



COMMENTS REGARDING STATEWIDE DATA INDICATORS AND NATIONAL STANDARDS FOR CHILD AND FAMILY SERVICES REVIEWS AND ADDITIONAL COMMENTS REGARDING THE CHILD AND FAMILY SERVICES REVIEW TECHNICAL BULLETIN #7

PROPOSED RULE PUBLISHED IN FEDERAL REGISTER ON APRIL 23, 2014, AND CHILD AND FAMILY SERVICES REVIEW TECHNICAL BULLETIN #7 PUBLISHED IN MARCH 2014

COMMENTS SUBMITTED BY THE NATIONAL INDIAN CHILD WELFARE ASSOCIATION AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS

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Introduction

On behalf of the National Indian Child Welfare Association (NICWA) and Association on American Indian Affairs (AAIA), we are pleased to have the opportunity to submit comments regarding these important changes in the process and content of the Child and Family Services Review (CFSR). While the Federal Register Notice of Proposed Rulemaking is only asking for comments on the data indicators and national standards proposed changes, we saw the technical bulletin changes to the CFSR process as critical to understanding American Indian and Alaska Native (AI/AN) tribes' and children's needs within the larger review system. Therefore, our testimony also provides comments on the changes to the CFSR process contained in Technical Bulletin #7.

NICWA is a national organization with over 30 years of experience in providing leadership in the development of effective public policy that supports AI/AN children and families. NICWA regularly provides technical assistance to tribal communities and state and federal agencies to build their child welfare program capacity and create more effective services for the AI/AN children and families they serve. NICWA also engages in professional research to fill data gaps related to the well-being of AI/AN children and families. Last year alone, NICWA received close to 2,000 calls from AI/AN tribes and family members throughout Indian Country with children in state child welfare systems who were seeking assistance. NICWA is located in Portland, Oregon, and works closely with tribal leadership, national and regional AI/AN organizations, and national child and family advocacy groups.

The Association on American Indian Affairs is a 90-year-old Indian advocacy organization located in Maryland and governed by an all-Native American board of directors. AAIA has been involved with Indian child welfare issues for decades and played a key role in the enactment of the Indian Child Welfare Act (ICWA) of 1978. Since 1978, AAIA has worked to ensure the proper implementation of ICWA and to improve the functioning of child welfare systems in general in regard to outcomes for AI/AN children. To this end, AAIA has not only been involved in legal proceedings, but have also worked with tribes to negotiate tribal-state partnerships to better serve Indian children and have provided training to state employees and officials about Indian child welfare.

Tribal Governmental Status and Basis for Consultation and Coordination with Federal Agencies

There are 566 federally recognized tribal nations (variously called tribes, nations, bands, pueblos, communities and Native villages) in the United States. Approximately 229 of these nations are located in Alaska; the rest are located in 33 other states.

The United States Constitution, under the Commerce Clause, recognizes that tribal nations are sovereign governments just like other countries outside the United States and individual states within the United

States. The Supreme Court, Congress, United States presidents, and hundreds of treaties have repeatedly reaffirmed that Indian nations retain their inherent powers of self-government. Treaties and laws have created a fundamental contract between Indian nations and the United States: tribal nations ceded millions of acres of land that made the United States what it is today, and in return received, among other guarantees, the right of continued self-government on their own lands and the right to resources to provide for the well-being of their citizens. The federal government not only has a government-to-government relationship with tribal nations, but it also has a trust relationship to protect tribal self-governance, tribal lands, assets, resources, treaty rights, and to carry out the federal directions of court decisions and laws. This is a moral obligation of the highest regard and, in this context it requires that federal agencies, which are obligated to carry out this responsibility, take every precaution to ensure that the needs of tribal nation children and families are carefully considered and addressed in any proposed policy or program changes.

To carry out this federal trust responsibility federal agencies must carefully and effectively consult with tribal nations on any proposed policy or program changes. All of the recent presidents within the last three decades have instituted federal policies on relations between the federal government and tribal nations. These policies have addressed the general principles of how federal agencies will interact, consult, and consider the needs of tribal citizens in proposed policy and program changes. President Obama issued an Executive Order (E.O. 13175) on November 5, 2009, that details the policies and procedures with respect to consultation and coordination with tribes. Below is Section 3 of that Executive Order.

Sec. 3. Policymaking Criteria.

