way to improve a state’s ICWA compliance).
- An agreement may provide for tribal engagement in the development of state IV-E and IV-B plans and Child and Family Services reviews, particularly in terms of ICWA compliance.
- An agreement may facilitate involvement of tribes in state court improvement planning (and assist tribes who have received court improvement dollars for their tribal courts, if requested).
- A tribe can benefit from building collaborations and partnerships with a state for a variety of purposes – for example, reducing numbers of children in foster care and disproportionality, providing culturally sensitive services and training, and recruiting more native foster homes. A tribal-state agreement may be a mechanism for achieving some of these goals.

In summary, it may be beneficial for some tribes receiving direct funding to consider a different type of tribal-state IV-E agreement that will help them to provide the highest quality IV-E child welfare services to their children and families and that will also impact and improve how states are handling tribal children in their systems.

## VIII. PROMISING PRACTICES TEMPLATE

This survey and analysis has analyzed a wide variety of tribal-state agreements for Title IV-E funding. A few of these agreements are simple provider or contractor type agreements and others express a strong government-to-government relationship between the state and a tribe. No one agreement is perfect and the best Title IV-E agreement is negotiated in good faith, as required by the Act, and with the full participation of Indian nation tribal leaders, social services directors and legal counsel. The provisions and scope of the agreement should always follow the Indian nation's vision for its program, and the way in which the Indian nation wishes to assert its sovereignty pursuant to its own customs and laws.

This document provides a template for a Title IV-E tribal-state agreement by extracting various tribal-state agreement provisions that exemplify "promising practices" that a tribe may wish to include in its tribal-state IV-E agreement. These "promising practice" provisions are provided in an outline structure that includes sections addressing federal law requirements, as well as sections that may increase the efficacy of the agreement. We have tried to provide different options for each subject area so that tribes have access to a range of different approaches. Of course, a tribe should always feel free to craft its own language if it would be a better fit for the tribe's needs.

In summary, a "promising practices" tribal-state agreement will expressly recognize tribal sovereignty and create a cooperative and collaborative relationship between the tribe and the state. An agreement should expressly recognize the responsibilities of the tribe, and where there are issues with institutional capacity to fulfill such responsibilities, methods to move toward full tribal capacity expressed in the agreement. Each agreement with a tribe should make available all funding provided to the state through the state plan – including administrative, training and maintenance funding for foster care, kinship guardianship assistance and adoption assistance, other specialized care, as well as Chafee funding, if the tribe has a need for those funds. Tribal compliance should be primarily based on tribal and federal law, with express and specific provisions applying state law only where the tribe and its legal counsel understand it to be absolutely necessary for compliance with Title IV-E. A tribe should not have to agree to comply with state or federal law that is not specifically applicable to Title IV-E.

There are no "perfect" tribal-state agreements. Probably the best agreements in place are in the states of Iowa, Minnesota, Montana, New Mexico, Oregon and Washington. The following are the most promising provisions from tribal-state agreements reviewed<sup>59</sup> and organized within a template agreement framework.

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<sup>59</sup> As stated in the Introduction, this full report was prepared during a 14 month period between October 2012 and December 2013. It took into account 98 agreements representing 267 Indian Nations from 16 states that pass federal Title IV-E allowable costs to the tribes. During that period, some agreements expired and new agreements were developed. Other agreements were replaced by direct funding programs pursuant to 42 U.S.C. § 679B. Thus, this report does not attempt to provide definitive numbers of current tribal-state

## A. Introduction and Purposes or Preamble

*Promising Practices Note: This section provides background and the tone for the agreement. The key concepts are that the agreement should recognize the tribe's sovereignty and be based upon a government-to-government relationship.*

### 1. Purpose

Indian Tribes are sovereign nations and a unique government-to-government relationship exists between the [insert Tribe] and the State of Montana. The best interests of the Indian Tribes and the State of Montana will be served by engaging in government-to-government relationships and respectfully recognizing the rights, duties and privileges of both Tribal and State citizenship and by ensuring all Indian children are treated equally with regard to the provision of Title IV-E eligible services. The State of Montana and Indian Tribes working together in government-to-government relationships and engaging in Agreements for the benefit of Indian and non-Indian residents promotes effective Tribal-State relations. (*Montana, Preamble*)

The Sac and Fox Tribe of the Mississippi in Iowa and the state of Iowa have a mutual interest in entering into an agreement which will: permit the Tribe to obtain federal and state foster care funds for the foster care placements of children who are residents of Iowa and are within the jurisdiction of the Tribal Court, allow the Tribe to request and access State-funded child welfare services for children under court orders and jurisdiction of the Tribal Court, and indicate the mutual agreement of the parties concerning other child welfare matters, such as access to state child welfare training, monitoring of child welfare expenditures for Tribal children, and other issues. (*Iowa, Whereas clauses*)

The parties agree:

A. Recognition of the Tribe as a sovereign entity is essential to ensure a cooperative and beneficial relationship between the parties.

B. There is no resource that is more vital to the continued existence and integrity of the Tribe than its children and young adults.

C. The State of Texas has a direct interest in protecting Indian children and young adults.

D. The Tribe's interest in child custody, child welfare, and child protection proceedings involving children and young adults is critical to the long-term survival of the Tribe.

E. The State of Texas has a direct interest in protecting the cultural heritage of Indian Tribes in this state.

F. DFPS and the Tribe each have unique and valuable skills and strategies to support child safety and stable families; collaboration between the parties will best serve the children and families in Texas.

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agreements or their exact status. Rather, its goal is to provide an overview of the substantive landscape of Title IV-E tribal-state agreements during a particular window of time.

G. The Tribe has a critical interest in:

1. Preventing the inappropriate cultural separation of the Tribes children from their families:
2. Ensuring the placement of all children in a manner which preserves the unique values of the Tribes culture: and
3. Protecting the health and safety of the Tribe's children. (*Texas, II*)

## **2. Establishing Sovereignty and Self-Determination**

The State of Minnesota, pursuant to Minn State. 16C.05, subd.7, shall not require an Indian tribe or band to deny their sovereignty as a requirement or condition of a contract with the State or agency of the State. (*Minn-Leech Lake, Whereas clauses*)

The State of Iowa and the Sac and Fox Tribe of the Mississippi in Iowa are separate sovereigns and each respects the laws of the other sovereign. (*Iowa-Sac & Fox, Whereas clauses*)

The Karuk Tribal Court is an integral component of the Tribe's sovereign authority, and is crucial to the effective meeting of the policy goals here articulated. (*Cal-Karuk, II.D.6*)

The [Navajo] Nation as a sovereign government, has the inherent authority to enter into this agreement with the State. (*Arizona, Whereas clauses*)

It is the intent of the Red Lake Nation to ultimately assume full responsibility for all child welfare programming and the state recognizes this intent. This agreement is in place until such time as that occurs. (*Minn-Red Lake, Whereas clauses*)

### **a. Indian children receiving services in equity with other children**

*Promising Practices Note: These provisions recognize the right of Indian children and families under tribal jurisdiction to have equal access to state/county services. This is important because states have sometimes refused to provide services to children and families that are under the tribe's jurisdiction.*

The parties recognize and affirm the unique situation that Native Americans enjoy dual citizenship, a citizen in their Indigenous Nation/tribe, and citizenship in the U.S. and that their U.S. citizenship provides the basis of their equal and unfettered access to the rights, privileges and benefits of such citizenship. (*Minn-Red Lake, Whereas clauses*)

It is the intent of DSHS/CA to provide services to children who are subject to Tribal Court proceedings to the same extent as provided to other children and families in Washington State provided the services are available and the children meet existing eligibility requirements for the services. (*Wash-PG, 1.00*)

The best interests of the Indian Tribes and the State of Montana will be served by engaging in government-to-government relationships and respectfully recognizing the rights, duties and privileges of both Tribal and State citizenship and by ensuring all Indian children are treated equally with regard to the provision of Title IV-E eligible services. (*Montana, Preamble*)

The department recognizes the responsibility of the state and local social service agencies to make available to Indian families all of the other services available to any other family in the circumstances covered by the Tribal State Agreement (February 22, 2007). The parties agree that orders of the Leech Lake Tribal Court concerning the placement of an Indian child shall have the same force and effect as orders of a state district court in compliance with 25 U.S.C. 1911 (d), which requires each state to give full faith and credit to the public acts, records and judicial proceedings to the same extent that the state or county gives full faith and credit to public acts, records, and judicial proceedings of any other entity. The exercise of tribal court jurisdiction does not mean withdrawal, decrease, or denial of county social services. (*Minn-Leech Lake, I, para. 2*)

#### **b. Citations to treaties and other important Tribal authority**

Leech Lake Band of Ojibwe is a federally recognized sovereign nation established by treaty with the United States in 1855. (*Minn-Leech Lake, Whereas clauses*)

Nothing in this Agreement shall be construed as a diminishment or abrogation of the Tribe's rights under the Indian Child Welfare Act, any other federal law, or its treaty. (*Oregon, 16.07*)

#### **c. Full faith and credit**

The Department recognizes its responsibility in giving full faith and credit to public acts, records, and judicial proceedings of a Tribal Court applicable to Indian child custody proceedings to the same extent given to any other entity as required by 25 U.S.C. § 1911(d). (*Mich-Little Traverse, Purpose of the Agreement*)

"The United States, every state, every territory or possession of the United States, and every Indian tribe, shall give full faith and credit to the public acts, records, and judicial proceedings of an Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 USC §1911(d). "The Department recognizes its responsibility to adhere to this mandate." (*Tribal State Agreement, February 22, 2007*) (*Minn-Leech Lake, XI*)

Tribal court orders will be given full faith and credit pursuant to the Indian Child Welfare Act, 25 U.S.C. 1911 (d), and the Washington State, Tribal-State Agreement. (Wash-PG, 1.00)

## **B. Establishing Consultation, Cooperation and Collaboration**

*Promising Practices Note: This section includes both general commitments for cooperation and collaboration between tribes and states, as well as some specific examples of mechanisms to facilitate that relationship.*

### **1. General Provisions Recognizing Cooperation**

The Parties agree to perform their respective duties and responsibilities under this Agreement in good faith and in a spirit of cooperation to accomplish the purpose of providing foster care services to Title IV-E eligible Indian children residing on the [ ] reservation. (*Montana, Preamble*)

This agreement shall be utilized to facilitate intergovernmental cooperation; to allow the band to provide for the best interests of Leech Lake children under the jurisdiction of the Leech Lake Band of Ojibwe Tribal Court, children placed voluntarily into foster care and foster care candidates; to meet the policy goals established by the Leech Lake Band of Ojibwe for its children; to comply with the federal Title IV-E program regulations. (*Minn-Leech Lake, Whereas clauses*)

The purposes of this Agreement are to: ... Facilitate intergovernmental communication and collaboration, in a spirit of cooperation and good will. (*California, II.A.2*)

This agreement is entered into pursuant to the government-to-government relationship between DFPS, a Texas state agency, and the Alabama-Coushatta Tribe in the spirit of cooperation, coordination, communication, and good will. (*Texas, II*)

In the spirit of cooperation that the parties to this agreement have resolved to bind themselves, each party will timely inform the other of any shortcomings, lack of documentation or other responsibility that has not been satisfied; and will provide the other party with a meaningful opportunity to correct such documentation, lack of documentation or other responsibility. (*Minn-White Earth, Whereas clauses*)

The Tribe and the Department agree to cooperate to the utmost in carrying out the intent and purposes of this agreement. (*Minn-White Earth, 20.5*)

No party shall unreasonably deny, withhold, or delay any consent or approval required or contemplated for any action or transactions proposed to be taken or made hereunder. The parties agree to cooperate fully with each other and to act reasonably and in good faith and in a timely manner in all matters hereunder so that each of them may obtain the benefits to which they are entitled hereunder and, for which they have negotiated. The parties agree to negotiate in good faith and without delay as to all matters requiring negotiation. DHS has a protocol in place to reduce barriers which may cause delays in the steps required to process contracts and payments. The protocol is a guide for DHS to follow, attached as Appendi[x] B. (*Oregon, 16.03, see also Wash-PG, 17.06*)

The Department and the Pueblo recognize that Pueblo children are citizens of the State and further recognize the need to coordinate their efforts with respect to these children to ensure that the Title IV(E) payments and care these children receive is in accordance with the federal standards set forth in Title IV(E). (*New Mexico, Whereas clauses*)

Each Tribe with a Tribal State Agreement is assigned a Tribal Liaison located in an OKDHS county office. The role of the Tribal Liaison is to assist the Tribe in obtaining foster care payments for the Tribal custody children. The Tribal Liaison also coordinates with the Custody Specialist in providing information so that the appropriate Title IV-E determinations can be made. (*Okla-Cherokee, Attachment 1, VI*)

In any case in which the Pueblo has custody, but the action is being maintained in State court, or the child is placed in a foster home outside of the Pueblo, a staffing between the appropriate Pueblo representatives and Department representatives, including the Children's Court Attorney, will be necessary to coordinate responsibilities relative to the State court proceedings. (*New Mexico, VIII.1*)

Both the IDHS and the Tribe, through Meskwaki Family Services, agree to share reports of child abuse assessments as is legally permissible and necessary to work together in protecting the safety and welfare of children. (*Iowa, 4.F*)

Upon request by the Tribe, CDSS will assist in securing the sharing and transfer of information from a county to the Tribe related to a child or children being transferred to Tribal Court jurisdiction. (*California-Karuk, XI.B.4*)

The Parties agree to work collaboratively with the affected counties, to facilitate local agreements that provide for coordinated local emergency response, which protect Indian children from child abuse or neglect and allow for the efficient exercise of Tribal care and supervision of said children. (*California-Karuk, VI.B*)

## **2. Referencing Other Tribal-State Agreements Promoting Cooperation**

The State-Tribal Cooperative Agreements Act, § 18-11-101 et seq., MCA, promotes cooperation between State agencies and sovereign Tribal governments, and authorizes the State of Montana to enter into this Agreement with the [ ] Tribe. (*Montana, Preamble*)

Consistent with the Government-to-Government Policy provisions under the Intergovernmental Agreement entered into by the State and the Nation the interactions between the State and the Nation are predicated on a government-to-government relationship and carried forward in a spirit of cooperation, coordination, communication, and good will. (*Arizona, Whereas clauses*)

## **3. State Interest in Protecting Indian Culture and Heritage**

There is no resource that is more vital to the continued existence and integrity of the Tribe than its children and young adults. The State of Texas has a direct interest in protecting the cultural heritage of Indian Tribes in this state. (*Texas, II.B and E*)

## **C. Inclusion of the Indian Child Welfare Act**

*Promising Practices Note: It is not essential that the Indian Child Welfare Act be incorporated into a Title IV-E agreement as ICWA is applicable to state court proceedings and not tribal court proceedings except in limited circumstances. Nonetheless, many agreements have chosen to incorporate ICWA compliance provisions and, for that reason, we have included some examples in this template.*

The Indian Child Welfare Act (ICWA) authorizes States and Indian Tribes to enter into Agreements with each other regarding care and custody of Indian Children. (*Montana, Preamble*)

