

ACTION TRANSMITTAL

OCSE-AT-05-02

DATE: January 19, 2005

TO: FEDERALLY RECOGNIZED INDIAN TRIBES, TRIBAL AGENCIES ADMINISTERING CHILD SUPPORT ENFORCEMENT PROGRAMS UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT, STATE AGENCIES ADMINISTERING CHILD SUPPORT ENFORCEMENT PROGRAMS UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT, AND OTHER INTERESTED PARTIES.

SUBJECT: Systems and Financial Policy Questions and Responses to Miscellaneous Issues regarding Provision of 45 CFR part 309, the Tribal Child Support Enforcement Program Final Rule.

BACKGROUND: The Tribal Child Support Enforcement Program Final Rule, at 45 CFR part 309, which provides the requirements that Tribes and Tribal organizations must meet in order to receive Federal funding under title IV-D of the Social Security Act (the Act) was published in the Federal Register on March 30, 2004 (69 FR 16638). The Office of Child Support Enforcement (OCSE) has received numerous inquiries from Tribes, Tribal organizations and states regarding interpretations of its provisions. The purpose of this Action Transmittal (AT) is to inform Tribes, Tribal organizations and states of OCSE's policy responses to these inquiries.

ATTACHMENT: Attached are a collection of questions and answers in response to inquiries regarding provisions of 45 CFR part 309. The questions are arranged by subject matter.

RELATED REFERENCES: ***AT-00-06**, Notice of Proposed Rulemaking and Interim Final Rule for Tribal Child Support Enforcement Programs, dated August 22, 2000*
***AT-02-03**, Clarifying the Applicability of the Full Faith and Credit for Child Support Enforcement Orders Act (FFCCSOA) to States and Tribes, dated May 28, 2002*
***AT-04-01**, Final Rule on Tribal Child Support Enforcement Programs, dated March 30, 2004*

AT-04-03, *Program Instruction—Required Changes to Tribal IV-D Plans: Checklist*, dated May 13, 2004

INQUIRIES: Regional Administrators

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Grants Management

Q 1. When does the three-year timeframe for the Tribal ten-percent share of expenditures begin?

A 1. The three-year timeframe for the Tribal ten-percent share of expenditures begins on the first day of the first quarter in which the Tribe receives Federal-funding for an approved comprehensive IV-D program.

Q 2. Will Tribes that are currently funded under the authority of the Interim Rule be allowed to restart the three-year timeframe for the ten-percent Tribal share when they become funded under the Final Rule?

A 2. No. Both the Interim Rule and the Final Rule require Tribes to pay a ten percent Tribal share of expenditures for the first three years that they receive Federal funding and twenty percent Tribal share for every year thereafter.

Q 3. May funds from Public Law 93-638 programs, The Indian Self-Determination and Education Assistance Act, be used to meet the Tribe's non-Federal share of a IV-D grant?

A 3. Yes. Tribes may use Federal grant dollars received under Public Law 93-638 to meet the Tribe's cost sharing match for Federal and non-Federal programs. Pursuant to 25 U.S.C. 450(j) – 1(j), notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

Q 4. Do §309.35 – “Procedures for review of application, plan or plan amendment”, §309.40 – “Basis for disapproval of an application, plan or plan amendment”, §309.45 – “How may a Tribe request reconsideration of a disapproval action”, and §309.50 – “Consequences of a disapproval of an application, plan or plan amendment”, apply to both the application process for start-up funding and for comprehensive Tribal IV-D program funding?

A 4. Yes. The requirements of §309.35, §309.40 and §309.50 apply to the application process for start-up funding and for Tribal IV-D program funding. However, pursuant to §309.45(g), disapproval of start-up funding is not subject to administrative appeal.

Q 5. How often does a Tribe have to apply for start-up funding? Must a Tribe submit a new budget for the second year of start-up funding?

A 5. If an application for start-up funding is denied, a Tribe may reapply at any time. Once a start-up application is approved, the Tribe must submit a new budget for the second year in which it will receive start-up funding.

Q 6. May a Tribe receive the total allowable start-up funding (\$500,000) during the first year of start-up funding?