In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

- a. Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.
- b. With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.
- c. When undertaking to formulate and implement policies that have tribal implications, agencies shall:
 1. encourage Indian tribes to develop their own policies to achieve program objectives;
 2. where possible, defer to Indian tribes to establish standards; and
 3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

The CFSR addresses conformity to established federal safety and permanency outcomes, which apply to all children and families within a particular state child welfare system, including AI/AN children and families. They also impact the tribal government's ability to exercise their sovereignty and protect their most vulnerable citizens' well-being. Approximately two-thirds of AI/AN children and families who are involved in a child welfare system are under the care of a state child welfare system. These children and families may be represented in rural and urban areas of a state, and many times their tribal government is helping manage the case in collaboration with their state partners, participate in reviews, and intervene in state court proceedings as a legal party pursuant to ICWA. In any given child welfare case involving an AI/AN child there can be multiple jurisdictions, service providers, and legal requirements involved (federal Indian law and more general federal child welfare statutes). Congress has established a legal framework under ICWA, and through other federal Indian laws, that mandates certain procedural efforts to protect the basic rights of tribal children, protect their connection to their tribal culture and tribal affiliation, and

protect against bias and trauma from practices that have historically, and even today, threaten the well-being of AI/AN children and their families. These circumstances and the accompanying federal framework form the foundation from which we develop our comments and recommendations.

While our organizations view our role as child advocates, we also advocate for policies and procedures that lend support to tribal self-governance, encourage standards that support the use of tribal cultural practices, promote close collaboration between tribes and their state and federal partners, reduce and eliminate racial inequities that tribal children and families experience, promote racial healing between tribal communities and other entities, and protect the rights of AI/AN children, families, and tribes as recognized under federal law. Increasing understanding of AI/AN children's and families' needs comes when there is effective consultation and coordination with tribal governments, which are the most well-suited to understand and develop solutions to the challenges their children's and families' experiences.

Statewide Data Indicators and National Standards for CFSR's Comments

Consultation and coordination with tribal governments—The Proposed Rule discusses the purpose of the CFSR and the process the Children's Bureau has used to develop the proposed changes. The purposes include 1) ensure conformity with federal child welfare requirements; 2) determine what is actually happening to children and families as they are engaged in child welfare services, and 3) assist states to enhance their capacity to help children and families achieve positive outcomes. It goes on to say that the Children's Bureau conducts the reviews in partnership with state child welfare agency staff and other stakeholders, and has made ongoing improvements to best meet state and federal needs.

What is missing from this description and in the practice of the Children's Bureau has been the engagement of tribal governments regarding the impact of state child welfare services on their children and families, and more specifically, the utility of the CFSR in measuring safety and permanency for AI/AN children. As we read the Proposed Rule we noticed that tribes are not mentioned. This causes us to ask the following questions: How can the Children's Bureau be sure that states are working with tribes related to the preparation, implementation, and performance improvement plans under the CFSR? How can the Children's Bureau ensure the purposes of the CFSR are carried out in ways that provide specific information on the experiences of AI/AN children and families? How can the Children's Bureau ensure meaningful participation by tribes and adherence to standards of safety and permanency in the CFSR without tribal consultation and coordination?

Former Commissioner Samuels in May 2013 told the Department of Health and Human Services (DHHS) Secretary's Tribal Advisory Committee that he was committed to making sure that tribal governments were involved on the front end of any changes that would be proposed for the CFSR. Our understanding is that there has never been any meaningful consultation with tribes or active involvement in shaping this Proposed Rule and the changes to the CFSR process. This is the primary concern we have and we feel very strongly that this process is not in compliance with the President's Executive Order on tribal consultation and coordination, and it is also out of compliance with the DHHS and Administration for Children and Families (ACF) tribal consultation policies. It also falls dramatically short of the trust responsibility that all federal agencies have for AI/AN people.

Recommendation: Immediately establish a meaningful consultation process for tribal governments according to the dictates of the President's Executive Order on the CFSR process and proposed data indicator and national changes. This consultation should allow tribes time to learn more about the CFSR in general and opportunities to provide input on the proposed changes. The consultation should be more than a conference call or one national meeting, but instead it should provide all tribal governments with the opportunity to attend a meeting within their state or region, in addition to the availability of conference calls.

Proposed Safety Performance Area 2: Re-Report of Maltreatment—While we understand the desire to develop better indicators of a child's ability to be protected from maltreatment we have concerns about how this proposed change would affect AI/AN children in state care. The Children's Bureau believes the proposed change will help more accurately assess a state agency's actions to prevent future reports.

State and national data, and our experience in working with state and tribal child welfare agencies, reveal that as you progress through key child welfare decision making points after a report of abuse and neglect (whether to investigate, substantiate abuse or neglect, or remove a child from their home), state child welfare agencies increasingly decide to intervene more intensively with AI/AN families. This results in AI/AN children being increasingly disproportionately represented at each level of key decision making.