25 USC 1901 et.seq., ... authorizes states and Indian tribes “to enter into agreements with each other respecting care and custody of Indian children.” Both parties agree that this document is bound by the law, intent and spirit of the Indian Child Welfare Act. (*Minn-Leech Lake, Mille Lacs, White Earth and Red Lake agreements, Whereas clauses*)

The purposes of this Agreement are to: ... Meet the policy goals of the Indian Child Welfare Act of 1978 to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. (*California, II.A.3*)

The ICWA, the Karuk Children’s Code and Welfare and Institutions Code sections 10553.1 and 10553.2 apply specifically to the provision of foster care and child welfare services to Indian children by their tribes. (*California-Karuk, II.D.4, see also II.B.2 citing to ICWA section 1919, and II.D generally*)

The United States Congress has enacted Public Law 95-608, known as the Indian Child Welfare Act of 1978, 25 U.S.C. 1919 (hereinafter referred to as the “Act”), which recognizes that an Indian tribe possesses exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the exterior reservation boundaries of such tribe and over any Indian child who is a ward tribal court and ... FIA and Tribe have lawful authority to enter this Agreement pursuant to Section 109(a) of the Indian Child Welfare Act of 1978, 25 U.S.C. 1919. (*Mich, Whereas clauses*)

The parties to this agreement understand and agree that the State and its counties and other agents, in its Title IV-E agency role, shall comply with the mandates of the Federal Indian Child Welfare Act. (*Mich-Little Travers, Purpose of Agreement*)

The Tribe and Department agree that the provisions of the Indian Child Welfare Act (25 U.S.C. 1901 et. seq.) apply to this Agreement and Plan. The Tribe and Department agree that the provisions of the State statutes and regulations set forth in this Agreement shall not apply to the extent that they conflict with the provision of the Indian Child Welfare Act. The Department and Tribe recognize that the Indian Child Welfare Act provides authority for, and the overriding law that governs this Agreement and the activities contemplated under the Plan. The Department and the Tribe further recognize that this Agreement does not purport to subject the Title or its members to the jurisdiction or authority of any court or other tribunal or any agency, department or other entity, public or private, or subject the Tribe or its members to the law or regulations of any such court, tribunal, agency or department, unless done so in a manner consistent with the Indian Child Welfare Act. (*NY 1994, 4*)

## D. Primacy of Federal and Tribal Laws

### 1. Recognition of Jurisdiction

*Promising Practices Note: Some agreements impose state laws on tribes to varying degrees. These provisions recognize that tribal law governs child welfare proceedings on tribal lands and that the agreement is not intended to diminish tribal sovereignty.*

The Pueblo maintains jurisdiction, custody, and supervision over certain children within the Pueblo. (*New Mexico, Whereas clauses*)

Nothing in this agreement is intended to alter the criminal or civil jurisdiction of either the State or the Tribe. The parties further acknowledge that nothing in this contract is intended to alter the Tribal Court's authority to be the final and definitive arbiter of the meaning of tribal statutory or other laws and that nothing in this contract is intended to alter the State Court's authority to be the final and definitive arbiter of the meaning of state statutory or other laws. (*Iowa, 2.E*)

The department recognizes and respects the authority of the band to place and care for children under the jurisdiction of the Leech Lake Band of Ojibwe Tribal Court. (*Minn-Leech Lake, Whereas clauses*)

The department agrees that the band retains all jurisdiction and authority over placement and care responsibility for children within its jurisdiction, and will designate the services to be provided, by order of the Leech Lake Band of Ojibwe Tribal Court. The Leech Lake Band of Ojibwe Tribal Court has jurisdiction to make decisions for Indian children who:

- A. Are recognized by the Leech Lake Band of Ojibwe as members of the Band and are residents of, or domiciled on the Leech Lake Band of Ojibwe reservation; or
- B. Are eligible for membership under the Indian Child Welfare Act with the Leech Lake Band of Ojibwe, not necessarily residing within the boundaries of the Leech Lake reservation, upon transfer of child welfare proceedings from state district court; or
- C. Are deemed to be wards of Tribal Court and thus fall under the exclusive jurisdiction of the Tribal Court.
- D. Are otherwise subject to the jurisdiction of the Leech Lake Band of Ojibwe Tribal Court as set forth under Title III of the Leech Lake Band of Ojibwe Judicial Code. (*Minn-Leech Lake, II*)

Nothing in this Agreement shall be construed to give the State of Oklahoma or its agents jurisdiction over Indian persons on reservation, trust or restricted land, as defined by 25 U.S.C.A. 1903 (10). (*Okla-Cherokee, 2.a*)

## **2. Application of Tribal and Federal Laws with Limited Applicability of State Law**

### **a. Establishing authority for entering into agreement**

*Promising Practices Note: These provisions recognize federal, state and tribal laws as sources of authority for the agreement.*

Authority for the Parties to enter into this Agreement is found in: 1. The Karuk Tribe's Constitution. 2. Section 1919 of the Indian Child Welfare Act.... 3. Section 472(a)(2) of Title IV-E of the Social Security Act, codified as 42 U.S.C. section 672(a)(2). 4. California Welfare and Institutions Code sections 10553.1 and 10553.2 which authorize the Director of the Department, in accordance with federal and state law, to enter into agreements with Indian tribes to provide for the pass through of funds for the provision of foster care and adoption assistance payments and child welfare services. (*California-Karuk, II.B*)

Authority for this Program Agreement includes the Constitution and by-laws for the Port Gamble S'Klallam Tribe, the Adoption Assistance and Child Welfare Act (Public Law 96-272), Part E of Title IV of the Social Security Act, the Adoption and Safe Family Act (Public Law 105-89) and the Washington State, Tribal-State Agreement Regarding Child Custody Services and Proceedings. (*Wash-PG, 1.00*)

### **b. Acknowledging federal trust responsibility**

The department understands that the federal government is bound to the Trust Responsibility Doctrine, and that, by entering this agreement, the department is carrying out a program of the federal government. Nothing in this agreement shall abrogate that trust responsibility. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (*analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal sovereignty*). (*Minnesota, Whereas clauses*)

### **c. Primacy of federal and tribal laws**

*Promising Practices Note: Federal and tribal laws should be the primary, if not sole, authority for the implementation of a tribal-state agreement. One key concept recognized in some of these provisions is the idea that the state/county will accept and implement tribal court orders to the same extent that it accepts and implements state court orders. Another significant provision recognizes that the tribal code meets the minimum requirements of the federal Title IV-E statute.*

The parties will comply with all applicable federal laws, whether currently adopted or adopted while this agreement is in effect, related to the delivery of services under this contract, and such federal laws are incorporated into this Contract as if stated in full herein. Title 7 of the Code of the Sac & Fox Tribe of the Mississippi in Iowa (Child Welfare) and Title 6, Article 1, Chapter IX (Adoption), attached hereto, provide procedural and substantive laws related to child welfare

and child adoption cases, which meet the minimum requirements provided for in the Act. (*Iowa, 2.A and 2.D*)

The FIA shall: 1. Accept Tribal Court orders and referrals in the same manner that state juvenile court orders are accepted. 2. Accept Tribal Court orders on juveniles and provide placement in Agency operated facilities, if appropriate. 3. Accept Tribal Court orders on children who are temporary Tribal Court wards and whose parental rights have been terminated. 4. Accept Tribal Court orders on children who are permanent Tribal Court wards and whose parental rights have been terminated. (*Mich-Bay Mills, II.B.1-4*)

The Department recognizes that the Tribal court may retain jurisdiction and authority over placement and care responsibilities for all appropriate child(ren), and will designate the services to be provided by order of the Tribal court. (*Mich-Little Traverse, "Purpose of Agreement", para. 4*)

This agreement shall not infringe on the sovereignty of the Tribe to establish Tribal policies and procedures, including Tribal children's code, foster care policy and foster home licensing procedures. (*Mich-Little Traverse, Scope of Agreement, p 4*)

The best interests of the child(ren) must be determined consistent with the Leech Lake Band of Ojibwe Children's Code and Title IV, Part E of the Social Security Act. (*Minn-Leech Lake, Whereas clauses*)

The Department and the Tribe understand and agree that utilization of Title IV-E funding requires compliance with the mandates of the Social Security Act, Section 4, Title E; Code of Federal Regulations Title 45, parts 1356 and 1357 which, in compilation, comprise Attachment "A" of this Agreement. The Parties agree to comply with all other applicable Federal, State and Tribal laws, rules and policies concerning, but not limited to, human rights, civil rights, employment law and labor law. (*Montana, 16*)

The Nation agrees to comply with all of the requirements of Title IV-E, including the case plan, the case review system, the procedural and judicial safeguards described in 45 CFR §1356.20 & 1356.21 for all Red Lake Nation children under the jurisdiction of the Nation's court or placed voluntarily and for whom placement and care responsibility has been transferred to Red Lake Family & Children Services. (*Minn-Red Lake, IX*)

The county continues to be financially responsible to provide services and for the foster care maintenance costs for Tribal children who are residents of the county when such placements are ordered by the Tribal Court. (*Minn-Red Lake, Whereas clauses*)

## **E. What Types of Funding and Programs**

### **1. Administrative Cost Funds**

#### **a. General requirements**

*Promising Practices Note: These provisions may not be required in an agreement since they are*

*in essence a restatement of applicable regulations, but their inclusion makes the agreement a complete document that stands on its own which may be helpful in implementing an agreement.*

For a detailed expression of Administration Costs, see *Montana, Attachment B*.

Federal matching funds (based on Federal Cost Allocation principles) will be made available for reimbursement of allowable administrative expenditures necessary for the proper and efficient administration of the Title IV-E foster care and adoption program. The following are examples of potentially allowable administration costs:

1. Referral to services;
2. Preparation for and participation in judicial determinations (45 CFR 1356.60 (c)(2)(ii)) are limited to the preparation of reports to the court and participation in court proceedings by State or local agency casework or casework supervisory personnel.
3. Placement of the child;
4. Development of the case plan;
5. Case reviews;
6. Case management and supervision;
7. Recruitment and licensing of foster homes and institutions, including the cost of home studies and criminal records checks;
8. Rate setting; and,
9. A proportionate share of related agency overhead.

Allowable administrative costs do not include the costs of social services provided to the child, the child's family or foster family which provides counseling or treatment to ameliorate or remedy personal problems, behaviors or home conditions. (*Arizona, 5.0*)

Non-Allowable Costs:

A. Costs that are not allowed and therefore not reimbursable under Title IV-E, 45 CFR 1356.60(c)(3), include those costs incurred for: 1. direct services such as those that provide treatment to the child, the child's family or foster family to remedy personal problems, behavior or home conditions, and 2. the cost of investigations in response to child abuse or neglect referrals, and 3. the cost of physical and/or mental examinations

B. Examples of nonallowable and therefore not reimbursable services include: 1. Counseling Services 2. Homemaker Services 3. Housing Services 4. Physical Examinations 5. Mental Examinations 6. Abuse/Neglect Intake Investigations 7. Respite Care 8. Placement Prevention Services. (*Montana, Attachment B*)

“PENETRATION RATE” shall mean the proportion of Title IV-E eligible children within the total Tribal foster care population; this ratio is also referred to as the “Title IV-E penetration rate” and is used to calculate the Tribe’s administrative and training claims. (*Wash-PG, 2.00(y)*)

### **b. Time studies**

*Promising Practices Note: Time studies are necessary to allocate costs between Title IV-E and other programs, but there are no exact requirements in the law as to how large a time sample is*

*required. The Oregon agreement is less burdensome than most and it has been included for that reason, as well as some provisions on training.*

Reimbursement for allowable Title IV-E administrative and training costs for Mille Lacs children under the jurisdiction of the District Court of Mille Lacs Band of Ojibwe or in placement pursuant to a voluntary placement agreement with Mille Lacs Band of Ojibwe Family Services or foster care candidates shall be accessed through the Social Services Administrative Tribal Time Study (SSATTS) and made available to the band after the following A-C steps have been completed:

A. A time study and software application has been developed by the department;

B. Mille Lacs Band of Ojibwe Family Services staff has received training; and

C. A cost allocation plan developed by the department has been submitted for federal approval.

*(Minn-Mille Lacs, XV)*

The band shall act as the administrator, trainer, and fiscal reporting agent for purposes of operating the Social Services Administrative Tribal Time Study (SSATTS) project. The department will ensure the staff person identified by the band to be the SSATTS coordinator will receive the training to carry out the following duties: department staff shall provide the initial training to time study participants. In the future, when new staff joins the time study, the SSATTS coordinator will be asked to provide this training when department staff is not available. *(Minn-Leech Lake, XVIII.F)*

“Tribal Time Study” means a study of staff time in conducting IV-E related activities. DHS randomly selects two weeks in each fiscal quarter of the fiscal year for the time study. *(Oregon, 2.34)*

See detailed “Time Sample Instructions for Tribal IV-E Case Management Contracts” in *Montana, Attachment J*.

