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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476

* 11404 Moorage Way * La Conner, Washington 98257 *

June 5, 2018

**Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024**

Via electronic correspondence at: CBComments@acf.hhs.gov

**Re: RIN: 0970-AC72 Adoption and Foster Care Analysis and Reporting System;
Advance Notice of Proposed Rulemaking (3/15/2018)**

Dear Sir or Madam,

The Swinomish Indian Tribal Community submits these comments on the Advanced Notice of Proposed Rulemaking (ANPRM) regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016. The Swinomish Indian Tribal Community opposes any diminishment or termination of this important ICWA data point collection.

Compliance with the Indian Child Welfare Act is vital to the protection of the children of the Swinomish Indian Tribal Community, as we, like many other tribes, must work closely with state social services and court systems to ensure the best outcome for tribal children who are in the state foster care system. As has been noted in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527, many states, tribes and child welfare organizations recognize that the Indian Child Welfare Act is the “gold standard” of child welfare practices, emphasizing placement with family and within the tribal community wherever possible, and requiring active efforts to keep the family together.

Despite the fact that ICWA has been law for 40 years, there has been no federal oversight and thus, little in-depth data exists on actual child outcomes in ICWA cases. The Final Rule was celebrated in the January 2017 edition of the ABA’s Child Law Practice Journal (Vol. 36, No. 1, 22, 23) as providing “the first opportunity to really examine case outcomes on a national level....The changes to AFCARS are huge for the field and will be critical to move

understanding of ICWA cases forward in a meaningful way.” Such data is important to furthering the cooperation between states and tribes to help ensure the best outcome for American Indian/Native Alaska children – and because ICWA is the gold standard, it may assist in developing better outcomes for all children.

Collecting this data falls squarely within the statutory mission of the Administration for Children and Families (ACF)’s data collection responsibilities, as Section 479(3) of the Social Security Act requires ACF to, among other things, provide reliable national data on “the status of the foster care population (including the number of children in foster care, length of placement, type of placement, availability for adoption, and goals for ending or continuing foster care),” and “the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided.”

The Indian Child Welfare Act reaches into every aspect of a dependency action or an adoption to which it applies: active efforts before a case is filed to keep a family together, placement priorities, and burdens of proof at both the placement into foster care and termination of parental rights levels. Notice to and the intervention of tribes helps ensure that tribal resources can be added to possible services for families. It is, therefore, impossible to have a comprehensive picture of American Indian/Native Alaskan children in foster care without including ICWA data points.

ACF has already made an extensive analysis of the benefits of collecting the additional data points versus the burdens. A Notice of proposed updates to AFCARS to include ICWA data points was published on April 2, 2015, inviting comments. Additional notice occurred on April 7, 2016. The Final Rule was published on December 14, 2016 and thoroughly responded to comments on both the benefits and burdens of including the ICWA data elements. Given the multiple opportunities to comment throughout this time period, any additional rulemaking or comment collection is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and were provided ample time to comment on this vital and important rule change. In fact, this Tribe provided comments to ACF at that time, as reflected in the attached copy.

States also had ample opportunity to participate in the rulemaking. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which ACF considered and addressed fully. 81 Fed. Reg. at 90566.

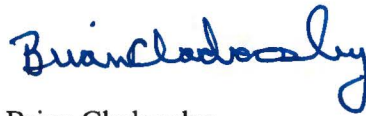
Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware of several trainings that Washington State has initiated to assist state and tribal programs with Title IV-E funding to implement the Final Rule. At this stage, any modification of the data collection requirements would be a waste of finite state and tribal child welfare resources, which itself is an additional burden.

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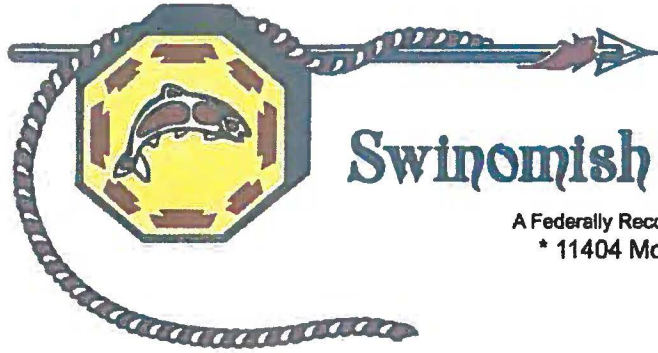
Conclusion

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, that the benefit of this data collection outweighs any burden. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies which are working to implement data collection. In the interest of protecting our Swinomish Indian Tribal Community children and families, we respectfully submit these comments.

Sincerely,



M. Brian Cladoosby
Chairman, Swinomish Indian Senate



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* 11404 Moorage Way * La Conner, Washington 98257 *

April 9, 2015

Ms. Kathleen McHugh, Director
Division of Policy, Children's Bureau
Administration on Children, Youth and Families
Administration for Children and Families
1250 Maryland Avenue, SW, 8th Floor
Washington, DC 20024

Re: Comments on Notice of Public Rulemaking (NPRM), proposed changes to the Adoption and Foster Care Automated Reporting System (AFCARS), published in the *Federal Register* on February 9, 2015, pages 7132–7221

Dear Ms. McHugh:

The Swinomish Indian Tribal Community, a federally recognized Tribe in Washington state, is pleased to provide comments on the Notice of Public Rulemaking (NPRM) regarding proposed changes to the Adoption and Foster Care Automated Reporting System (AFCARS) published in the *Federal Register* on February 9, 2015, pages 7132–7221, regarding the need to include new data elements related to children who are in out-of-home placements under state custody and subject to the requirements of the Indian Child Welfare Act (ICWA).