A 6. The expectation of the regulation is for Tribes to receive no more than \$250,000 a year for two years. We believe it is unlikely that any Tribe will have expenses during the start-up phase that will exceed \$250,000 per year. However, if a Tribe is able to provide evidence in its start-up plan and application to justify the need for more than \$250,000 in the first year it may receive more than \$250,000 in the first year. This funding is not a flat grant, but is based on need demonstrated in the application.

Q 7. May a Tribe receive more than \$500,000 in start-up funding?

A 7. Pursuant to §309.16(c)(2), the Secretary may grant an increase in the amount of Federal funding for start-up activities above \$500,000. A tribe must demonstrate specifically the purpose for which the funds will be used, that use of the funds will result in satisfaction of the requirements in §309.65 that would otherwise not be met, and that it has complied with all applicable reporting requirements.

Q 8. Can a Tribe request start-up funding in the second year for activities that are different from the activities it requested funding for in the first year?

A 8. The Tribe's program development plan must outline the activities for which the Tribe is requesting funding for the two-year period. The activities funded in the second year need not be the activities that were funded during the first year, but new activities must be in an approved start-up program plan and the timeline associated with each activity must also be included. A progress report that describes accomplishments to date must be submitted with the next annual funding request. Program activities which are different from those outlined in the initial program development plan must be articulated with the submission of the progress report. These activities should build on the first years work.

Q 9. If a Tribe does not obligate its start-up funding, may it ask for a no-cost extension?

A 9. Start-up funding can cover a two-year time period. During the first year of start-up funding, if a Tribe fails to obligate the grant award, the Tribe must request that the unobligated balance be carried forward into the second year when it applies for second-year funding. Tribes must request funding for a second year at least 60 days prior to the start of the second year budget. For example, if the Tribe receives a \$250,000 grant award in the first year and the Tribe only obligates \$200,000, the remaining \$50,000 may be included in the Tribe's request for second-year funding. If at the end of the second year, a Tribe fails to obligate and liquidate all of the grant award, pursuant to §309.16(c)(1) and §309.135(e) a Tribe may request a no-cost extension. Such request must be made as soon as it is clear that such an extension will be needed; any request received after the end of the liquidation period will not be considered.

Q 10. If a Tribe, while receiving start-up funding, decides to decline to further participate in the IV-D program, will the Tribe be required to pay back any Federal funds?

A 10. Any Federal funds that were expended on allowable activities under the start-up grant need not be repaid. However, any grant funds that are unobligated and unliquidated as of the day the Tribe withdraws from the IV-D program will be rescinded from the Tribe and any costs that have been incurred by the Tribe and have been found to be unallowable Tribal IV-D program expenditures must be repaid. If the Tribe submits a report showing unliquidated obligations after the termination date, OGM will deobligate the unliquidated balance and return the money to the Department of Treasury. The tribe cannot accrue any expenditures after the termination date.

Q 11. If, during the time that a Tribe is receiving start-up funding, the Tribe completes its start-up activities prior to the end of the 12-month grant period, may the Tribe apply for direct funding?

A 11. Yes. However, any start-up funds that are unobligated, as of the day the Tribe receives funding for a comprehensive program, will be required to be returned to the Federal government.

Q 12. Must a Tribe apply for funding at the beginning of the Federal fiscal year? If not, is annual funding then based upon the date that the Tribe first received Federal funding?

A 12. A Tribe may apply for funding at any time. The first IV-D start-up grant will run 12 months from the first day of the quarter in which the application was approved. The second start-up grant funding period will be the same as the first. Funding will be adjusted to coincide with the Federal fiscal year when the program evolves from being a start-up program to being a comprehensive program. For comprehensive funding, once the grant period is adjusted to coincide with the Federal fiscal year, the grant will continue to be administered by Federal fiscal year. Provided the Tribal IV-D program complies with the regulations, Federal funding to the Tribe will not be interrupted.

Q 13. Once a Tribe receives funding for a Tribal IV-D program, can the plan be disapproved? If so, how will this affect the Federal funding?

A 13. Pursuant to §309.40(a)(1), a currently-funded Tribal IV-D plan will be disapproved if the Secretary finds that the plan or plan amendment no longer meets one or more of the requirements set forth in program regulations or any other applicable Federal regulations, statutes and implementing instructions. Additionally, pursuant to §309.35(d), after approval of the original application, all new relevant changes required by new Federal statute, rules, regulations and Department interpretation are required to be submitted so that the Secretary may determine whether the plan continues to meet with Federal requirements and policies.

