

ACF

Administration
for Children
and Families

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration for Children, Youth and Families

1. Log No: ACYF-IM-89-08

2. Issuance Date: 4/17/89

3. Originating Office: Children's Bureau

4. Key Words: The Use of Nunc Pro Tunc Orders to Verify Title IV-E Eligibility

INFORMATION MEMORANDUM

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

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

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

BACKGROUND: Title IV-E eligibility for foster care is based, in part, upon two judicial determinations:

1. that continuation in the home would be contrary to the welfare of the child; and
2. that reasonable efforts were made prior to placement to prevent or eliminate the need for removal of a child from his home. The reasonable efforts determination is an important protection for children living in troubled homes to assure that appropriate services are provided to prevent the separation of the family by the removal of the children and their placement in foster care.

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

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

Examination of recent nunc pro tunc orders submitted by States to satisfy the judicial determination requirements indicates that there is confusion about the acceptable interpretation of the term nunc pro tunc in the title IV-E program as well as some misuse of nunc pro tunc orders in relation to title IV-E eligibility. The confusion regarding the term may be due to the fact there are two legal interpretations of nunc pro tunc in ordinary use by the courts. In the broader meaning of the term, the court may allow for an action to be taken after the time it should have been taken, with a retroactive effect. The more narrow interpretation allows the court only to supply for the record documentation of an action that had actually occurred. The narrow interpretation, as set forth in [ACYF-IM-87-28](#), is the only acceptable interpretation to satisfy the judicial determination requirements in section 472(a)(1). We have also found that nunc pro tunc orders have been utilized in some States in a widespread, undifferentiated manner, primarily to maintain eligibility for Federal funds, rather than to focus on the assurance of a judicial determination at the time of removal as a protection to the child and his family.

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

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

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

INFORMATION: Nunc pro tunc orders will be admissible in determining the eligibility of a child for purposes of title IV-E financial reviews under certain circumstances. For each nunc pro

tunc order that is used to meet the statutory requirements in section 472(a)(l), contemporaneous court documentation must be submitted which will verify that the determinations were, in fact, made but were omitted from the record through inadvertency or mistake.

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

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

INQUIRIES TO :Regional Administrators, OHDS Regions I - X
Joseph Mottola
ACTING COMMISSIONER