Currently, there are few data collection efforts at the state and federal level that can provide meaningful data on the status of American Indian and Alaska Native children who are under the custody of state child welfare authorities. Despite the protections of the ICWA, this population is overrepresented within state foster care systems nationally. However, without more detailed, case-level data at the federal level, it is impossible to know how many American Indian and Alaska Native children are receiving ICWA protections.

The proposed regulations state that ICWA information was omitted because of the Administration for Children and Families' belief that it does not have specific enforcement authority over ICWA. However, section 479 of the Social Security Act requires that the Administration collect information regarding the number and characteristics of children in the

foster care and adoption systems. Whether a child is a member of a federally recognized tribe is a characteristic which dramatically affects how that child is treated in the foster care and adoption systems. This characteristic is going to affect placement preferences, efforts to reunite families, burdens of proof, transfer options to Tribal Court and various additional resources provided by Tribal communities. The proposed regulations state they include “[r]evised data elements that enhance our understanding of permanency planning for children in foster care, including new data elements that identify why a child’s permanency plan changes, the child’s concurrent permanency plans and the child’s transition plan,” among many other elements. Understanding the permanency plan for a child requires knowledge of whether ICWA applies.

Further, the Administration for Children and Families is incorrect in stating that ICWA is outside its purview. Section 422(b)(9) of the Social Security Act requires that Title IV-B state plans “contain a description, developed after consultation with tribal organizations...in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.” The Administration has specific authority and oversight over the Title IV-B programs.

Specifically, we recommend adding the following data elements:

Identification of American Indian/Alaska Native children

- Is the child American Indian or Alaska Native (allow for self-identification and those who are members or eligible for membership in a federally recognized tribe)?
- Does ICWA apply to this child (must be a member or eligible for membership of a federally recognized tribe)?
- What is the child’s tribal membership or eligibility (name all tribes)?
- Date of verification of ICWA status

Tribal notification

- Date of notice to tribes, parents, or Indian custodian of report of child abuse or neglect, or other state intervention?
- Who was notified (name all tribes and federal agency, if applicable)?

Tribal intervention in a state case

- Did the tribe intervene? On what date?
- Was the case transferred to tribal court?
- Date of transfer to tribal court jurisdiction

Caretaker Family Structure (home from which child was removed)

- Add Indian custodian (currently AFCARS only asks about marital status, but this is important to understanding ICWA applicability)

Relationship of the foster parents and other care providers to the child

- Add member of child's tribe (reflects the fact that shared tribal membership can be the basis for a relationship between the foster parents and child that exceeds that of other relationships)
- Add member of an Indian Tribe other than that of child's Tribe (reflects the fact that shared tribal membership even with a different tribe can be the basis for a relationship between the foster parents and child that exceeds other relationships)

Decision to place out-of-home

- Did the court find that active efforts had been provided to prevent removal?
- Did court find by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child?
- What services are being or were provided to prevent removal?
- Was placement out of the home approved by the tribe?
- Was qualified expert witness testimony provided at the court hearing? Who provided the testimony (tribal witness, state employee witness, AI/AN consultant/expert, non-Indian consultant/expert)?

Licensing of out-of-home placements

- Was the child's living arrangement licensed or approved by the state? By a tribe?
- For children living in an institution, was the institution licensed or approved by a tribe?

Foster placement preference (placement type)

- Child's extended family
- Foster home approved, licensed, or specified by the child's tribe
- AI/AN foster home licensed or approved by an authorized non-Indian licensing authority
- Institutional placement approved by a tribe or operated by an Indian organization
- Other foster home
- Other institutional placement

Termination of parental rights—involuntary

- Did the court find that active efforts were provided to reunify and avoid termination?
- Did the court find beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional and physical damage to the child?
- Was qualified expert witness testimony provided at the court hearing? Who provided the testimony (tribal witness, state employee witness, AI/AN consultant/expert, non-Indian consultant/expert)?

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Consent to voluntary foster care placement or termination of parental rights (TPR)

- Was the consent to foster care placement or TPR done in writing, recorded in the presence of a judge, and with a certification that the parent fully understood the meaning of the consent?

Consent to voluntary adoptive placement

- Was the consent to adoptive placement done in writing, recorded in the presence of a judge, and with a certification that the parent fully understood the meaning of the consent?
- Was consent to adoptive placement given 10 days after birth of the child?

Adoption placement preference (placement type)

- Child's extended family
- Members of child's tribe
- Other AI/AN families
- Other

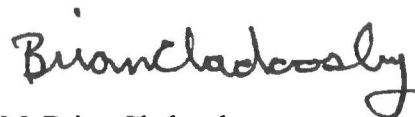
Title IV-E agency involvement (adoption)

- Was a tribal child welfare agency involved in placement?

The Swinomish Indian Tribal Community is hopeful that the Administration for Children and Families will reconsider its previous position on its authority to include new ICWA data elements in AFCARS. AFCARS cannot adequately provide information regarding the characteristics of all foster children if it does not include information about the political status of American Indian and Alaska Native children in the system and how that political status affects their cases.

If you have any questions, please don't hesitate to contact Ann Reading (reading.ann@gmail.com) and thank you in advance for consideration of our comments and recommendations.

Sincerely,



M. Brian Cladoosby
Chair, Swinomish Indian Senate