This cannot be simply explained as AI/AN families have more serious problems or are more likely to require more intensive interventions. Bias in the decision-making process has resulted in a very high disproportionate rate of AI/AN children in state foster care systems in many of the states—an end result which can be clearly seen. Given this information, we are concerned that the proposed change to collect data on screened-in cases will not address the root problem regarding the safety of AI/AN children and what states are doing to reduce the threats of harm in the home or inappropriate interventions by the child welfare system. The results of this change could also further reinforce existing stereotypes of AI/AN families in state child welfare systems.

Having said that, we are interested in how the CFSSR could be used as an opportunity to address issues of bias and provide incentives to address this system-wide issue. We would also note that while increasing numbers of states are moving to differential response, there has not been a substantial amount of data or information collected on how that is being used with AI/AN families and the results from implementation. Oregon is currently working with tribes in their state on the development of their differential response system, so this may be a resource to begin gathering more information on the subject.

Recommendation: Consult with tribal governments and experts in Indian child welfare on how to use the CFSSR safety measures to address issues of bias in child welfare decision-making processes and how differential response is impacting safety issues for AI/AN children.

Proposed Permanency Performance Area 1: Permanency in 12 Months for Children Entering Foster Care—We agree that moving children into permanent placements in the shortest amount of time possible is a good practice and worth reinforcing. For AI/AN children, the continuum of permanent appropriate placements may be broader than for other children. ICWA specifically identifies placement preferences for AI/AN children (relatives, members of child's tribe, and other AI/AN families). Customary adoption and customary permanent placements in family-based homes—generally used for older children with serious special needs who cannot be returned home and don't have a viable relative, guardian, or adoptive home available—need to be included as appropriate permanent placements as well. This is consistent with ACF regulations that discuss Another Permanent Living Arrangement and cite other permanent placements that tribes identify (45 C.F.R. 1356.21(h)(3)(iii)). Furthermore, we are familiar with what happens when state agencies don't work diligently to secure placements required under ICWA: AI/AN children are placed in placements that fall outside of these requirements—many times with non-Indian families that want to adopt these children.

We would also note that for the vast majority of families within the first 12 months after placement, the focus should be on reunification even with concurrent planning occurring. Child welfare families have needs of more intensive in-home and treatment services to make reunification possible, and 12 months can be a rather short period of time for many families dealing with serious trauma and substance abuse histories, which can often be the case for AI/AN families in the child welfare system.

The trend for families that want to adopt coming to public child welfare agencies and getting licensed as foster parents is increasing because of downturns in the number of children overseas being available for adoption. Many of these families begin pushing for an adoptive placement within 6-12 months after placement and resist further reunification efforts by the state agency with the birth parents. We have a concern that equalizing the efforts to place in any permanent home within 12 months of placement may inadvertently incentivize permanent placements outside of ICWA's requirements for AI/AN children and further erode engagement in more intensive reunification efforts for this population.

Recommendation: In the first 12 months after placement, measure efforts to reunify with the birth family as a permanency measure unless aggravated circumstances exist. Where aggravated circumstances do not exist, measure other forms of permanent placement in six-month increments up to 24 months. Include customary adoption and customary permanent placement in types of permanent placements that are measured.

Proposed Permanency Performance Area 4: Placement Stability—Stability in foster care is key in helping reduce the risk for further trauma for children. We agree that this should be measured. Our concern with the proposed change is that, many times, state agencies are not placing AI/AN children in required ICWA placement preference homes and are having to move them later to these homes. We are also concerned that this proposed change could inadvertently reinforce not moving AI/AN children to an ICWA placement preference home at a later date, compromising ICWA compliance and the ability of the child to have a home that provides the cultural and tribal affiliation that is important to their healing and positive development.

Recommendation: Measure states' efforts to place AI/AN children in an ICWA placement preference home at the first placement. Don't count the movement of an AI/AN child to an ICWA placement preference home against state agencies efforts to create placement stability.

National Standards—As we have stated earlier, determining what the appropriate standard for measuring AI/AN children's safety and permanency is not satisfied by using standards that were developed outside of consultation with tribal governments. While we can agree on certain safety and permanency concepts that can apply to all children in state child welfare systems, the details of exactly what that should look like for AI/AN children and how that should be implemented would be different than those used for other populations. In previous comments we have provided on the CFSR process, we have also indicated that Congress intended ICWA to be the hallmark of good practice with AI/AN children and families.

