



AAIA

ASSOCIATION ON AMERICAN INDIAN AFFAIRS

966 Hungerford Drive, Suite 12-B

Rockville, MD 20850

Phone: 240-314-7155 * Fax: 240-314-7159

E-Mail: general.aaia@verizon.net

Website: www.indian-affairs.org

The Role of the States in helping to implement the tribal provisions in the Fostering Connections to Success and Increasing Adoptions Act of 2008

P.L. 110-351 authorizes Indian tribes to submit a plan for approval to the Department of Health and Human Services (HHS) to directly operate the Title IV-E Foster Care and Adoption Assistance Program. It also recognizes the right of tribes to continue or seek new agreements with states to operate the program. In either case, states have an important role to play in optimizing the ability of tribes to successfully operate this program.

Tribal-state agreements

There are approximately 92 tribes in 14 states that have entered into agreements with a state to operate all or part of the Title IV-E program. Some agreements are very narrow – maintenance payments only – and others are quite broad and provide for full operation of the Title IV-E program by the tribe with the state paying for the match. Fostering Connections provides that any tribal-state agreement in effect on the date of enactment of the law remains in effect subject to the right of either party to revoke or modify the agreement and future tribal-state agreements are authorized.

There is a new requirement in the law that states are required to negotiate IV-E agreements with tribes in good faith, if requested. This may involve a new agreement or could be the renegotiation of an existing agreement. Although there are no guidelines issued as of yet, it is presumed that this requirement means that a state must engage in negotiations with the tribe over all aspects of the programs if the tribe so requests. One provision in the law whose intent is to help facilitate successful agreements is a provision that the state may utilize the tribe's FMAP for payments made pursuant to a Title IV-E tribal-state agreement. This will often result in a higher level of federal reimbursement under a tribal-state agreement for foster care maintenance, adoption and guardianship payments than would have previously been the case.

Direct funding to tribes

States have an important role to play even if a tribe decides to apply for direct funding from HHS. Among the issues that require, or would at least benefit from, state involvement are the following:

- 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 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 will be important to ensure that the child's access to maintenance payments and services is uninterrupted and to determine the allocation of costs.
- 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 on the date of enactment of this Act for which the State is receiving Federal matching payments must continue to receive such payments regardless of whether the tribe chooses to directly operate the program. Coordination between state and tribal programs is necessary if there is to be a transfer of responsibility for the child.
- If tribes are currently in tribal-state agreements and want to transition to direct funding, state support will be crucial. For example, in some cases states are currently providing match money to the tribes. A tribe may not be able to take over the program without a continuation of state support. Yet, 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.
- Some tribes may want to operate the program directly, but may not have the capacity to administer certain functions, e.g., eligibility determinations. It may be that 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 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.

Chafee

Tribes are made eligible to receive a direct allocation from the Federal government from the John H. Chafee Independence Program. The amount of the award would be calculated based upon the percentage of children in the state that are under a tribe's custody and would be a deduction from the state's allocation. Fostering Connections requires consultation between the tribe and state regarding benefits and services to be provided to Indian children under the tribal plan, as well as a process to make sure that there is an appropriate transition between the state services and tribal services, where applicable.

Tribes would also be permitted to access the program through tribal-state agreements and the State would be required to negotiate agreements in good faith if requested by a tribe, including provisions dealing with administration, supervision and oversight.

For further information, please contact Jack F. Trope, Executive Director, Association on American Indian Affairs, 240-314-7155, jt.aaia@verizon.net.

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