Pursuant to §309.45(h), where the Secretary believes an approved Tribal IV-D plan should be disapproved, he will notify the Tribe of his intent to disapprove the plan. If the Tribe waives its right to reconsideration under this section, the Tribe may request a pre-

decision hearing within 60 days of the date of the Notice of Intent to Disapprove the plan. The hearing will utilize the procedures at 45 CFR Part 213.

If a determination is made to disapprove the plan, no further Federal funding will be available until a new plan is submitted and approved. A Tribe will not receive any additional Federal funds that have not been obligated as of the day the plan is disapproved. A Tribe may also be required to reimburse Federal funds that have been previously expended and have been found to be used for unallowable Tribal IV-D program expenditures.

Q 14. Are indirect costs included in the grant award for Tribal IV-D program activities or are they in addition to the grant award for the Tribal IV-D program?

A 14. As indicated in §309.16(a)(3)(iii), a tribe's indirect costs are included within the Federal funding for start-up costs. Allowable indirect costs for Tribal IV-D program activities are determined on a tribe-by-tribe basis. If a Tribe uses its approved Department of Interior, Bureau of Indian Affairs indirect cost rate, the appropriate corresponding percentage will be included in its grant award. If a Tribe chooses to estimate indirect costs and submit them as direct costs, the reasonable estimated amount will be paid as part of the grant award.

We caution Tribes that there is some risk involved in using the negotiated indirect cost rate agreement. As stated in the preamble to the final rule (69 FR 16670), the Federal statute at 42 U.S.C. 651 limits the use of Federal IV-D funds to the purposes enumerated in that section, whether such costs are characterized as "direct" or "indirect" costs. Tribes will want to be careful with charges to the indirect cost rate so as not to build up a large audit exception or debt.

Q 15. If a Tribe attends a Tribal regulation rollout meeting, can it receive reimbursement for those expenses?

A 15. A Tribe may receive Federal funding to cover the expenses of attending a Tribal regulation rollout meeting if it is currently operating a Tribal IV-D program. In addition, if a Tribe applies for start-up or comprehensive funding, and is approved for Federal funding within the quarter in which it attends the rollout meeting, the cost of attending the meeting may be reimbursed. In accordance with §309.35(f), upon approval of a Tribal plan, funding for otherwise allowable IV-D costs is available as of the first day of the quarter in which an approved plan is submitted.

Q 16. If a Tribal IV-D program initiates a paternity establishment program with its Indian Health Service (IHS) hospital or clinic, can the Tribal IV-D program include those expenditures in its program budget?

A 16. IHS costs that are already Federally-funded can not be paid for by OCSE. Pursuant to §309.145(b)(1), establishment of paternity pursuant to Tribal law, code or custom, under §309.100, including providing an alleged father an opportunity to

voluntarily acknowledge paternity, or providing genetic testing or any other reasonable attempts to determine the identity of a child's father pursuant to the IV-D plan, is an allowable Tribal IV-D program expenditure. Allowable Tribal IV-D activities are eligible for reimbursement.

Q 17. Can a Tribe and state that are each providing the other services offset those expenses rather than actually exchanging money? For example, a state is providing a service to the Tribe at \$100 per hour and the Tribe is providing a service to the state at \$100 per hour and each provides the other 5 hours of services.

A 17. Yes. Tribes and states may agree to offset the value of services being provided to the other. However payment is made, it must be reported as program income and the Federal government would get its respective share (34 percent for states and 10 or 20 percent for Tribes). Even if no money is exchanged, costs and income must be separately tracked and accounted for by each program.

Q 18. Can a state provide assistance to a Tribe to meet the Tribal share of expenditures requirement?

A 18. There is no Federal requirement that prohibits a state from assisting a Tribe with its share of expenditures requirement. We encourage states and Tribes to work together to ensure both programs are successful. However, Federal dollars received by the state cannot be used for the Tribal share of expenditures and a state contribution to a Tribe is not a state IV-D expenditure.