#### ***c. Use of federally established indirect cost rate***

***Promising Practices Note: Using the tribe’s federally-established indirect cost rate helps ensure adequate reimbursement for the tribe’s overhead costs.***

The Tribe shall provide annually a copy of the Tribe's letter from the federal government regarding the Tribe's currently approved federally established indirect rate (FEIR). *(Iowa, 9.C)*

#### ***d. Staffing and personnel***

***Promising Practices Note: The New Mexico provision recognizes that Indian preference can be consistent with the merit-based requirements of the Title IV-E statute.***

Notwithstanding the above provisions, nothing in this agreement shall prohibit the Pueblo from adhering to a policy of Indian preference in employment to the fullest extent permitted by law. *(New Mexico, XVII.3)*

Use merit based personnel standards, as specified in 42 U.S.C. § 671(a)(5). (*Texas, VI.A.2.q*)

### **e. Other promising practices**

*Promising Practice Note: The definition of “foster care candidate” is included in this section because it is a mechanism for obtaining administrative costs without removing a child from his or her family. Administrative costs may be claimed for children “at imminent risk of removal”.*

Advance payments will be issued to the Tribe by the last business day of each month, based on need and/or spending trend. However, advance payment requests will be subject to the timely submission of actual monthly and quarterly expenditure reports. (*Cal-Karuk, Fiscal Addendum, B.2*)

“Foster Care Candidate” means a child who is at imminent risk of removal from the home as evidenced by the Tribe either pursuing his/her removal from the home or making reasonable efforts to prevent such removal. A child may be determined to be a foster care candidate after returning home from placement in foster care. (*Oregon, 2.15*)

Retroactive Eligibility: Any funds collected based upon retroactive eligibility that impacts the Tribe’s administration or training claim will be reimbursed to the Tribe. (*Wash-PG, 14.04*)

The Department may receive adoption incentive payments in accordance with Section 473 of the Social Security Act [42 U.S.C. 673 (b)]. If the Department receives adoption incentive funding and if the children included in the calculation of the amount of adoption incentive funds received include eligible children under the jurisdiction of Tribal Court the Department will provide the Tribe with a payment equal to a pro-rated share of the adoption incentive funding based on the percentage of their Tribal Court children in the total number of adopted children used in calculating the amount of adoption incentive funds received. (*Montana, 6.A.5*)

## **2. Training and Technical Assistance**

### **a. Training generally**

*Promising Practices Note: These provisions may not be required in an agreement since they are in essence a restatement of applicable regulations, but their inclusion makes the agreement a complete document that stands on its own which may be helpful in implementing an agreement.*

The Department shall provide the Tribe with training, technical assistance and support in order to ensure appropriate claiming and to adjust title IV-E claims related to ineligible claims or underpayments. Training and technical assistance will be provided on-site at the Tribal office to the extent feasible at times agreeable to both parties. (*Mich-Little Traverse, A.IV*)

Title IV-E Allowable Training Topics: Federal policy specifies what training topics for staff are subject to Title IV-E training reimbursement. Examples include:

Preparation for and participation in judicial determinations  
Case management and supervision  
Referral to service  
Development of the Case Plan  
Placement of the child  
Case reviews  
Recruitment and licensing of foster homes and institutions  
Cultural competency related to children and families  
Title IV-E policies and procedures  
Social work practice, such as family centered practice and social work methods including interviewing and assessment  
Permanency planning including kinship care as a resource for children involved with the child welfare system  
Effects of separation, grief and loss, child development and visitation  
Foster care candidate determinations and pre-placement activities directed toward reasonable efforts if the training is not related to providing a service  
Communication skills required to work with children and families  
Activities designed to preserve, strengthen, and reunify the family, if the training is not related to providing treatment of services  
Child abuse and neglect issues, such as the impact of child abuse and neglect on a child, and general overviews of the issues involved in child abuse and neglect investigations, if the training is not related to how to conduct an investigation of child abuse and neglect  
Ethics training associated with a Title IV-E state plan requirement, such as confidentiality requirements  
General substance abuse, domestic violence, and mental health issues related to children and families in the child welfare system, if the training is not related to providing treatment or services  
Assessments to determine whether a situation requires a child's removal from the home, if the training is not related directly to conducting a child abuse and neglect investigation. Training on how to conduct specialized assessments such as psychiatric, medical or educational assessments are not permitted  
Training on referrals to services, not how to perform the service (*Alaska, II.B.4*)

The State shall pass through to the Tribe the full amount of federal funds received for expenses incurred by the Tribe in providing allowable training activities for Meskwaki Family Services staff or for current or prospective foster or adoptive parents of Eligible Children. Allowable training costs are those training activities and costs included in the Tribe's training plan that is included in the IDHS Child and Family Services Plan submitted to the federal DHHS regional office. Allowable training costs, specified in 45 C.F.R. § 1356.60(b), include long or short term training of personnel employed by or preparing for employment with the Tribe in accordance with 45 C.F.R. § 1356.60(b). The Tribe's training plan can be amended to include appropriate training throughout the contract period with prior IDHS approval, which approval shall not be unreasonably withheld. (*Iowa, 14.A and B*)

- A. The Tribe may submit claims for reimbursement of Title IV-E allowable training costs in accordance with Attachment “K” which is incorporated by reference into this Agreement. Title IV-E allowable costs include costs for pre-service training required to become a licensed foster/adoptive parent, ongoing training for foster/adoptive parents, and Title IV-E allowable training to Tribal Social Services staff listed in Attachment “C”.
- B. The Tribe does not need to develop a specific training budget or have a training budget line item in Attachment “C” to request Title IV-E training reimbursement.
- C. The Department shall disseminate the CFSD Training Calendar to the Tribe and to the extent possible, identify the percentage of the training content which is Title IV-E reimbursable for individual training events. (*Montana, 7*)

Federal Financial Participation (“FFP”) is available for the training of child welfare personnel employed or preparing for employment in the Tribe’s child welfare agency. Foster parents and staff of licensed or approved child care, institutions providing foster care shall be eligible for short-term training at the initiation of or during their provision of care. FFP directly related to such training shall be limited to travel and per diem. (*Oregon, 3.10*)

Federal matching funds are available for the short and long term training of child welfare personnel employed by or preparing for employment in the Tribe’s child welfare agency in accordance with federal regulations. All training activities and costs funded under Title IV-E shall be included in the Tribe’s federal Child and Family Services Plan, or if the Tribe does not submit an annual Child and Family Services Plan to DHHS, in the Tribe’s training plan that is sent to DSHS/CA for inclusion in the state’s annual Child and Family Services Plan. For training plans included in the state’s Child and Family Services Plan, the state shall review the training plan to assure compliance with federal regulations. The training plan may be amended by the Tribe and sent to DSHS/CA anytime during the year. The Tribe shall submit for reimbursement of eligible training expenditures on a quarterly basis. Foster parents and staff of licensed or approved child care institutions providing foster care shall be eligible for short-term training at the initiation of or during their provision of care. FFP directly related to such training shall be limited to travel and per diem. (*Wash-PG, 3.07*)

**b. Notice of state training**

*Promising Practices Note: These provisions recognize that in addition to training allowed by Title IV-E and reimbursed directly to the tribe, there may be benefits to accessing additional state-conducted or sponsored trainings.*

The Department shall provide the Tribe with training, technical assistance and support in order to ensure appropriate claiming and to adjust title IV-E claims related to ineligible claims or underpayments. Training and technical assistance will be provided on-site at the Tribal office to the extent feasible at times agreeable to both parties. (*Mich-Little Traverse, A.IV*)

Upon request or as mutually agreed upon, training related to Title IV-E eligibility and Title IV-E foster care services. In addition, the State shall: notify the Tribe of annual Child and Family Services Division policy training to enhance compliance with Federal regulations and

awareness of State policy; and notify the Tribe of all relevant trainings related to Title IV-E. (*Montana, 4.A.6*)

DES will invite and provide advance notice to the Nation to participate in DES sponsored staff training that may contribute to enhance the Nation's compliance with efforts in this IGA. (*Arizona, 15.2*)

The IDHS agrees to provide MFS on a regular and ongoing basis with information concerning available IDHS child welfare training courses and schedules and agrees to allow MFS staff to enroll in these training courses without paying tuition costs. (*Iowa, 14.C*)

OKDHS will provide three spaces for Tribal workers to participate in each CORE training. The spaces will be held until two weeks before the scheduled training. If there are no Tribal workers identified to participate, the training spaces will be released for OKDHS staff. Tribal Child Welfare staff can enroll and participate in Child Welfare Level Trainings if desired. (*Oklahoma, 16*)

### **c. Technical assistance**

***Promising Practices Note: These provisions recognize that most tribes will need technical assistance to properly implement Title IV-E.***

The Department shall provide reasonable technical assistance to the Pueblo to comply with federal law, policy and regulations for fiscal accountability, program operations, reporting procedures and to comply with the terms and conditions of this agreement. The Department's Title IV(E) staff shall monitor the Pueblo's cases in accordance with Title IV(B) and Title IV(E) of the Social Security Act. The Department agrees to assist the Pueblo in the training of personnel for the preparation of referrals and the appropriate forms for payments provided under the terms of this agreement. (*New Mexico, VII.A.G*)

The Department's Federal Compliance Division shall provide training and technical assistance to Tribe regarding compliance with federal title IV-E requirements and to ensure that Tribal case files contain proper documentation. The Department shall provide the appropriate forms, consultations, and monitoring to enhance such compliance. The Department will provide training and technical assistance on other related topics at the request of the Tribe. (*Mich-Little Traverse, Scope of Agreement, I and II*)

The Parties further agree that the Tribe may request from CDSS technical assistance on issues related to implementation and/or operation of this Agreement. CDSS will work in good faith to provide the Tribe with technical assistance. (*Cal-Karuk, XI.B.7*)

The IDHS will provide MFS with information, and training as necessary, on the array of federal and state-funded child welfare services that may be provided for children and families under Tribal Court jurisdiction. This information and training will include information on state-

established eligibility criteria for these services as well as procedures through which these services are requested and authorized. (*Iowa, 7.A*)

The Department's foster care/Tile IV-E staff, in conjunction with the Title IV-E Eligibility Determination Trainers, will provide training and technical assistance to assist the Red Lake Nation in compliance with federal Title IV-E requirements and to ensure that the case files contain proper documentation. The Department agrees to provide the appropriate forms, consultations, and monitoring to enhance such compliance. (*Minn-Red Lake, II*)

Provide reasonable technical assistance, including information, advice, and educational materials to the Tribe to support compliance with the requirements of this Agreement. (*Texas, VI.B.1*)

The [state] agrees to provide: ... Consultation to enhance Tribal compliance with Title IV-E requirements and State policies and procedures which support Title IV-E compliance. (*Montana, 4.A.3*)

### **3. Maintenance**

*Promising Practices Note: These provisions may not be required in an agreement since they are in essence a restatement of applicable regulations, but their inclusion makes the agreement a complete document that stands on its own which may be helpful in implementing an agreement.*

"Foster care maintenance payment" is defined as the payments made by the Tribe or county on behalf of a child eligible for Title IV-E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers. Local travel associated with providing the items listed above is also an allowable expense. Daily supervision for which foster care maintenance payments may be made includes 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. 45 CFR § 1355.20 (a). (*Minn-White Earth, 1.1.12*)

Allowable foster care maintenance payments for an eligible child in foster care may cover:

- A. The cost of (and the cost of providing) food, clothing, shelter, daily supervision, school uniforms and supplies, a child's personal incidentals, a child's special events gifts, liability insurance with respect to the child, reasonable travel to the child's home for visitation; and
- B. In the case of institutional care, the reasonable costs of administration and operation of such institution as are necessarily required to provide the items noted in Section 4.0.2.A; and

C. In the case of working foster parents, day care for a young, disabled or sick child during the day. (*Ariz, 4.2*)

LOWO is eligible for Title IV-E federal financial participation when a child in foster care is under the legal jurisdiction of the Tribe. DSS/CPS shall make foster care maintenance payments to eligible foster care providers for such children. Foster care maintenance payments include the foster care basic rate, and may include the special rate and/or allowable maintenance payments per the Code of Federal Regulations, 42 CFR 1355, 1356, and 1357. (*SD-Lakota, Program Addendum, pp 3-4, "Title IV-E Foster Care Maintenance Funds to be Used When a Child is Eligible"*)

Foster care maintenance payments made under this Agreement shall be equal in amount to the payments DHS would make for these children if the children were in the care of DHS under state court jurisdiction. (*Oregon, 5.02*)

**a. Foster care (Involuntary Placement)**

*Promising Practices Note: Under Title IV-E regulations, tribally-licensed homes located on or near the reservation are defined as "foster family homes" and may be reimbursed under Title IV-E. Thus, some of the provisions listed below include this language. Their inclusion is not meant to suggest a limitation on tribal authority to license homes elsewhere, but simply recognizes this limitation in Title IV-E. Other provisions included address the importance of a child's cultural and spiritual development and the use of kinship stipends to help establish family placements.*

**(1) Generally**

"Foster Care" means 24-hour substitute care for children placed away from their parents or guardians and for whom the Yurok Tribe has placement and care responsibility. This includes, but is not limited to, placements in foster homes approved or licensed by the Tribe for a home on or near its reservation, or a home approved by another tribe on or near its respective reservation (45 C.F.R. Section 1355.20), a State/County licensed foster family home or small family home, a family home certified by a State licensed foster family agency, a State/County approved relative or non-related extended family foster home, or a state licensed group home for children. (*Cal, III*)

Placement Resource families must show respect for the child's individual cultural heritage. Efforts must be made by the Placement Resource families to provide similar cultural experiences, to the background of the child, when possible. (*Okla-Cherokee, Attachment III, Tribal Resource Home Standards, "Cultural Values"*)

The Cherokee Nation recognizes the importance of the spiritual aspect of development among its families and children. When a child is placed in a Resource home, the spiritual beliefs of the child and his or her family of origin will be respected. The child will be allowed to attend the services of their choice, and Placement Resources and tribal social workers shall endeavor to the best of their ability to make these arrangements. No child shall be forced to attend a religious

service against his or her wishes. Of course any children adopted through our program will be advised as to their spiritual values by their adoptive parents. (*Okla-Cherokee, Attachment III, Tribal Resource Home Standards, "Spiritual Values"*)

Kinship Start Up Stipend:

- a. A Tribal custody child placed in a Tribal Kinship foster home prior to full foster home approval is eligible to receive a Kinship Start Up Stipends (KSUS) if the Tribe implements procedures which ensure the safety of the child. These procedures include: (1) a completed and signed Initial Kinship Placement Agreement, (2) a completed and signed application for foster care, (3) a completed OSBI, Department of Public Safety, and Sex Offenders registry Background check, (4) Documentation that the house and environment are safe and pose no threats to the child, and that the child's needs can be met, (5) Telephone or in-person interviews with at least three personal references, of whom two are non-family members.
- b. Tribal kinship foster homes are eligible for a one time kinship start-up stipend to assist with initial expenditures for each child placed in the home for fourteen days. The amounts of the initial kinship star-up payments are stated in Attachment 1. (*Okla-Choctaw, 13*)

## **(2) Licensing of Foster Homes**

For general treatment of Tribal Foster Care Home Standards, see *Okla-Cherokee, Attachment III*. Attachment III states that the "Cherokee Nation Indian Child Welfare reserves the right to deviate from these qualifications for the purpose of serving the best interests of children and maintaining compliance with the Indian Child Welfare Act."