While we can disagree on who has comprehensive oversight function authority for ICWA compliance, it is clear that several of the requirements do speak to safety and permanency outcomes not just procedures. Our recommendation has always been to convene tribal governments and consult with them on how ICWA requirements can inform measurements of child welfare outcomes for AI/AN children. However, tribes have never been invited to have that conversation with the Children's Bureau. We continue to see proposals such as these to develop or refine national standards that don't include ICWA and are based upon research and data that is not reflective of AI/AN children and family experiences in state child welfare systems. We would also note that the American Public Human Services Association in 2011 provided several recommendations, consistent with ours, on improvements to the CFSR system regarding AI/AN children and families (see States' Child and Family Services Review and Program Improvement Plan Redesign

<http://www.aphsa.org/content/APHSA/en/resources/search.html?q=States%E2%80%99+Child+and+Family+Services+Review+%28CFSR%29+and+Program+Improvement+Plan+%28PIP%29+Redesign+>).

Recommendation: Convene tribal governments and experts in Indian child welfare to discuss the applicability of current national standards being used, how they can be refined, and what additions can be made to more accurately reflect and measure the experience of AI/AN children and families in state child welfare systems.

Comments on the Child and Family Services Review Technical Bulletin #7

Below are our comments on the technical bulletin that describes revisions to the CFSR process. These comments focus on issues related to the participation of AI/AN tribes in the CFSR process and ensure that data and results are appropriately considered during the reviews.

- **Section I. Overview:** We understand the desire to move away from a federal review that takes a snapshot in time, but we have concerns that a state self-assessment and monitoring process may not address unique issues for AI/AN children adequately.

- **Section II. Revised Features of the Review, Subsection A. Statewide Assessment and Integration with the Child and Family Services Plan:** In the new statewide assessment process, states will be able to refer to their Child and Family Services Plan and Annual Progress and Services Report, and update information only as needed. There will also be a greater reliance on particular assessment questions and less on policy and contextual information. How will this affect the Title IV-B plan requirement for states to consult with tribes on the work they are doing to implement ICWA?
- **Section II. Revised Features of the Review, Subsection B. Onsite Reviews—Stakeholder Interviews:** The Children’s Bureau is varying the extent and scope of stakeholder interviews conducted during the onsite review based upon the level to which the state demonstrates it is functioning on each of the systemic factors. This can result in certain stakeholder interviews not being required. We are aware of different situations where states that have strained or limited relationships with their tribal nation partners have been considered to have met expectations for good tribal-state relationships and effective coordination through the CFSR process. This occurs because there is insufficient information provided by the state or the interview and participation process for tribes is flawed. Tribes are not just stakeholders, they are governmental partners, and the federal government has a responsibility for mandating states demonstrate their commitment by ensuring that tribes have opportunities to actively participate in the CFSR process at all stages and that tribes are the primary decision makers in determining whether additional consultation is required. Disproportionality and disparate treatment cannot be addressed effectively through a selective or optional process.
- **Section II. Revised Features of the Review, Subsection C. Onsite Reviews—Case Reviews:** States meeting Children’s Bureau criteria may conduct their own case reviews using a revised federal CFSR onsite review instrument. We are concerned that the criteria proposed (Appendix A) is not specific enough to accurately determine how states are serving AI/AN children and families. While Criterion 1 requires a cross-section of state child welfare practice and includes significant tribal populations that are representative of the state demographics, we have seen some states pick areas that do not reflect the predominant pattern of service or outcomes for AI/AN children in their state. We would recommend that states be required to include tribal representatives in the selection of the sample and reviews. In the past, tribal representatives have not always been included, or were asked at the last minute, preventing them from participating. In addition, some states were encouraged to use tribal people from other states to participate in the reviews, including people that were employed by a state child welfare agency. Any determination about a state being able to use an alternative process should be done in consultation with tribal governments within the state and agreed to by the participating tribal nations.
- **Section II. Revised Features of the Review, Subsection D. Statewide Data Indicators and National Standards:** Children’s Bureau will provide a refined set of CFSR statewide data indicators in addition to the Adoption and Foster Care Automated Reporting System and National Child Abuse and Neglect Data System ones traditionally used. The statewide data indicators will be associated with the same federal safety and permanency outcomes, but will be different in some aspects. We recommend that ICWA outcome measures be used, especially for the permanency outcomes—and provide states and tribes that have state policy or data collection efforts related to AI/AN children in their state the option to use some of their statewide indicators.

For more information on the comments and recommendations included in this document, please contact either NICWA Government Affairs and Advocacy Director David Simmons at desimmons@nicwa.org or AAIA Executive Director Jack Trope at jt.aaia@indian-affairs.org.