Q 19. If a Tribe provides training or education to other IV-D agencies, may the costs associated with providing that training or education be used as an in-kind contribution for the Tribal share of expenditures, required in accordance with the final rule, after the Tribe has completed its Tribal IV-D program phase?

A 19. No. With the exception of activities that are funded under Public Law 93-638, the Indian Self-Determination and Education Assistance Act, activities that are funded by Federal dollars cannot be used as an in-kind contribution whether or not they are being provided to another Federally-funded program.

Q 20. If a Tribe builds a facility for use by the IV-D program, and no rent and utilities are charged to the IV-D program, may the IV-D program use the program's share use of the building at market value as an in-kind contribution to its non-Federal share? Can they use the value of program's share of building utilities?

A 20. A Tribe may use the market value of the space used by the IV-D program as an in-kind contribution, provided Federal funds were not used to build the building. Tribes may use the value of building utilities as an in-kind contribution to the non-Federal share at any time. For both building space and utilities, the IV-D program may only be reimbursed for the IV-D programs share of those expenses. Please see OMB Circular A-87, Attachment B, Selected Items of Cost, 11. Depreciation and Use Allowances.

Grant funds can be used for construction and major renovations only if Congress specifically authorizes such use. Tribes are reminded that the child support statute does not provide for this use.

Q 21. If the Tribe pays for the salary of Tribal judges and court staff, can the IV-D program use the time that Tribal judges and court staff spent on child support matters as an in-kind contribution to the non-Federal share?

A 21. If the judges and court staff are being paid by the Tribe, and no Federal funds are involved, the time that is spent on child support matters may be used as in-kind contribution.

Q 22. If part of a Tribal court Judge's time is paid by the IV-D program, at what rate can the Judge be paid?

A 22. The rate at which a Tribal court Judge is paid for time spent on child support matters should be comparable to the rate at which other Tribal judges, or judges in the geographical area, are paid.

Q 23. Must the Tribal court Judge document the specific time spent on child support matters?

A 23. Yes. For audit purposes, a Tribal IV-D program that pays judges from its budget must keep records that indicate the amount of time that the Tribal Judge spent on child support matter and the rate at which he/she was paid. Some Tribal IV-D programs pay Tribal court judges a flat fee for each hearing and then only need to track the number of cases heard by the Tribal court. Tribes are reminded that costs must be reasonable and necessary and the flat rate fee is subject to disallowance if not in accordance with actual time and expense.

Q 24. Can the Tribe use, as an in-kind contribution, those expenses associated with the cost of jailing noncustodial parents for failure to pay child support?

A 24. No. To be used as an in-kind contribution, the activity or service must be a cost that is allowable under the regulation. The cost to jail noncustodial parents is not an allowable cost as set forth in §309.155(d).

Q 25. If the Tribe pays the salary of a staff person from another program, and details him/her to the IV-D program, can his/her salary be used as an in-kind match for the non-Federal share?

A 25. Yes. With the exception of programs that are funded under Public Law 93-638, the Indian Self-Determination and Education Act, volunteer services that are not paid for by the IV-D program, or another program that is funded by Federal dollars, may be used as an in-kind contribution of the non-Federal share. Volunteer services may be provided

by professional and technical personnel, consultants, and other skilled and unskilled persons. Each hour of volunteered service may be counted if the service is an integral and necessary part of an approved IV-D plan. A volunteer's time may not be used to match more than one grant. To count the time of a volunteer as part of the tribal share, the volunteer must be providing a service to and not receiving a service from the program.

Computer Systems and Automation

Q 26. What is the Tribal share for costs associated with the development of Tribal IV-D automated data processing systems?

A 26. Development of automated data processing systems is not an allowable activity under the Final Rule. OCSE is working with current grantees on what Tribal IV-D systems may look like. Guidance on development of Tribal IV-D systems will be issued separately.

Q 27. What costs related to planning for automated data processing systems are allowable under the Final Rule and what is the Tribal share?

A 27. Section 309.145(h) allows for planning efforts for the identification, evaluation and selection of a new or replacement automated data processing system; operation and maintenance of existing automated data processing systems and the establishment of intergovernmental agreements with states and Tribes for use of an existing automated data processing system.