The Nation will designate a Tribal authority or authorities that shall be responsible for establishing and maintaining standards for foster family homes and childcare institutions under the jurisdiction of the Nation, The licensing standards shall be reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or home, including standards, related to admission policies, safety, sanitation, and protection of civil rights. The standards established shall be applied by the Nation to any foster family home or childcare institution receiving funds under Titles IV-B or IV-E. The denial, suspension or revocation of a license will be in compliance with the Nation's Foster Care Regulations. Criminal background checks are required as a condition for licensure in accordance with federal regulation (42 U.S.C. 671 (A)(20)). (*Arizona, 9.0*)

Establish and adhere to tribal standards for foster homes, guardians and adoptive homes, which standards are within the Tribe's authority to set, pursuant to 25 U.S.C. §1931(b). (*Texas, 8.A.2.c*)

## **(3) Background Checks**

***Promising Practices Note: These requirements are mostly statutory, but state cooperation can be important to the successful implementation of this requirement.***

DFPS agrees to: ... Respond to requests from the Tribe for checks of the child abuse and neglect registry pertaining to prospective foster parents, guardians or adoptive parents and other adults in the home. (*Texas, VI.B.5*)

The Tribe agrees to: ... Establish and adhere to tribal standards for foster homes, guardians and adoptive homes, which standards are within the Tribe's authority to set, pursuant to 25 U.S.C. §1931(b). Tribal standards must meet 42 U.S.C. § 671 (a)(10) and the following fingerprint-based criminal history and abuse and neglect registry requirements must be complete before any benefits can be provided under this Agreement: (i) Fingerprint-based checks of national crime information databases must be run for all applicants who seek to become a foster or adoptive parent and the mandatory permanent and five year bars applied to any foster or adoptive parent applicant who will receive payment under this Agreement, in conformance with 42 U.S.C. §671 (a)( 20)( A); (ii) Child abuse and neglect history checks for any prospective foster or adoptive parent who will receive payments under this Agreement, as well as for any other adult living in the home, and same information must be requested from any other states an applicant or other adult in the home has lived in during the preceding five (5) years, in conformance with 42 U.S.C. § 671(a)(20)(B); (iii) Fingerprint-based checks of national crime information databases for all applicants who seek to become guardians and may receive PCA, in conformance with 42 U.S.C. § 671(a)(20)(C); and (iv) Child abuse and neglect history checks for any prospective guardians who will receive PCA on behalf of a child, as well as for any other adult living in the home, and the same information must be requested from any other states an applicant or other adult in the home has lived in during the preceding five (5) years, in conformance with 42 U.S.C. § 671(a)(20)(C). (*Texas, VII.A.2.c*)

A. For any child for whom federal funds are provided under Title IV-B or IV-E or for any other services provided, and for any services performed by MFS or IDHS, no employee or agent of either party to this agreement may have unsupervised access to a child until the person has obtained a satisfactory background

B. Where a background clearance of a tribal employee or agent is required, as part of background clearance the background investigation, the Tribe shall request child abuse records check from IDHS and a criminal history check from the Iowa Department of Criminal Investigation. IDHS will provide the Tribe with the names of designated staff within the Ames Service Area that the Tribe can contact to complete these child abuse records checks. The IDHS shall perform the child abuse records check at no cost to the Tribe. The Tribe shall be responsible for the cost of the records check from the Iowa Department of Criminal Investigation.

C. In addition to those background clearances required by subsection A, the Tribe may request child abuse records checks and/or criminal history checks for others who will or may have access to children. Requests for such checks and financial responsibility for those checks shall be the same as stated in subsection B. (*Iowa, 5.A-C*)

#### **(4) Parental Responsibility**

The parties acknowledge that the Act requires that parents participate financially in their child's care while the child is in foster care. Where appropriate, the Tribe shall take all steps, including cooperative efforts with DHS, to secure an assignment of any rights to support on behalf of each Eligible Indian Child receiving Title IV-E foster care maintenance payments. The Tribe shall pay

to DHS the federal share of the support amount collected, for distribution to the federal government. (*Oregon, 15.0*)

### **b. Placement preferences**

*Promising Preferences Note: Although technically not a Title IV-E provision, agreements can have the sub-purpose of promoting compliance with ICWA (although maximum compliance is probably best achieved through a more comprehensive separate agreement).*

- a. Cherokee Nation and OKDHS shall work conjointly to ensure compliance with the placement preferences of Cherokee Nation in the placement of Cherokee children in foster home placements.
- b. OKDHS agrees to respect and follow the identified Cherokee Nation order of placement preference as it appears on Attachment 2 when out of home placement is necessary for children in OKDHS custody.
- c. OKDHS agrees to continue to follow the identified Cherokee Nation order of placement preference for the duration of case.
- d. OKDHS agrees to conduct a diligent search process at onset of case to ensure relative options are fully explored and will provide the list of considered relatives to Cherokee Nation in writing. (*Okla-Cherokee, 8.a-d*)

The placement preferences specified in 25 U.S.C. Section 1915, shall apply to all pre-adjudicatory placements, as well as pre-adoptive, adoptive and foster care placements as defined in the Indian Child welfare Act, 25 U.S.C. Section 1901 et seq. (*Okla-Cherokee, Attachment II*)

### **c. Specialized Foster Care Rates**

*Promising Practices Note: Enhanced levels of payment are possible under Title IV-E as recognized by some of the provisions that are referenced in this section.*

Throughout the period of this agreement, representatives from IDHS and MFS may communicate to consider and approve special rate or personal care services requested by the MFS program staff for children placed in out-of-home care under Tribal Court jurisdiction. These representatives may approve an additional monthly reimbursement for foster parents, based on the special needs of children following the application of IDHS special rate policies and procedures. (*Iowa, 6.F*)

The Tribe shall provide IDHS with necessary information to allow IDHS to complete the foster care payment rate assessment or determine the group care rate, and to allow IDHS to assess the need for other allowable child welfare services for the child that may be needed during the period of the child's placement or change of placements. (*Iowa, 9.B*)

#### **(1) Difficulty of Care**

“Difficulty of care rate” is defined as a supplemental payment to foster parents for children in foster care who have mental, physical, or emotional handicaps who require additional

supervision or assistance in behavior management, activities of daily living, management of medical problems, or interaction with birth parents and the community. The difficulty of care rate shall be determined according to Minnesota Rules Chapter 9560 and documented with the Department's Difficulty of Care Assessment Schedule DHS-2834-ENG (5-06) and forms developed by the Tribe (*Minn-White Earth, 1.1.9*)

The OKDHS agrees to provide difficulty of foster care payments to tribal foster homes who are providing foster care for tribal custody children when it is determined that the tribal custody child meets difficulty of care criteria. (*Okla-Cherokee, 10.b, and see Attachment I, section II for details on rates and criteria*)

A supplemental payment may be made for enhanced supervision needs of child to a certified family. An enhanced supervision level of care may be established as set forth in Subsections 14.04. (*Oregon, 3.03*)

The rate will be established following the applicable department guidelines including the county and the band making a good faith effort to come to an agreement on any disputed DOC assessment of a child. (*Minn-Mille Lacs, V, para. 3*)

## **(2) Therapeutic Foster Care**

The OKDHS agrees to provide therapeutic foster care for those tribal custody children who meet therapeutic foster care criteria. (*Okla-Cherokee, 10.d, and see Attachment I, section III for details on procedure*)

## **(3) Specialized Foster Homes**

Specialized foster homes may be used to bridge the transition of a child with special needs from a higher level of care back into the community, or to prevent placement in a higher level of care. Specialized foster homes (SFF) are licensed foster homes that provide care and treatment for children with problems that cannot be adequately addressed through the regular foster care services. A child who requires specialized foster care includes a child who: has a medical condition making the child non-ambulatory; a colostomy or feeding tube; requires prescribed physical therapy provided by the foster parent; has severe or profound mental retardation; has a terminal illness; cancer; blood disorders; multiple handicaps; serious burns requiring special care by the foster parent; serious emotional disturbance; HIV or AIDS; has been exposed to drugs or alcohol; and exhibits moderate to severe symptoms; has been diagnosed with fetal alcohol syndrome or effect and exhibits moderate to severe symptoms; or has other severe physical or mental health problems but whose needs are more appropriately met in a family setting. The child protection specialist will determine if the child's needs require specialized foster care. (*Montana, Attachment D*)

#### **(4) Group Home**

The Tribal ICW worker may request placement in an OKDHS residential group home for a tribal custody child when it is determined that the child's needs cannot be met in a tribal foster home or therapeutic foster home. (*Okla-Cherokee, 12.a*)

#### **(5) Supplemental Support Services**

The Department will provide funding for the following supplemental support services provided to IV-E eligible children under the jurisdiction of the Tribal court: 1. Child Care, 2. Transportation, 3. Clothing Allowance, 4. Diaper Allowance. (*Montana, Attachment L; see Attachment L for more details and form*)

#### **(6) Personal Care Services**

Level of Personal Care Services Assessment and Plan: All requests for a level of personal care reimbursement will require an evaluation by a registered nurse of the child's ability to perform the functional activities required to meet the child's daily needs and a personal care services plan which indicates the care, treatment, and procedures that are to be provided by the qualified provider to meet the child's daily needs. (*Oregon, 14.05*)

"PERSONAL CARE SERVICES" means the provision of or assistance with those functional activities described in OAR 413-090-0120 consisting of mobility,-transfers, repositioning, basic personal hygiene, toileting, bowel and bladder care, nutrition, medication management, and delegated musing tasks that a child requires for his or her Continued well-being. (*Oregon, 2.28*)

#### **(7) Foster Care payments until age 21**

For purposes of out of home placement, the band agrees to advise youth in foster care under Leech Lake Tribal Court jurisdiction who are not able to return home or otherwise achieve permanency prior to age 18, of the availability of continued care benefits up to age 21, provided that the youth meet the following conditions: 1) Completing secondary education or a program leading to an equivalent credential, 2) Enrolled in an institution that provides postsecondary or vocational education, 3) Participating in a program or activity designed to promote or remove barriers to employment, 4) Employed for at least 80 hours per month, or 5) Incapable of doing any of the activities describes above due to a medical condition. (*Minn-Leech Lake, VIII.D*)

#### **d. Use of Tribal FMAP**

***Promising Practices Note: Using tribal FMAP as permitted by law maximizes federal reimbursement in most cases.***

Section 474(a)(1) of the Social Security Act authorizes tribes who possess an agreement with a state to operate part of the Title IV-E program to claim Title 1V-E foster care maintenance reimbursement based on a federally determined tribal FMAP. DHHS determines a tribe's unique FMAP in accordance with section 479B(d) of the Social Security Act. Upon mutual agreement between the band and the department to use the Tribal FMAP in place of the state FMAP rate, the band and the state will work collaboratively to ensure that the band is able to

claim federal Title IV-E foster care maintenance using the specified rate. (*Minn-Leech Lake, VI; see also Minn-White Earth*)

### **e. Guardianship Assistance**

***Promising Practices Note: Not all states have adopted this option. Where a state has, however, inclusion of guardianship language reemphasizes the availability of this option.***

Guardianship assistance is available to tribal custody children who meet the eligibility requirements for Title IV-E relative guardianship assistance payments under Section 473(d)(3)(A) of Title IV-E of the Social Security Act. Relative guardianship eligibility requirements include the following: 1) Child has been removed from his or her home pursuant to a voluntary placement agreement or as a result of a judicial determination that continuation in the home would be contrary to the welfare of the child and is IV-E eligible for at least six consecutive months; 2) Child is a sibling to a child eligible for receiving Title IV-E relative guardianship assistance and is residing or planning to reside in the same placement; 3) Permanency plans of reunification and adoption have been ruled out; 4) Relative has completed all requirements to be an approved Tribal foster home as determined by the Tribe; 5) Child is currently residing with the relative and has been for six consecutive months; 6) Relative is willing to assume legal responsibility for the child and has a strong commitment to permanently care for the child; 7) Child who is 14 years of age or older has been consulted regarding the kinship arrangement; 8) Child demonstrates a strong attachment to the prospective relative guardian. (*Okla-Cherokee, 13.a*)

See generally, *Montana, Attachment E, Subsidized Guardianship*, which provides very detailed provisions of the requirements for Guardianship, including subsidy eligibility and subsidy negotiation to be between the Tribe and the prospective guardian.

The advantages of guardianship over long term foster care include: a legally recognized relationship in which the child's guardian(s) have the right and responsibility to make important decisions regarding the child without Tribal Social Service involvement; a more stable placement which can only be terminated by court action; the comfort and security of belonging without the need to terminate parental rights; greater likelihood of parental acceptance since termination of parental rights is not required; provides legal permanence to existing relationships in a manner which supports connections and cultural norms; returns legal custody to family members; and assists family members in meeting the child's needs. (*Montana, Attachment E, p. 3-4*)

The permanency staffing for Guardianship should delegate the following action steps: ... assistance to the potential guardian to identify ways that will help the child to maintain positive connections to his/her culture and heritage. (*Montana, Attachment E. p. 5*)

## **f. Adoption Assistance**

*Promising Practices Note: Much of what is in these provisions is part of the statute or regulations, but inclusion in an agreement emphasizes the availability of this support for adoptions finalized through tribal court.*

“Adoption Assistance” means financial assistance and medical coverage granted to an adoptive or pre-adoptive family on behalf of an eligible adoptive child to offset the costs associated with adopting and meeting the ongoing needs of the child. Adoption assistance may include cash payments, Medicaid Coverage, an Agreement Only...and reimbursement of nonrecurring expenses. (*Oregon, 2.02*)

DHS shall make a determination for adoption assistance payments for any eligible Indian Child that is free for adoption or is adopted and is eligible for Title IV-E foster care maintenance payments. In determining whether a child has special needs under §473(e)(1) of the Act, the decision is then based on evidence by an order from a court of competent jurisdiction terminating parental rights, the existence of a petition for a termination of parental rights, a signed relinquishment by the parents, or in the case of children who can be adopted in accordance with tribal law without a termination of parental rights or relinquishment, documentation of a valid reason why the child cannot or should not be returned to the home of his or her parents. (*Oregon, 3.07*)

Cherokee Nation ICW agrees to provide information to adoptive families for tribal custody children regarding adoption subsidy. OKDHS agrees to process completed applications for adoption subsidy. (*Okla-Cherokee, 15*)

For purposes of this Agreement, the IDHS considers children placed in the guardianship of Meskwaki Family Services by Tribal Court for purposes of adoptive placement to be potentially eligible for Adoption Assistance. The IDHS considers and recognizes Meskwaki Family Services to be the entity approved and licensed by the Tribe as a child-placing agency with the authority to place and supervise children in foster and adoptive settings. (*Iowa, 12*)

In some tribes, adoption is legal without a Termination of Parental Rights (TPR) or a relinquishment from the birth parent(s). If a child can be adopted in accordance with Tribal law without a TPR or relinquishment, and is otherwise eligible for adoption subsidy, the Department may enter into an adoption subsidy agreement with the adoptive parents if the tribe has documented the valid reasons why the child cannot or should not be returned home. (*Montana, Attachment F, “Note: Tribal Adoptions Where No TPR Exists”*)

The Leech Lake Band of Ojibwe Tribal Court can order, according to tribal law, that the child(ren) can be adopted without a Termination of Parental Rights. When this occurs, all parties much agree that the requirements of the Social Security Act 473(c)(1) will be satisfied so long as the band’s law remains in effect, and the Leech Lake Band of Ojibwe Tribal Court order has documented valid reasons why the child(ren) cannot, or should not, be returned to their home. (*See, Administration for Children and Families Policy Announcement ACYF-CB-PA-01-01*)

A. The department shall enter into a Title IV-E Adoption Assistance Agreement with adoptive parent(s) who adopt child(ren) under the jurisdiction of the band when the child(ren) meet(s) the eligibility requirements for Title IV-E Adoption Assistance.

B. The placing agency will certify that the child(ren) is/are eligible for adoption assistance according to rules promulgated by the commissioner. The placing agency shall not certify any child(ren) who remain(s) under the jurisdiction of sending agency pursuant to Minnesota Statutes, section 260.851, article 5, for state funded Adoption Assistance when Minnesota is the receiving state.

C. The adoption assistance rates shall be determined by Minnesota Rules Chapter 9560 and Minn. Stat. §259.67. Special needs qualifications shall be defined by the department in communication and cooperation of the band. The Tribe may elect to use additional forms that are culturally appropriate in addition to the aforementioned documentation. (*Minn-Leech Lake, XIV*)

## **F. Non-Federal Matching Funds**

### **1. State General Funds for IV-E and Other Child Welfare Purposes**

*Promising Practices Note: Some states have agreed to provide state general funds to build the capacity of tribes to provide child welfare services. Some of these programs are linked to Title IV-E reimbursement (meeting the match requirement for maintenance payments or for reimbursement for administrative or training costs), but others represent a more general allocation of state dollars in support of tribal child welfare programming.*

The California Department of Social Services (CDSS) agrees to: Provide the Tribe annually, pursuant to the Annual Budget Act, an allocation of State General Funds for administrative and services costs associated with the Tribal Child Welfare Services Program. The allocation will be based on an agreed upon cost methodology between COSS, the Tribe, and the affected counties in accordance with Welfare and Institutions (W&I) Code Section 10553.2. (*California-Karuk, Fiscal Addendum, A*)

In consideration of the services to be provided through this Agreement, the Tribe is to receive from the Department reimbursement for services rendered in accordance with those costs provided for in Attachment "C" and as follows:

1. The parties agree that the total amount of State General fund reimbursement from [insert begin date] through [insert end date] shall not exceed insert GFO dollar amount. The reimbursement of State General fund will be determined in accordance with Attachment "C" by the amount of Title IV-E allowable administrative expenditures the Tribe has incurred and paid during the identified time frame. The Parties agree that from [insert begin date] through [insert end date] the Tribe will have the ability to access Title IV-E funding. The amount of Title IV-E reimbursement the Tribe will receive will be determined by the cost associated with providing Title IV-E allowable services to Title IV-E eligible children. The amount of Title IV-E reimbursement the Tribe receives will be determined in accordance with Attachment "C" by the amount of Title IV-E eligible administrative expenditures the Tribe has incurred and paid

- during the identified time frame. No reimbursement can be made by the Department to the Tribe until all required Title IV-E financial documentation is received from the Tribe;
2. Following Tribal submission of all required information necessary to determine eligibility and Tribal completion of all required data entry, the Department shall make timely monthly Title IV-E foster care payments to fully licensed out-of-home providers on behalf of Title IV-E eligible children under the jurisdiction of Tribal Court;
  3. The Department shall provide State General Fund monies to match Title IV-E funds utilized for foster care, subsidized relative guardianship, and subsidized adoption payments made on behalf of children under Tribal Court jurisdiction who are Montana Title IV-E eligible;
  4. The Department shall provide State General Fund monies to match Title IV-E funds utilized for the following Title IV-E eligible supplemental support services provided to children under Tribal Court jurisdiction who are Montana Title IV-E eligible: child care, clothing, diapers, and transportation. (*Montana, 6.A*)

The IDHS and MFS will work cooperatively to identify a list of Tribal children and families that have received child welfare services through IDHS. This information will be used to identify an estimated total amount of federal and State-funded child welfare services, including both placement and non-placement interventions, historically provided for Tribal children and families. Once information on historical spending for child welfare services to Tribal children and families has been gathered and analyzed, IDHS and MFS agree that:

- A. An estimated annual child welfare service amount per child, based on historical spending patterns, will be established. The per child amount shall be adjusted annually to reflect increases or decreases in the costs of providing the described services, based upon statewide statistics.
- B. The IDHS agrees to make a maximum of this per child amount available to MFS for expenditure on state-funded child welfare services for each Tribal child under Tribal Court order and jurisdiction who requires child welfare placement or services funded under this agreement.
- C. MFS may spend this per child allocation of child welfare service funding for services funded through the Department.
- D. The IDHS will regularly report to the Tribe on expenditures for child welfare services funded by the state for Tribal children. (*Iowa, 8*)

The Tribe agrees: To provide the matching funds allowable under Title IV-E and related federal regulations towards the cost of services provided under this Agreement. Allowable Tribal IV-E matching funds may also include DSHS/CA Indian Child Welfare (ICW) contract funds once the Tribe has received a letter from the DSHS/CA Assistant Secretary, per the ICW contract, allowing the funds to be used as match funds for the Tribe's Title IV-E Administrative and Training claim. However, the state will continue to provide the matching funds for the foster care maintenance payments. Possible sources of matching funds include, but are not limited to: BIA 638 – administrative funds (Indian Self-determination Act – Amendments of 1994); ICWA (Indian Child Welfare Act) grant funds (needs letter from CA to allow use as a match); and other funds available to some tribes and tribal organizations at the discretion of the tribe or tribal organization that could be used as match for Title IV-E administration including: Gaming

funds; Tribal business profits; Other tribally controlled funds; and Private foundation contributions. (*Wash-Lummi, 4.b.1*)

## **2. State Match for IV-E Maintenance Payments Only**

The Department agrees to make payments to the foster parent(s) as established by the Department's policies and procedures and rates (attached hereto as Exhibit "B" and incorporated herein by reference). The Department will pay the entire foster care payment for the Title IV(E) eligible children only, which payments shall include the State's matching portion. If the child loses Title IV (E) eligibility, then the Title IV(E) foster care payments shall cease. (*NM, VI.A.1*)

## **3. Where No State Funds are Provided**

*Promising Practices Note: Unlike states, there are some federal sources of funds that may be utilized by tribes to meet the required match. The following is an example of a provision recognizing that authority.*

The parties agree that the Nation's expense funding used by the Nation can be either from non-federal or allowed federal funds permitted in the Indian Self-Determination Act of 1994 (PL 103-413), Indian Child Welfare Act of 1978, 25 U.S.C. Sections 450h(c) and 1931 and other applicable Federal policies. (*Arizona, 13.3*)

# **G. Judicial Determinations and Administrative Requirements**

## **1. Removals and Court Proceedings**

### **a. "Reasonable Efforts", "Contrary to the Welfare", and "Best Interests"**

*Promising Practices Note: These provisions may not be required in an agreement since they are in essence a restatement of applicable regulations of judicial findings that need to be made before a child can be IV-E eligible but their inclusion makes the agreement a complete document that stands on its own which may be helpful in implementing an agreement.*

For a child to be Title IV-E eligible, the Tribal Court shall be responsible for making the following judicial findings: 1. Language to the effect that it is "Contrary to the Welfare" of the child to remain in the home, or that it is in the "Best Interest" of the child to be removed from the home must be in the first court order removing the child from the home. This finding must be child specific and contain details that are unique to the child's case. 2. DSS has made "Reasonable efforts" to prevent removal of the child from the home or to reunify the child with the family. This may be in the first order removing the child from the home, but must be in a court order no later than sixty (60) days after removal from home. This finding must be case specific and contain details of the efforts made to prevent removal. 3. Custody or placement and care responsibility "shall rest with NDSS" must be in a court order prior to any claim for Title IV-E maintenance reimbursement. 4. DSS has made reasonable efforts to address the permanency goal. This finding must be made at least every twelve (12) months the child is in

care. 5. All judicial findings necessary for Title IV-E eligibility are child specific and contain details that are unique to the child's case. (*Arizona, 7.0*)

Reasonable efforts shall be made to preserve and reunify families, to prevent or eliminate the need for removing the child from the child's home, and to make it possible for the child to safely return to the child's home. When making reasonable efforts, the child's health and safety shall be the paramount concern. In any case in which the agency supervising the placement of the child is required pursuant to the Indian Child Welfare Act (ICWA), 25 USC 1912(d), to make active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family, the reasonable efforts requirements of this Program Agreement shall be construed in a manner consistent with the active efforts requirement of ICWA. (*Wash-PG, 9.01; see also SD-Lakota, Preventive and Reunification Services, pp 10-11*)

### **b. Termination of Parental Rights**

*Promising Practices Note: The requirement for a TPR filing is a federal statutory requirement and exceptions may be made only on a case-by-case basis. Some of the agreements helpfully spell out specific circumstances where a TPR filing may not be required that go beyond the statutory language, e.g., customary adoption, when there are no grounds for a TPR, or when adoption is not included in the permanency plan. Of note also is a provision recognizing that the application of the aggravated circumstances TPR provision is at "the option of the tribe."*

Under the Adoption and Safe Families Act, the responsible social services agency must file a termination of parental rights petition for children who have been in foster care for fifteen of the most recent 22 months or if the court has determined a child to be an abandoned infant, the parent has committed murder of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent or at the option of the Tribe, if there are aggravated circumstances. Pursuant to the ASFA rules the Tribe must document on a case by case basis why a termination of parental rights petition is not required or in the best interests of the child. Exceptions to filing a termination of parental right petition and identifying the recruitment for a qualified family for adoption include: a. the child is being cared for by a relative; b. the Tribe has documented in the case plan (which must be available for court review) compelling reason for determining that filing such a petition would not be in the best interests of the child; or c. the Tribe has not provided the family of the child such services the Tribe deems necessary for the safe return of the child to the child's home if active efforts could result in the return of the child to the home and such active efforts are required. (*Minn-White Earth, 10.2*)

When a child has been in foster care for 15 of the past 22 months, the band may elect to file or join a petition to terminate parental rights unless there is documentation of compelling reason in case file. Compelling reasons to not file a Termination Of Parental Rights include but are not limited to: adoption not being the appropriate permanency goal for the child(ren), or no grounds to file a petition to terminate parental rights exist; or the band has not provided services to the family, consistent with the time period in the case plan, such services that the

band deems necessary for the safe return of the child(ren) to their home when reasonable efforts to reunify the family are required. (*Minn-Leech Lake, X.G and H*)

The Mille Lacs Band of Ojibwe Tribal Court can order, according to tribal law, that the child(ren) can be adopted without a Termination of Parental Rights. When this occurs, all parties must agree that the requirements of Social Security Act 473 (c)(1) will be satisfied so long as the band's law remains in effect, and the Mille Lacs Band of Ojibwe Tribal Court order has documented valid reasons why the child(ren) cannot, or should not, be returned to their home. (*Minn-Mille Lacs, XI*)

The governing body of the White Earth Band of Ojibwe, the White Earth Tribal Council, has enacted a customary adoption code which provides a unique permanency option for children whose cases are before the White Earth Tribal Court. The customary adoption will be utilized as a permanency option for cases before the White Earth Tribal Court that are included in the American Indian Child Welfare Initiative. The customary adoption is an acceptable permanency option pursuant to the Adoption and Safe Families Act. (*Minn-White Earth, 10.1*)

### **c. Voluntary Placement**

***Promising Practices Note: These provisions recognize the right of tribes to execute voluntary placement agreements that are IV-E reimbursable.***

Requirements for Voluntary Placement: Foster care maintenance payments from Title IV-E federal funds shall be made in cases of voluntary placement of an Indian Child out of the home by or with the participation of the Tribe only if: (a) the assistance of the Tribe has been requested by the child's parents or legal guardian; and (b) there is a written voluntary placement agreement, binding on all parties to the agreement, which specifies at a minimum the legal status of the child and the rights and obligations of the parents or guardian(s), the child, and the Tribe while the child is in placement.

Judicial Determination Required for Extension: Federal reimbursement may be claimed only for voluntary foster care maintenance expenditures made within the first 180 days after the date of the original foster care placement unless there is a judicial determination by the Tribal Court within the first 180 days of the date of placement to the effect that the continued voluntary placement is in the best interest of the child.

Revocation of Voluntary Placement: The Tribe shall provide a uniform procedure or system for revocation by the parents or guardians of a voluntary placement agreement and return of the child. (*Oregon, 6.0*)

See also *Arizona, 8.0* and *Minnesota-Mille Lacs, X*.

The OKDHS agrees to provide foster care payments for tribal children who are placed with the Tribe on a voluntary basis in a tribal foster home for children under the age of 18 for up to 180 days. Voluntary foster care placements that extend beyond 180 days require a judicial determination to the effect that continued voluntary foster care is in the child's best interests. Foster care payments may be made for youth over the age of 18 who were in care prior to their

eighteenth birthday for the purposes of completing their high school education. The youth must be enrolled and attending a secondary school or its equivalent. The foster care payment will cease when the youth leaves school, graduates or turns nineteen, whichever occurs earlier. (*Okla-Cherokee, 11*)

#### **d. Permanency Hearings and other Procedural Safeguards**

*Promising Practice Note: The permanency hearing requirements are federal statutory requirements as are the types of permanency that are recognized. Some of the agreements maximize tribal flexibility by, for example, limiting the application of these requirements to children subject to Title IV-E or by specifying specific circumstances where an alternative planned permanent living arrangement would be allowed.*

When Required: A permanency hearing must be held for each Eligible Indian Child in foster care under the responsibility of the Tribe if the Tribe claims federal reimbursement for the Costs of foster care maintenance payments. To meet this requirement, the hearing must take place within (twelve) 12 months of the date of the child is considered to have entered foster care (as defined in Subsection 9.06) and not less frequently than every twelve (12) months thereafter during the continuance of foster care.

Determinations: For the purposes of this requirement, a permanency hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent. In cases where the Tribe has documented to the satisfaction of the Tribal Court a compelling reason for determining that it would not be in the best interest of the child to return home, the Tribe will place the child for adoption, place the child with a fit and willing relative or a legal guardian, or place in, another permanent living arrangement. If the child is placed out of state, the Tribal Court shall determine whether the out-of-state placement continues to be appropriate and in the best interests of the child. In the case of a child who has attained age sixteen (16), the Tribal Court shall determine the services needed to assist the child to make the transition from foster care to independent living.

Exceptions: The provisions of this Section apply to all Eligible Indian Children who receive federal reimbursement for the costs of foster care maintenance payments under the agreement. It does not apply to those children for whom the Tribe intends not to claim federal reimbursement for the costs of foster care maintenance payments.

Procedural Safeguards: (a) As procedural safeguards, the Tribal Court or the SSD program shall notify the parents that their child has been removed from their home and when a hearing before the Tribal Court is scheduled, (b) The parents shall be notified by the Tribal Court or the SSD program when their child is moved from one placement to another. The parents shall be notified by the Tribal Court or the SSD program of any determination affecting their visitation rights. (c) The foster parents (if any) of a child and any pre-adoptive parent or relative providing care for the child shall be provided with notice of, and an opportunity to be heard in any review or hearing to be held with respect to the child, except that such notice shall not be construed to require that any foster parent, pre-adoptive parent, or relative providing care for the child be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard. (*Oregon, 8.0*)

When Required: A Permanency Hearing must be held for each child in foster care under the responsibility of LOWO if the child placed by LOWO receives federal IV-E foster care maintenance payments. To meet this requirement, the hearing must take place within (twelve) 12 months of the date the child is considered to have entered foster care (as defined in Section 9.05) and not less frequently than every twelve (12) months thereafter during the continuance of foster care. If a twelve (12) month permanency hearing is not held, the State will notify LOWO that the child is no longer eligible for IV-E funding and IV-E funding will not be reinstated until a permanency hearing is held.

Determination: For the purposes of this requirement, a Permanency hearing shall determine the permanency plan for the child that includes whether, and if applicable when: 1) The child will be returned to the parent; 2) the child will be placed for adoption and LOWO will file a petition for termination of the parental rights; or 3) the child will be placed in a custom (customary) adoption that gives the child a permanent parent-child relationship with someone other than child's birth parents even though the child's birth parents' parental rights are not terminated; or 4) the child will be referred for legal guardianship or, in cases where LOWO has documented to the satisfaction of the Tribal Court a compelling reason for determining that it would not be in the best interests of the child to return home and that termination of parental rights and/or guardianship are not appropriate, the child may be placed in another planned permanent living arrangement by determination of the Tribal Court.