Planning Phase efforts include those technical and management activities necessary for initiating and providing guidance for a software project. For example, a preliminary planning activity is to create a development plan to give a detailed description of the nature and scope of the activities to be undertaken and the methods to be used to accomplish the project, including defining the project life-cycle and the processes, methods, and tools for software development. The plan should describe the projected resource requirements for staff, hardware, and other needs and the resources available or expected to be available to meet the requirements. The plan must also contain a proposed activity schedule for the project, a personnel resource statement indicating availability of qualified and adequate staff, a proposed budget including a description of estimated expenditures by category and amount, and the estimated total project cost. The plan should define the project's deliverables, work breakdown structure, quality goals, and risks, as well as processes to be employed for monitoring, controlling and reporting on the project throughout its life.

Activities in this planning phase may also include (in addition to creating the development plan): performing a Requirements Analysis, preparing a Functional Requirements Specification, assessing other systems for transfer, installing hardware and networks for project planning and management, and preparing and conducting any

procurements in support of securing contract resources to conduct any of the above activities.

A Tribe will receive Federal funding for these activities at the same rate as it does for other IV-D program activities.

Q 28. What is the difference between an automated data processing system and office automation?

A 28. The regulatory language using these two terms in 45 CFR 309.145(h), does not define them. However, regulations at 45 CFR Part 95.605 “Definitions”, though not applicable to Tribal child support, do provide some guidance and understanding as to a definition of an *automated data processing system (ADP system)*. Specifically, 45 CFR 95.605 states:

Automatic data processing or ADP means data processing performed by a system of electronic or electrical machines so interconnected and interacting as to minimize the need for human assistance or intervention.

.....

Data processing means the preparation of source media containing data or basic elements of information and the use of such source media according to precise rules or procedures to accomplish such operations as classifying, sorting, calculating, summarizing, recording and transmitting.

Essentially, the term *automated data processing system* means the data, information, business rules, and requirements, built into process-specific software applications, supported by operating system software and computer hardware and telecommunications equipment, that when combined and interfaced will meet an organization’s operational business requirements and goals. A child support enforcement system is an example of an automated data processing system in the human services arena, as is, for example, a financial management and accounting system in a bank’s finance department. A copy of Microsoft Windows© is not an automated data processing system; rather, it is but one component (the operating system) of a larger, overall ADP system.

Neither the regulations at 45 CFR Part 95, nor the Title IV-D child support program regulations at 45 CFR 300-310 provide any definition of *office automation*. The term is an industry-standard nomenclature, and though *office automation* is similar to an automated data processing system in that *office automation* contains multiple components, e.g., operating system software, hardware, and networking, it is not an ADP system.

Office automation is not specifically designed to meet the programmatic and business-centric needs of an organization. Rather, *office automation* is a generic adjunct component that supports the routine administrative functions in an organization, as well as certain functions of an automated data processing system. For example, *office automation* might include the word processing capabilities needed to enable the child support enforcement system (the actual ADP system) to produce summons and petitions. *Office automation* might also describe the creation of certain reports or accounting

spreadsheets that serve to streamline an otherwise wholly manual business function through the use of *macros* to merge data and text into a usable management productivity tool. Office automation components can include some or all of the following:

- Personal computers and workstations
- Networking and application servers
- Telecommunications and network wiring to connect the computers in a unified network environment
- Network Operating Systems (NOS) and workstation and personal computer operating system software, such as Microsoft Windows XP© or Red Hat Linux©
- Office productivity software, such as Microsoft Office©, Microsoft Project© or WordPerfect©
- Electronic mail and Internet access services, such as T-1, DSL, or 56K dial-up (e.g., AOL© and Earthlink©.)

Q 29. Can a non-profit association receive direct Federal IV-D funding to act as a broker for purposes of developing a plan for Tribal IV-D system?

A 29. No. A non-profit association cannot receive direct Federal funding to act as a broker for a Tribe to plan for a Tribal IV-D system. Only Federally recognized Tribes or tribal organizations operating IV-D programs can receive Federal funding for the purpose of developing a plan for a Tribal IV-D system. However, a non-profit organization may be eligible to apply for Federal funding under a Special Improvement Project (SIP) grant for the purpose of planning, designing, and/or developing systems for Tribal IV-D programs.