The following are examples of compelling reasons: (i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan; (ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or (iii) LOWO has identified another planned permanent living arrangement for the child.

In cases where the child is placed out of state, the Tribal Court shall also determine whether the placement continues to be in the best interests of the child.

In the case of a child who has attained age (16) sixteen, the Tribal Court shall determine the services needed to assist the child to make the transition from foster care to independent living. (*South Dakota, p. 9-10*)

The band shall apply procedural safeguards with respect to parental rights pertaining to the removal of the child(ren) from the home of their parent(s), to a change in the child(ren) placement, and to any determination affecting visitation privileges of parent(s) in accordance with 42 USC § 675 (5) (c). (*Minn-Mille Lacs, VII*)

Exercise due diligence to identify all adult grandparents and other adult relatives and give them the required notice regarding the removal and placement options, including available services and supports, within 30 days after removal of a child, as specified in 42 U.S.C. § 671 (a)(29). (*Texas, VI.A.2.m*)

As procedural safeguards, the Tribe shall notify the parents: when a hearing before the Tribal Court is scheduled; when their child is moved from one placement to another; or of any determination affecting their visitation rights. The foster parents (if any) of a child and any pre-

adoptive parent or relative providing care for the child shall be provided with notice of the date, time, and location of any review or hearing to be held with respect to the child, and an opportunity to be heard, except that shall not be construed to require that any foster parent, pre-adoptive parent, or relative providing care for the child be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard. (*Wash-PG, 8.03*)

## **2. Eligibility**

*Promising Practices Note: Agreements vary as to whether eligibility determinations are made by states or tribes. Examples of both approaches are provided.*

### **a. State Makes Eligibility Determination**

The [state] agrees to provide: ... Determinations of Title IV-E eligibility for foster care payments, financial predetermination for subsidized relative guardianship payments, and subsidized adoption payments for children under Tribal Court jurisdiction in a timely manner. Upon departmental receipt of all required information necessary to determine eligibility, including wage information, the Department shall make every effort to make a determination within one business week. (*Montana, 4.A.5; Montana provides a detailed description of documentation and process required for an eligibility determination in its Attachment B*)

IDHS shall designate staff within the IDHS Ames Service Area to be the Eligibility Worker(s) for applications submitted by MFS to determine whether child welfare foster care placements for children under Tribal Court jurisdiction are eligible for federal funding under the Title IV-E program. IDHS will provide MFS with the names and contact information for these designated staff and will provide training for MFS on the types of information that needs to be collected and submitted to IDHS in order to assess eligibility for the IV-E program. (*Iowa, 6.A*)

DSHS/CA shall designate staff within DSHS/CA to be the eligibility worker for Title IV-E foster care payment applications made by the Tribe pursuant to this Program Agreement, and will notify the Tribe of that designated staff. (*Wash-PG, 14.01*)

The band shall assume responsibility for determining Title IV-E foster care eligibility for children participating in the American Indian Child Welfare Initiative and for any other Children under the band's legal and financial responsibility. Title IV-E foster care eligibility determinations for children not identified in the previous paragraph shall remain the responsibility of the county of financial responsibility. (*Minn-Leech Lake, XVII*)

### **b. Tribe Makes Eligibility Determination**

In accordance with Section II of this Agreement, the Tribe shall be responsible for the administration of the Tribal Child Welfare Services Program, including the determination and re-determination of Title IV-E eligibility, along with the administrative activities associated with making foster care maintenance and adoption assistance payments. (*Cal-Yurok, IV.H*)

### **c. State and Tribe Share Responsibilities**

The band will assume responsibility for determining federal Title IV-E foster care eligibility for child(ren) under tribal court jurisdiction in the future. The band and the department are committed to working together to identify the steps necessary to carry out this responsibility. (*Minn-Mille Lacs, XIV*)

The Department shall determine Title IV(E) eligibility based upon the information received with the referral. The Pueblo shall redetermine the child's eligibility for Title IV(E) benefits at six-month intervals. At the time of such redetermination, the Pueblo shall complete the Title IV(E) Eligibility and Redetermination Checklist (attached as Exhibit G), send a copy of the completed form to the Department, and file the original completed form in the child's case record. (*New Mexico, VII.B.1 and VII.E*)

### **3. Case Reviews and Case Plans**

***Promising Practices Note: These provisions help clarify roles and requirements with regard to these IV-E-required practices.***

Both the IDHS and the Tribe agree that their representatives will collaboratively work together to develop effective case plans for Tribal children and families, regardless of whether the proceedings are held in State or Tribal Court. If Tribal Court has jurisdiction of the child's case, Meskwaki Family Services will have case management responsibility and be responsible for developing the case plan. If a state court has jurisdiction, IDHS staff will have case management responsibility and be responsible for developing the case plan. Case plans will specify the responsibilities of each of the parties and which services will be provided and funded by each party. (*Iowa, 3.E*)

A. Case plan. The case plan must be designed to achieve placement in the most family-like setting possible, and in accordance with Mille Lacs Band of Ojibwe placement preference, MLBSA § 3156(b); consistent with the child's best interests and special needs; and shall comply with 45 C.F.R. § 1356.21 (g)(1),

B. The case plan shall be a written document that is a discrete part of the child's case record and in a format jointly approved by the department to be in compliance with federal Title IV-E requirements. For cases the Mille Lacs Band seeks to transfer to tribal court, the Mille Lacs Band of Ojibwe's Solicitor General will file a petition with the tribal court to request acceptance into tribal court at the same time a petition to transfer is filed with the district court. District court retains jurisdiction until the tribal court has issued an order accepting jurisdiction. The case plan must be developed no later than 60 days from the time the band assumes legal responsibility for placement and care of the child(ren). The 60 days begins when the case is accepted for transfer into tribal court. Until tribal court has accepted jurisdiction, the county social services agency remains responsible for ensuring the case plan requirements are met. The case plan shall be developed jointly with the parent(s) or guardian of a foster child and shall include the following: 45 CFR § 1356.21 (g) (1)-(3)

1. A description of the foster home or residential setting where the child(ren) is to be placed, an explanation of why the placement is appropriate, and how the band plans to implement judicial requirements. All judicial determinations are to be made in accordance with the Mille Lacs Band of Ojibwe Family Code and in accordance with 45 CFR §1356.21

2. An explanation of the efforts that were offered and made to prevent the need for removal of the child(ren) from their home;

3. A description of the care and services the child(ren) will receive in the foster home, both to meet the needs of the child(ren) while in foster care, and to document what steps have been made toward achieving the permanency goal;

4. A description of the services that the child(ren) and their parent(s) will receive, with the objective of allowing the child(ren) to return home;

5. A discussion of why the care and services provided to the child(ren) under the plan are appropriate;

6. A written description, when a child reaches the age of 16, of the programs and services which will help the child(ren) to prepare for the transition from foster care to independent living; and

7. Include, to the extent available, the health and education records of the child(ren) which include,

a. The names and addresses of the child(ren) health and education providers;

b. Their grade level performance;

c. Their school record;

d. Assurances that the child(ren)'s placement in foster care takes into account the proximity to the school in which the child(ren) is enrolled at the time of placement;

e. A record of immunizations;

f. Any known medical problems;

g. Any medications;

h. Any other relevant health and education information determined to be appropriate by the band. (*Minn-Mille Lacs, VI.A and B*)

Case review system. The band will maintain a case review system that complies with 45 Code of Federal Regulation (CFR) 1356.21 (f) that ensures:

1. The status of each child is reviewed no less frequently than once every six months, through either judicial or administrative review;

2. The placement is still necessary and appropriate, the case plan is followed and relevant to the child's(ren's) permanency plan, that progress is made toward eliminating the need for foster care, and that a likely date is established by which the child(ren) will either be returned home or placed for adoption, legal guardianship or an alternative planned permanent living arrangement;

3. If the administrative review method is used, it must be available to the child's(ren's) parent(s), and be conducted by a panel of appropriate persons; at least one of whom is not responsible for case management or services for the child(ren) or the parent(s). (*Minn-Mille Lacs, VI.C*)

#### **4. Cooperative Efforts in Fulfilling Legal Requirements and Achieving Administrative Goals**

*Promising Practices Note: These provisions promote cooperation in processing Indian children, both within and outside of Indian country.*

Cherokee Nation ICW agrees to cooperate with the OKDHS Child Welfare worker in the removal of a child in OKDHS custody in a foster home located on trust or restricted lands as defined by 25 U.S.C.A. 1903 (10) if removal is necessary. OKDHS agrees to cooperate with the Cherokee Nation in the removal of a child in Cherokee Nation custody in a foster home located on state land if removal is necessary. (*Okla-Cherokee, 5.c*)

The OKDHS worker makes every effort to identify the Indian heritage of children who come into custody. When children are identified as an Indian child, the child's Tribe is contacted to discuss the child's situation, including: custody status, reason for court action, and all pertinent information regarding the child's need for care. The OKDHS worker requests the assistance of the Tribal ICW worker in identifying and assessing relatives for the possibility of placement. If there are not available relatives, the OKDHS worker asks for assistance with a Tribal foster home placement. The OKDHS worker also looks at certified OKDHS foster homes in which one or both parents are members of the child's Tribe. If no placement resource is identified within the child's Tribe, the OKDHS worker requests assistance from other Tribes for a placement. The OKDHS worker and the Tribal ICW worker make a selection of the most appropriate placement for the child. (*Okla-Cherokee, Attachment I "Child in State Jurisdiction and OKDHS Custody"*)

In most situations in which the Pueblo has custody, the action will be in Pueblo Court or in the process of being transferred to Pueblo Court. In any case in which the Pueblo has custody, but the action is being maintained in State court, or the child is placed in foster home outside of the Pueblo, a staffing between the appropriate Pueblo representatives and Department representatives, including the Children's Court Attorney, will be necessary to coordinate responsibilities relative to the State court proceedings. (*New Mexico, VIII.1*)

Upon request by the Tribe, CDSS will assist in securing the sharing and transfer of information from a county to the Tribe related to a child or children being transferred to Tribal Court jurisdiction. (*Cal-Karuk, XI.B.4*)

### **H. Compliance**

*Promising Practices Note: These provisions are designed to establish reasonable procedures to meet the audit requirements of Title IV-E.*

#### **1. Audits and Monitoring**

Records will be made available at the Tribe's office at reasonable times upon request of the Department, if necessary. Tribal staff may be present during the records review. (*Mich-Little Traverse, A.VI*)

The Pueblo shall provide for strict accountability of all money paid to the Pueblo subject to this agreement and shall follow generally accepted accounting principles and account for all receipts and disbursements of funds made to the Pueblo pursuant to this agreement. *(NM, XI)*

The records and case files shall at all times remain the property of the Tribe and will be returned immediately upon completion of the review process. Tribal staff may be present during the records review. The Tribe acknowledges that ACF conducts periodic Title IV-E reviews of the Department's administration of the Title IV-E program and that the Tribal cases may be pulled for such review. *(Mich-Little Traverse, A.VII)*

The Tribe and DSHS/CA acknowledge that the federal Department of Health and Human Services (DHHS) and DSHS/CA conduct periodic reviews of state agencies that receive and distribute Title IV-E funds, and that DHHS and DSHS/CA require as a part of such reviews that case files on children receiving Title IV-E support be made available for inspection at a Tribal designated location or other mutually agreed to location. Upon reasonable advance written notice, the Tribe will make available for review by DHHS or DSHS/CA personnel the case file and provider files on the children in foster care under the jurisdiction of the Tribe whose foster care providers receive Title IV-E funds. The Tribe agrees to make the records/files described herein available at all reasonable times at the Tribe's designated location for review by DHHS or DSHS/CA. The files shall at all times remain the property of the Tribe and shall be returned to the Tribe immediately upon completion of the review process. *(Wash-PG, 13.02)*

OKDHS will provide the Cherokee Nation ICW program 30 day advance notice of case reviews. [The case reviews focus on compliance with Title IV-E and Title IV-B requirements as stated in this Agreement.] Preliminary findings will be discussed with the Tribal Child Welfare Program Director in an exit conference at the conclusion of the review. A written summary of findings will be provided to the Tribal program within 30 days of the conclusion of the review. *(OK-Cherokee, section 3.a and b)*

## **2. Confidentiality**

*Promising Practices Note: The key concept here is that confidentiality is a shared responsibility.*

The Tribe and the Department each acknowledge that, during and after the term of this agreement, they share an obligation and responsibility to protect confidential consumer and recipient information obtained and used in the performance of this Agreement. The Parties further agree that the federal Health Insurance Portability and Accountability Act (HIPAA) sets forth the legal authority and standards which guide the process of sharing HIPAA protected, individually identifiable health information. *(Montana, 17)*

To the extent that confidential personal information must be shared for purposes of claiming title IV-E reimbursement, both parties to this agreement agree to protect confidential information and adhere to federal, state and Tribal privacy protections to the extent applicable. *(Mich-Little Traverse, A.V)*

(A) The parties agree to maintain information concerning children, families, and foster parents in the strictest confidence per the Social Security Act until Title IV-E Section 471 (8) [42 U.S.C. 671(8)] Title IV-E. The parties shall maintain information concerning individuals in strictest confidence and safeguard all information, and shall not use or disclose any information concerning any client for any purpose not directly connected with the administration of their responsibilities under this agreement, except as permitted by law or by prior written consent of the client or, in the case of a minor, the client's legal guardian. (B) Each party agrees to train and assist foster parents to safeguard all information in either electronic, and/or in hard copy. (C) It is understood and agreed by the parties that the obligations of subsection (A) shall survive the expiration or termination of this Agreement. (*Iowa, 10*)

### **3. Reporting and AFCARS**

*Promising Practices Note: These sections recognize the need for information exchange and focus upon meeting federal data collection requirements.*

The Parties agree that they will exchange information as permitted under state, federal and Tribal law pertaining to case management as may be necessary for each Party to perform its respective duties, responsibilities and functions under this Agreement. (*Cal-Karuk, XI.D.1*)

The Tribe shall provide federally requested information for the State Automated Child Welfare Information System (SACWIS), which includes the AFCARS data elements as outlined by IDHS. (*Iowa, 9.F*)

Detailed AFCARS requirements are presented in *Attachment M* of the *Montana Agreements*.

### **4. Record Retention**

All records referenced in Section 6 of this Agreement shall be maintained for four years and then until the completion of any pending audits related to any transactions for which the records may be of use. (*Iowa, 9.H*)

Record Maintenance: The Tribe will maintain all records pertaining to Title IV-E eligibility for the entire time period for which an Eligible Indian Child is in out-of-home care, and a minimum of four (4) years after the child has left care. Unless this Agreement requires a longer retention period for certain information, Tribe and all providers shall maintain all accounting records, financial records, supporting documents, statistical records and all other records related to payments under this Agreement or payment for the delivery, of any Service for a minimum of thirty-nine months after the payment. If there are unresolved audit questions or litigation at the end of the thirty-nine month period, the records shall be retained until the questions are resolved. (*Oregon, 12.03*)

The Pueblo agrees to develop and maintain client case records and foster parent records, including placement agreements, consistent with the requirements of Title IV(B) and IV(E) of the Social Security Act, for a period of three (3) years. The Department has designated the

Uniform Case Record forms (attached as Exhibit J), which contain all of the federal requirements and may be used by the Pueblo. If the Pueblo wishes to develop their own forms, then they must be approved by the Department Title IV(E) Specialist prior to receiving Title IV(E) payments. All of these records shall be submitted to the Title IV(E) Specialist prior to the initiation of the foster care payments. The Pueblo agrees to make all records pertaining to Title IV(E) payments (including the eligible child's foster care/adoption case record, placement and foster home records, including studies and licensure information), available for on-site inspection at the Pueblo's Social Services Office with reasonable notice. The Pueblo shall maintain fiscal and program records pertaining to this agreement for a minimum of three (3) years. (*New Mexico, X*)

The Tribe shall make records that support maintenance claims available to the Department for purposes of assuring compliance with federal regulations related to the administration of the Title IV-E state plan. Records will be made available at the Tribe's office at reasonable times upon request of the Department, if necessary. Tribal staff may be present during the records review. (*Mich-Little Traverse agreement, VI*)

## **5. Child Abuse and Reporting**

*Promising Practices Note: These provisions are included because they create mutual obligations and/or focus upon meeting federal requirements.*

Both the IDHS and the Tribe, through Meskwaki Family Services, agree to share reports of child abuse assessments as is legally permissible and necessary to work together in protecting the safety and welfare of children. The IDHS will share completed child abuse assessment reports with Meskwaki Family Services for Meskwaki children in which child abuse allegations have been reported, as described in 4A in the following circumstances: 1. Meskwaki Family Services, or another Tribal institution, has made the child maltreatment report to the IDHS; 2. The alleged victim of abuse is a child under the custody or jurisdiction of Tribal Court; or 3. Meskwaki Family Services is responsible for providing care, treatment, and supervision for a child named in the child abuse assessment report. (*Iowa, 4.F*)

The Tribe has exclusive jurisdiction to investigate allegations of child abuse or neglect occurring in a foster home licensed by the Tribe. The Tribe shall notify the Department contact for licensing of Tribal approval or termination of any foster care license. The Tribe also will notify the Department of any founded allegation of child abuse or neglect occurring in a foster home licensed by the Tribe. The Tribe agrees to provide this information in order to participate with other child welfare providers in an attempt to keep central records within the State of Washington on individuals who care for or who seek to care for children, disabled persons or vulnerable adults. The information maintained by the Department will be kept confidential according to Washington State law. (*Wash-PG, 13.01; this language can also be found at SD-Lakota Reporting Requirements, p 13*)

The Tribe will require reporting of child abuse manner that meets the requirements of 42 USC sec. 671(9). (*Oregon, 13.01*)

OKDHS shall conform to the provisions of the ICWA and OICWA, including but not limited to: Notifying the child's tribe of allegations involving a Tribal child by written correspondence within 36 hours of receipt of initial referral to the Cherokee Nation Indian Child Welfare Intake unit; Notifying the child's tribe immediately of the removal of any identified Tribal child from their home; Sharing information on diligent efforts made to locate ICWA compliant placement. Cherokee Nation ICW agrees to report any suspected abuse or neglect incidents identified in working with tribal families residing on state land to the local OKDHS office. (*Okla-Cherokee, 4.b and c*)

## **I. Risks and Liabilities**

*Promising Practices Note: It can be challenging to find ways to resolve disputes and protect each party from liability for the mistakes of the other in a manner consistent with tribal sovereignty. The following are examples of creative way in which tribes and states have tried to achieve this goal.*

Each party shall be solely responsible for fiscal or other sanctions occasioned as a result of its own violation of requirements applicable to the performance of this agreement. Each party shall be liable for its actions in accordance with this agreement. (*NM, XIII*)

### **1. Dispute Resolution**

#### **a. In General**

The Parties agree to establish an administrative procedure for the timely and expeditious resolution of any dispute that may arise over the provisions of this IGA. (*Arizona, 18.0*)

This dispute resolution process seeks to effectively and efficiently streamline and standardize the communication process between the Parties with the goal of working together to seek mutually beneficial solutions to problems arising from implementation. The Parties agree to look for guidance on resolution of disputes to Title IV-E of the Act, the ICWA, the Federal regulations applicable to the programs the subject of this agreement, Karuk Tribal Codes, and the California Welfare and Institutions Code, section 10553.1 in particular. Both Parties will strive to ensure the dispute will not result in a disruption of the services to Indian children and families. Resolution of disputes regarding fiscal claims shall utilize the processes specified in the Fiscal Addendum. (*Cal-Karuk, XII*)

In the event a disagreement regarding Title IV-E program requirements occurs between the band, the department and/or the county, the county retains financial responsibility until the issue is resolved and appropriate adjustments have been made. The parties agree that, upon request of any party, disputes arising between any signatory Tribe and the Department concerning the application and interpretation of this agreement shall be referred to a duly designated representative (or representatives) of the Department and the Tribe for a good faith effort to resolve the dispute. If a resolution is reached, the decision shall be binding upon the Department and upon the participating Tribe. If a state or federal law is amended, neither the Tribe(s) nor the Department will be required to comply with any section of this agreement that

would be out of compliance with, or not required by existing law. (*Minn-Mille Lacs, XIII, first para*)

**b. In the Case of Disallowance**

1. The Pueblo will make repayment of any Title IV(E) funds expended by the Department on behalf of any child subject to the jurisdiction and authority of the Pueblo to which the federal agency (Health and Human Services) takes exception and requests reimbursement through a disallowance, provided that, and only to the extent that, such disallowance is based upon the acts or omissions of the Pueblo which violate applicable federal statutes and/or regulations.
2. If the Department becomes aware of circumstances that might jeopardize continued federal funding, the situation shall be reviewed and reconciled by the Pueblo and State Title IV(E) staff on a case-by-case basis. If the matter cannot be reconciled it shall be presented to a mutually agreed upon panel of Pueblo and Department officials on a case-by-case basis. If reconciliation is not possible, both parties shall present their views in writing to: Mr. Leon R. McCowan, Regional Administrator, Administration for Children & Families, U.S. Department of Health and Human Services, 1301 Young Street, Dallas, TX 75202, (Attention: Mr. Joe Woodard, Office of State and Tribal Programs), who shall determine whether continued payment shall be made on behalf of the case(s) affected.
3. Any disputed issues that remain unresolved at the end of the process described in ¶ 2 above shall be submitted to arbitration as outlined in the November 26, 1991 Memorandum on Dispute Resolution from the Office of the Attorney General of New Mexico (attached hereto as Exhibit F). Arbitration shall not be invoked until the administrative procedures described in ¶ 2 above have been exhausted. (*New Mexico, IV.D*)

In the event of a potential erroneous or improper payment, the following procedures shall apply: 1. The Tribe agrees to notify the Department verbally with a written follow-up immediately if the Tribe believes an overpayment or other erroneous or improper payment has been made; 2. The Department agrees to notify the Tribe verbally with a written follow-up immediately if the Department discovers that an erroneous or improper payment has been made to the Tribe or to a fully licensed out-of-home care provider on behalf of a Title IV-E eligible child under the jurisdiction of Tribal Court; 3. The State agrees to bear the costs of any errors or improper payment up to the full amount if the State is responsible for the errors or improper payment; 4. Upon receipt of written Departmental notification of tribal error, the Tribe has 30 days in which to cure the error or improper payment; 5. If the error is not cured by the Tribe within 30 days, or if the Tribe does not agree with the Departmental determination that it is in error, Tribal IV-E staff and the State IV-E program manager shall meet for the purpose of discussing and resolving the issue. If the issue cannot be resolved by the State program manager and tribal staff, then the DPHHS Departmental Division Administrator shall meet with Tribal Officials to resolve the issue. If the Division Administrator cannot resolve the issue, then the DPHHS Director shall meet with the appropriate Tribal Officials to resolve the issue. (*Montana, 12.C*)

## **2. Hold Harmless and Indemnification Provisions**

The Tribe shall be held harmless for errors associated with the child's title IV-E eligibility as determined by DHS unless DHS relied upon inaccurate financial information supplied by the Tribe for the eligibility determination. Errors associated with ineligible payments are the Tribe's responsibility if the Tribe failed to use a properly licensed provider. Errors associated with a non-IV-E compliant Tribal Court order will be the Tribe's responsibility. (*Mich-Little Traverse, Scope of Agreement, V*)

The Tribe agrees to indemnify, defend, and hold harmless the State of Montana, its officials, agents, and employees from any breach of this Agreement by the Tribe, from any matters arising from the performance of this Agreement or from the Tribe's failure to comply with any Federal, State or local laws, regulation and ordinances applicable to the services or work to be provided under this Agreement. The State agrees to indemnify, defend, and hold harmless the Tribe, its officials, agents, and employees from any breach of this contract by the State, from any matters arising from the performance of this contract, or from the State's failure to comply with any Federal, State, or local laws, regulations or ordinances applicable to the services or work to be provided under this Agreement. This indemnification applies to all claims, obligations, liabilities, costs, attorney's fees, losses or suits resulting from any acts, errors, omissions or negligence, whether willful or not, of the Parties, their employees, agents, subcontractors or assignees and any other person, firm, or corporation performing work, services or providing materials under this Agreement. (*Montana, 14*)

Each party shall be solely responsible for fiscal or other sanctions occasioned as a result of its own violation of requirements applicable to the performance of this agreement. Each party shall be liable for its actions in accordance with this agreement. (*New Mexico, XIII*)

Except as provided for under this subsection (including but not limited to, monetary penalties assessed against DHS by the federal government or an agency thereof), neither party shall be liable for any indirect, incidental, consequential or special damages under this Agreement. Neither party shall be liable for any damages of any sort arising solely from the termination of this Agreement or any part hereof in accordance with its terms. (*Oregon, 17.2*)

## **3. Insurance**

DSHS certifies it is self-insured for all exposure to tort liability, general liability, property damage liability, and vehicle liability as provided by Chapter 43.19, Revised Code of Washington. The Tribe certifies that either (a) it is self-insured and shall cover losses for which it is found liable, or (b) it shall maintain commercial liability insurance of \$1,000,000 per occurrence and \$2,000,000 aggregate and shall provide evidence of such insurance to DSHS within fifteen (15) days of execution of this Agreement. (*Wash-Lummi, 7.b(1)-(2)*)

## **4. Waivers of Sovereign Immunity**

*Promising Practices Note: Some states have required waivers of sovereign immunity in the agreement contrary to principles of tribal sovereignty. These provisions are examples of*

*agreements where this has not been required or where the waiver was constructed to be narrow and limited.*

**a. No Waiver**

The Cherokee Nation Indian Child Welfare's execution of this Agreement shall not be construed to be a waiver of sovereign immunity as to, or otherwise allow recovery against, the Cherokee Nation, its assets, or any elected officials, officers or employees of the Cherokee Nation. Any and all references to "Tribe" and/or "Tribal" refer specifically to the Cherokee Nation Indian Child Welfare Program. Execution of this Agreement in no way imposes any obligation on the Cherokee Nation, its government, employees, or elected officials except to the extent such obligations are imposed on the Cherokee Nation Indian Child Welfare Program. (*Okla-Cherokee, 19*)

Notwithstanding anything in this document to the contrary, this agreement shall not be construed, read, or implied to be a waiver of the Alabama-Coushatta Tribe's sovereign immunity. (*Texas, V; see also Ariz, 28.0*)

Nothing in this Agreement shall be construed as a waiver of the sovereign immunity of the Tribe except as provided for in Section XIII, that the Tribe's insurance company may not raise the defense of sovereign immunity. (*Cal-Karuk, XVII.F*)

This Agreement shall not be construed to waive or diminish the sovereignty or any sovereign immunity of the Tribe or Iowa. (*Iowa, 22.C*)

**b. If Waiver Required, Then Limited and/or Mutual Waiver**

The Tribe's insurance Policy shall acknowledge in writing that it will not assert the Tribe's defense of sovereign immunity for claims for bodily injury, personal injury, and property damage up to the limits of the Policy, provided, however, that nothing herein requires the Tribe to agree to liability for punitive damages or to waive its right to assert sovereign immunity in connection therewith, and shall include an endorsement providing that the insurer shall not invoke tribal sovereign immunity up to the limits of the Policy. However, such endorsement and acknowledgement shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity for the amount of any claim above the Policy limits, or for those claims not covered by the Policy. (*California-Karuk, XIII.G*)

The State has waived its sovereign immunity from suit for contract actions arising under this Agreement. See Montana Code Annotated, Title 18, Chapter 1, part 4. For the purposes of this Agreement, the Tribe expressly grants a limited waiver of sovereign immunity from suit for the sole purpose of enforcement of the Agreement by the Department and recovery of damages for breach of the terms of the Agreement. The Parties to this Agreement agree that no word, phrase, sentence, paragraph, or section, in whole or in part, separate or together, contained in this Agreement may be interpreted, other than expressly provided in this provision, as an express or implied waiver generally of the sovereign immunity of the Tribe. (*Montana, 21*)

## 5. Federal Tort Claims Act Coverage

Indemnification and Insurance: Each party is responsible for its own negligence. Contractor is insured under the federal tort claims act. (*Arizona, 27.0*)

The Tribe has compacted with the United States pursuant to the Indian Self-determination and Education Assistance Act, Public Law 93-638, for the Tribe to assume responsibility of social services and Indian Child Welfare programs and/or services formerly provided by the federal government that may be related to the subject of this Agreement. The Karuk Tribe is thus a self-governing Tribe with such a "638 compact" and its employees are thus considered employees of the federal government for purposes of Federal Tort Claims Act coverage, while performing work under the compact. The Tribe is of the position that due to its 638 compact, tribal employees (including individuals performing personal services contracts with the Tribe to provide health care services) are considered employees of the federal government for purposes of Federal Tort Claims Act coverage, while performing work under this Agreement. It is the intention of the Parties that liability not covered by the Federal Tort Claims Act, will be covered by the Tribe's insurance policy agreed to Section XIII paragraph D. The Tribe agrees to provide CDSS with thirty (30) days written notice in the event the 638 compact is no longer in place. (*Cal-Karuk, XIII.B and C*)

## 6. Handling Overpayments and Underpayments (Audit Exceptions)

*Promising Practices Note: A practice worth noting is the use of the withholding of future payments as a mechanism for dealing with overpayment, as opposed to a requirement for reimbursement.*

Under the following circumstances, DHS may recover from Tribe the financial assistance paid to Tribe under this Agreement for the applicable audit period:

- (a) If Tribe fails or, if applicable; a provider fails to have an independent certified public accountant audit federal funds in a manner that complies with Subsection 13.02 of this Agreement, DRS may recover from Tribe all federal funds paid to Tribe under this Agreement.
- (b) If federal authorities demand repayment of all or a portion of the federal funds or, disallow payment of all or a portion of the federal funds to Tribe under this Agreement, DHS may recover from Tribe that portion of the federal funds necessary to satisfy the federal repayment demand or disallowance. If the federal repayment demand or disallowance results from a provider's actions or omissions, Tribe shall, upon DES' request, recover the amount of the repayment demand or disallowance from the provider. To the extent permitted by state and federal law, DES shall not require Tribe to recover funds from a provider under this subsection if DHS determines that further action by Tribe is unreasonable given the cost of the action in comparison to the amount sought to be recovered and/or the likelihood of successful recovery resulting from Tribe actions under authority vested in Tribe.
- (c) If a Tribe expenditure of financial assistance paid to Tribe under this Agreement does not result in the delivery of a service in accordance with the terms and conditions of this Agreement, DHS may recover the amount of the expenditure from Tribe as provided by this subsection. If a Tribe expenditure of financial assistance paid to Tribe under this Agreement

does not result in the delivery of a service in accordance with the terms and conditions of this Agreement because of a provider's actions or omissions, Tribe shall, upon DHS request recover from the provider the amount of the expenditure received by the provider. To the extent permitted by state and federal law, DHS shall not require Tribe to recover funds from a provider under this subsection if DES determines that further action by Tribe is unreasonable given the cost of the action in comparison to the amount sought to be recovered and/or the likelihood of successful recovery resulting from Tribe actions under authority vested in Tribe.