Q 30. Can one or more Tribal IV-D programs contract with a non-profit organization to act as a broker on behalf of the Tribes to develop a plan for Tribal IV-D systems?

A 30. Yes. One or more Tribes that are receiving Federal IV-D funding may enter into a contract with a non-profit association for the purpose of developing a plan for a Tribal IV-D system. A Tribe that chooses to enter into such a contract must follow its internal contracting procedures as well as Federal contracting procedures. Any contract for the development of a plan for a Tribal IV-D system must be a competitive contract pursuant to Federal regulations at 45 CFR Part 92.36 “Procurement.” Sole sourcing of a contract to develop a plan for a Tribal IV-D system is not deemed to meet the explicit regulatory requirement that procurements supported with Federal grant funding be conducted in a manner that provides full and open competition.

Q 31. When a Tribe is planning for the development of a Tribal IV-D system, can a Tribal IV-D program delegate project management, grant management and other decision-making functions to another Tribe, state or private organization?

A 31. Yes, but the Tribal IV-D agency remains ultimately responsible for meeting Federal requirements pursuant to §309.60(c), including the planning, development, design and eventual installation of a Tribal IV-D system. The Tribal IV-D program must

have final review, acceptance and approval of all decisions that affect planning for a Tribal IV-D system. The Tribal IV-D program must retain final approval responsibility as it has the sole fiduciary and fiscal responsibility for all Federal funding authorized in the systems development project.

However, the organization of a planning project may include another Tribe, state or private entity, such as an Information Technology agency within the Tribal government. Planning projects may be operated through an inter-agency agreement between the IV-D program and a separate Information Technology agency that can deliver the necessary technical experience and resources. We encourage Tribal IV-D programs to make use of all available resources that can be used to help ensure the project's success.

Q 32. Can two or more Tribal IV-D programs enter into a consortium arrangement for purposes of cost-sharing the planning of a Tribal IV-D system?

A 32. Yes. This can be accomplished through an inter-governmental agreement that addresses up-front the numerous aspects of such a matrix-based project organization. Based on past experience with state IV-D systems, we would strongly encourage one Tribal IV-D program to be designated with lead responsibility for project organization and management in order to reduce some of the risks inherent to matrix-based project organization. Nevertheless, a consortium arrangement would be a prudent and fiscally sound consideration for Tribes.

Q 33. If the Tribe owns the system, can the system be used for other purposes (i.e., assisting other programs to manage program data) and/or can the technology be transferred to the development of an automated system for other programs?

A 33. Because the Tribe owns the software, the Tribe is free to give a copy of the software to any other program to help meet, once modified, that other program's unique requirements. Should it be subsequently enhanced to support, for example, the TANF program's operation, then that part of the development and operation of the system attributable to TANF would need to be funded through a cost-allocation plan as only part of the database, maintenance of central hardware and software etc., would now be attributable to the Title IV-D program. The same holds true for future enhancement and operational costs incurred as part of running a system that supports multiple programs, including Title IV-D. A cost allocation plan would be needed to appropriately allocate costs in the shared, underlying technical infrastructure and new development activity.

Miscellaneous

Q 34. Do the Federal Acquisition Regulations (FARs) apply to the transfer of Federal funds to Tribes from existing national and state IV-D programs?

A 34. No. FARs address acquisition issues and are not applicable to the funding process for Tribal IV-D programs. Funding for Tribal IV-D programs is not transferred from

other existing national and state IV-D programs but is an independent source of Federal funding. FAR 31.2 contains cost principles that would apply to for-profit contractors under IV-D funded programs.

If a state allows a Tribal IV-D program to purchase items, under a contract with the Federal government, and the Federal government maintains ownership of the items, then FAR would apply.

Q 35. Will Tribal IV-D programs have Federal Information Processing Standard (FIPS) codes?

A 35. Yes. FIPS codes are assigned to distinct geographical areas of the United States by the United States Geographical Survey. OCSE has identified FIPS codes for over 560 Federally recognized Indian Tribe and Alaskan Villages and is currently working to provide this list to Tribal and state IV-D programs, as well as integrating Tribal FIPS codes with existing OCSE web-sites.