(d) The sole method of recovering financial assistance from Tribe under this Agreement shall be by deducting the amount of financial assistance to be recovered from any future payments to Tribe. DES shall provide notice to Tribe of the amount of financial assistance to be recovered. Tribe shall have 60 days to provide payment to the DHS. If after 60 days DES has not received payment from Tribe, DHS may deduct the amount of financial assistance from a future payment to Tribe. For purposes of this subsection, "future payments" to Tribes include, but are not limited to, any payment to Tribe's Indian Child Welfare Program from DES under this Agreement; any payment to Tribe from DHS under any other contract or agreement between Tribe's Indian Child Welfare Program and DES, present or future, unless prohibited by state or federal law. DHS shall notify Tribe of its intent to recover financial assistance and identify the program from which the deduction will be made. Tribe shall have the right to, not later than 14 days from the date of DHS' notice, request the deduction be made from a future payment(s) identified by Tribe. To the extent that DHS' recovery of financial assistance from the future payment suggested by Tribe is feasible, DHS shall comply with Tribe request.

(e) In exercising DHS' right to recovery under this subsection, DHS shall first seek recovery from the State General Fund portion of financial assistance remaining to be paid under this Agreement to satisfy the repayment. If that amount is insufficient, then DHS shall seek recovery from the State General Fund portion of a future payment from any obligation of the State of Oregon Department of Human Services owing to Tribe. If that amount is insufficient, then DHS shall seek recovery from any other future payment as defined above.

(f) In no case, without the prior consent of Tribe, shall the amount of recovery deducted from any one obligation owing to Tribe exceed twenty-five percent (25%) of the amount from which the deduction was taken, the DHS may seek recovery from as many future payments as necessary in order to fully recover the amount of financial assistance. DHS' right to recover financial assistance from Tribe under this subsection is not subject to or conditioned on Tribe's recovery of financial assistance from a provider. (*Oregon, 17.1*)

A. The Tribe shall be financially responsible for any audit disallowances resulting from an action, omission or failure to act on the part of the Tribe, including but not limited to billing for services which were not delivered or billing for services which were not delivered in accordance with applicable standards. Where the Tribe's financial liability is determined after the Tribe has been reimbursed for the services at issue, IDHS shall recover the fees for those services and the Tribe shall fully cooperate during the recovery.

B. The State shall be financially responsible for any audit disallowances resulting from an action, omission or failure to act on the part of the State. Where the State's financial liability is discovered before it has reimbursed the Tribe for the services at issue, it shall pay the Tribe the

amount which would have been due if the state had not committed the action, omission or failure to act.

C. Except as otherwise provided in subsection (B), where the State has erroneously made an overpayment to the Tribe, the Tribe shall, upon receipt of notice of the overpayment, repay the overpayment.

D. If the Tribe does not repay the overpayment, the State may withhold the amount of the overpayment from future payments. (*Iowa, 20*)

## **J. Interstate Compact on the Placement of Children**

*Promising Practices Note: ICPC is a uniform state law governing interstate transfers of children, including continued jurisdiction and funding of a foster care placement by the sending state. The ICPC does not specifically apply to the transfer of children between a state and a tribe, or between tribes, although some state agreements include provisions whereby the state agrees to work with tribes that want to utilize the ICPC. We have included one such provision below. This may be helpful where a tribe does not want to transfer jurisdiction, but it is problematic when a tribe would like to transfer jurisdiction under the ICWA since funding by the sending state is premised on that state retaining jurisdiction. Thus, the provision provided here should not be considered by itself a “promising practice.” Of note, although there is nothing in the written tribal-state agreements themselves, the State of Minnesota has worked informally with tribes in a few instances to negotiate alternative procedures to the ICPC that have allowed continued funding by the sending state after transfer to a tribe. This type of arrangement is not precluded by Title IV-E and including this as part of a IV-E agreement would constitute a “promising practice.” To see more information on this subject, please go to Section VI.C of this report.*

A. For the purposes of the Department’s financial contribution for placement of children in out-of-home care under this Agreement, the Tribe agrees to accept children from out-of-state if they are placed according to procedures outlined in the Interstate Compact on the Placement of Children (ICPC), Mont. Code Ann. § 41-4-101 et. seq.

B. The Tribe agrees that, pursuant to the ICPC, the child’s sending State must maintain legal and financial responsibility for the child.

C. The Parties understand and agree that the Tribe is not legally required to enter into the ICPC when accepting out-of-state placements of Indian children onto the Reservation.

D. If the Tribe accepts any child without an approved Interstate Compact agreement in effect under which the sending State retains jurisdiction, the Tribe may not presently claim administrative costs for case management services provided with respect to that child and the Department will not make a Title IV-E foster care payment on behalf of the child. The State and the Tribe agree to amend this provision as soon as is practicable if the Federal government notifies

the Department in writing that such costs may be claimed. If such costs become Title IV-E allowable, those costs will be allowable for those children transferred to Tribal Court jurisdiction and placed in out-of-home care by the Tribe after the date of receipt of official notification from the Federal government.

E. The Department agrees to process the Interstate Placement of Children requests received from sending States in a timely manner. (*Montana-tribal agreement, section 9*)

## **K. Medicaid**

All qualified children who are eligible for Title IV-E retain their categorical eligibility under federal law for Title XIX Medicaid. Federal law requires that all Title IV-E eligible children are to receive medical coverage under Title XIX per ORS 414.737. A person who is an American Indian and Alaska Native is excluded from mandatory enrollment in prepaid managed care health services organizations. (*Oregon, 3.05*)

Medical cards for Tribal custody children certified for Title IV-E foster care will be sent to the Tribal worker at the Tribal office. The medical card will follow the child while in a tribally approved foster home. If the child is placed in another placement resource, the Tribal worker gives the current medical card to the child's new foster parent. If the child is removed from Tribal foster care, the card is returned by the Tribal worker to the Tribal Liaison. (*Okla-Cherokee, Attachment I, II, "Medical Cards"*)

DFPS agrees to: ...Make a referral for Title XIX Medicaid for all children who are eligible for Title IV-E monthly assistance payments under this agreement. (*Texas, VI.B.3*)

CDSS will work with the California Department of Health Care Services (DHCS), the Single Agency for receipt of Title XIX funds, to seek federal approval, if necessary, for the reimbursement of any Title XIX eligible administrative costs for Child Welfare Services health-related activities incurred by the Tribe. (*California-Yurok, Fiscal Addendum-F*)

## **L. John H. Chafee Foster Care Independence Program**

*Promising Practice Note: Although part of Title IV-E, The Chafee program is a separately funded non-entitlement program aimed at youth that will age out of foster care. These provisions recognize the need for tribal youth to access the program and be included in program data.*

OKDHS agrees to provide independent living services to tribal custody youth in the same manner as OKDHS youth in accordance with the Chafee Act of 1999. Cherokee Nation ICW agrees to assist the youth in developing an independent living case plan based upon an individual independent living assessment. Cherokee Nation ICW agrees to assist the youth in making application and referrals for those services which will assist the youth achieving their plan for independent living. Cherokee Nation ICW agrees to provide documentation and data to the CFSD Independent Living Coordinator as requested. (*Okla-Cherokee, 14*)

Cooperate with DFPS and facilitate the collection of data for the National Youth in Transition Database, in conformance with 45 C.F.R. § 1356.80- 1356. This data pertains to youth receiving services provided under the Chafee Foster Care Independence Program (CFCIP), including the baseline population (each youth who is in foster care as defined in 45 CFR 1355.20 and reaches his or her 17th birthday during Federal fiscal year 2011), and such youth who reach a 17th birthday during every third year thereafter, and any follow up with the baseline population at ages 19 and 21. (*Texas, VI.A.2.s*)

## **M. Other Special Provisions**

### **1. Waiver**

*Promising Practices Note: A number of states have Title IV-E waivers which allow them to deviate from Title IV-E requirements in order to test the efficacy of certain modifications to the system created by IV-E. This provision includes the tribe in the state's waiver.*

Title IV-E Waiver Guardianship Assistance Program: FFP is available for non-relative caretaker guardianship arrangements for IV-E eligible children who meet the criteria for the Guardianship Assistance Waiver Program. In the event the IV-E waiver program ends, the non-relative caretaker guardianship arrangements will remain the responsibility of DHS. Title IV-E Flexible Funding: The Waiver is available to provide greater flexibility to use Title IV-E funds for innovative services that prevent foster care placement of children or reunify children with their families. Waiver Plans must be approved by DHS to meet all criteria of the IV-E Waiver Program. Such funds shall be available notwithstanding any IV-E waiver county control groups and is subject to the availability of continued funding for the IV-E Waiver Programs. (*Oregon, 3.12 and 3.13*)

### **2. Reimbursement of State Savings/Formula for State Contribution**

*Promising Practices Note: These provisions provide creative mechanisms for increasing the level of state resources available to the tribe.*

DSHS/CA agrees: (1) To reimburse the Tribe for such portions of the Tribe's costs of allowable Title IV-E child welfare services as described in this Contract. The exact amount of reimbursement to the Tribe will vary, depending on the calculation and application of the Title IV-E Reimbursement Rate set forth below for that payment. (2) To reimburse the Tribe 40% of the state's savings in foster care maintenance funding that would have been paid by the state in all state funds for eligible children. (*Wash-Lummi, 4.a*)

The IDHS and MFS [Meskwaki Family Services] will work cooperatively to identify a list of Tribal children and families that have received child welfare services through IDHS. This information will be used to identify an estimated total amount of Federal and State-funded child welfare services, including both placement and non-placement interventions, historically provided for Tribal children and families. Once information on historical spending for child welfare services to Tribal children and families has been gathered and analyzed, IDHS and MFS agree that:

A. An estimated annual child welfare service amount per child, based on historical spending patterns, will be established. The per child amount shall be adjusted annually to reflect increases or decreases in the costs of providing the described services, based upon statewide statistics.

B. The IDHS agrees to make a maximum of this per child amount available to MFS for expenditure on state-funded child welfare services for each Tribal child under Tribal Court order and jurisdiction who requires child welfare placement or services funded under this agreement.

C. MFS may spend this per child allocation of child welfare service funding for services funded through the Department.

D. The IDHS will regularly report to the Tribe on expenditures for child welfare services funded by the state for Tribal children. (*Iowa, 8*)

### **3. Maintenance of Effort**

*Promising Practices Note: The Lummi provision enumerated below was included in the agreement at the request of the tribe in order to maximize available services for their families and children. Not all tribes will be in a position to make this commitment, however.*

The intent of the "Title IV-E Reimbursement Program," Title IV-E Participation Agreement and this Agreement is to assist the Tribe in the development and strengthening of its child welfare infrastructure. (2) Accordingly, the Tribe agrees not to reduce the amount of money from calendar year 2008, from January 1, 2009 to December 31, 2009, of tribally administered revenue sources that is available for or is spent on Child Welfare services. This provision {4e(2)} is at the Tribe's request. (*Wash-Lummi, 4.e*)

The Nation and DES agree that the Nation shall obtain federal reimbursement for its children and family programs and the Title IV-E funds obtained under this IGA shall be used to supplement existing program funds and shall not be used to supplant those funds. (*Arizona, 1.0*)

## **N. General Provisions to Include in Agreements**

### **1. Term and Termination**

Either Party may terminate this Agreement without cause. The Party terminating this Agreement must give notice of termination to the other Party at least sixty (60) days prior to the effective date of termination. Notice of termination must be given in writing. (*Montana, 19, C and D*)

This IGA shall be reviewed annually at a meeting of the parties or at any time at the written request of either party. This IGA may be modified by the written consent of both parties. Either of the parties may terminate this IGA, upon 180 days written notice to the other party. It is mutually agreed, however, that prior to the termination of this IGA, reasonable effort shall be made to discuss and salvage this IGA. Any costs incurred before termination shall be reimbursed. This IGA shall be governed and interpreted by the applicable laws of the State of

Arizona. Nothing in this IGA shall be construed to supersede the requirements of the Indian Child Welfare Act. (*Ariz, 28.0*)

The term of this Agreement shall commence on the effective date of this Agreement, and shall continue until terminated by the Parties as provided herein. Prior to notification of any termination, either Party considering termination shall seek to cooperatively explore with the other Party, ways in which to avoid termination. This Agreement may be terminated by either Party with one hundred eighty (180) days prior written notice. (*Cal-Karuk, XIV and XVI.A and B*)

“Good Cause” means, for termination of this agreement, a substantial reason that cannot be corrected by amendment to this agreement. For example, the following constitute good cause to terminate this agreement: termination of the Title IV(E) program by the federal government, blatant and repeated non-compliance with the terms of this agreement or with the Title IV(E) requirements, or a substantive change in federal law or policy which the parties to this agreement cannot accommodate by amendment of this agreement. (*NM, V.D*)

Either party may terminate this Agreement upon one hundred and twenty (120) days written notice to the other party, provided that, before termination of the Agreement, the terminating party makes good faith efforts to discuss, renegotiate, and modify this Agreement or to resolve disputes. (*Wash-Lummi, 7.h*)

## **2. Definitions**

Generally, see *Oregon, 2.0*.

## **3. Modification**

This Agreement may be modified at any time with the mutual consent of both Parties. This Agreement shall be modified as necessary due to changes in state or federal laws which impact its provisions and that cannot be addressed by the modification of the Tribal CWS Plan. Any modifications to this Agreement must be in writing and signed by authorized representatives of the Parties. (*Cal-Karuk, XV*)