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Dt: April 7, 2015

Re: Comments on Proposed AFCARS Regulations

Introduction

We are a group of law professors and practitioners with a longstanding academic and practical interest in the Indian Child Welfare Act (ICWA). We have experience in litigating ICWA cases in state and tribal court. This group also has particular expertise in the nationwide application of ICWA, and the data collection, or lack thereof, about American Indian / Alaska Native children in the child welfare system.

On February 9, 2015, the Administration for Children and Families (ACF), announced it would be amending the Adoption and Foster Care Analysis Reporting System (AFCARS) regulations. The proposed regulations are an extension of an earlier proposed rule, and address the requirements for State Title IV-E agencies to collect and report data to ACF on children who are in out-of-home care and in subsidized adoption of guardianship arrangements with the State. The proposed regulations also address AFCARS penalty requirements, under the Adoption Promotion Act of 2003, which will be applied to the Title IV-E agencies for failure to comply with AFCARS collecting and reporting data requirements.

On April 2, 2015, the Department of Health and Human Services (HHS), announced in the Federal Register that a supplement notice of proposed rulemaking (SNPRM) would be published and propose that Title IV-E Agencies collect and report additional ICWA related data elements in AFCARS. We would like to thank HHS for including this proposal.

The Indian Child Welfare Act (ICWA) was adopted in 1978 to address the practice of State entities removing a large number of Native American children from their homes without an understanding of traditional Native American child-rearing practices. Throughout the 1960s and 1970s, American Indian / Alaskan Native children were six times more likely to be placed in foster care than other children. *See*, H.R. Rep. No. 95-1386 (1978), at 9. Surveys conducted at the time found that in States with large Native American populations, 25 to 35 percent of all Native American children were removed from their homes and placed in foster care or adoptive homes at one time during their lives. ID. In Minnesota, a survey found that one of every four Native American children under the age of one was adopted, usually by a non-Native American family. ID. In Washington, the number of Native American children adopted was nineteen times greater than the rate for other children. ID. As of 2003, in both Alaska and South Dakota, out of the all the children placed in foster care, 62 percent were American Indian / Alaskan Native. *See*, GAO-05-290 Indian Child Welfare Act.

Gathering that original data to demonstrate the need for ICWA's passage was painstaking and difficult work, detailed at length in MARGARET JABOBS, A GENERATION REMOVED (2014):

> The compilation of this data proved to be an 'ordeal,' as [Bertram] Hirsch put it in 1974. 'Those statistics are extremely difficult to get,' he explained to a number of Indian activists. 'After much badgering, they supplied me with some statistics.' Hirsch first requested that the BIA provide data about the numbers of fostered and adopted Indian children for the last five to ten years, preferably broken down by state and tribe. The BIA had not compiled this information . . . Hirsch next contacted state and private agencies, which all used different approaches to tracking Indian children. Some state agencies claimed they did not keep statistics on Indian children.

ID. at 103.

The lack of statistics meant each tribe, in fact, each family, thought it was the only one facing a child removal crisis, when it was actually a nation-wide phenomenon driven by the state practices. ID.

As stated by Congress, "the States, [in] exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." See, 25 U.S.C. § 1901(5) (2006).

Congress has identified ICWA's purpose as *"it is the policy of this Nation to protect the best interests of Indian children* and to promote the stability and security of Indian tribes and families...." 25 U.S.C. § 1902 (2006).

Congress also identified the "Federal responsibility to Indian people" in passing ICWA, 25 U.S.C. § 1901 (2006), also called the trust responsibility. Stemming from treaties and the government-to-government relationship between tribes and the federal government, this responsibility applies across the board to all federal agencies. While it is most often used to limit agency action, it can also be used to "uphold agency action setting a higher standard for agency dealings with Indian tribes or resources." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 415 (2012 ed).

The Authority of AFCARS to Require ICWA Data Reporting

The Social Security Act (SSA) governs the requirements for the AFCARS system under Section 479, and states first and foremost that the study "shall… (i) assess (on a continuing basis) the incidence, characteristics, and status of adoption and foster care in the United States, and (ii) develop appropriate national policies with respect to adoption and foster care." 42 U.S.C. 479(a)(1). In addition, HHS provides direct Title IV-E funding to Tribes and Tribal child and family service programs under the Fostering Connections to Success and Increasing Adoption Act of 2008.

As stated by HHS in the Federal Register announcement, the mandate of the SSA is general and broad. Specifically, SSA requires AFCARS to collect "comprehensive national information" regarding (1) the demographics of adoptive and foster children, and biological, foster and adoptive parents, (2) status of the foster care population including length and type of placement, availability for adoption, and the permanency goal for the child, (3) characteristics of foster and adoptive children, and (4) the nature of the assistance provided by Federal, state and local governments to these children. 42 U.S.C. 479(c)(3)(A)-(D).

The statutory mandate under SSA has been read by ACF to include data that can help expand demographics, status, and characteristics of the children in foster care and adoption populations, along with the assistance provided to them. Specifically, ACF has incorporated the statute into AFCARS by requiring data collection of a broad range of data statistics, including those not specifically enumerated in the SSA.

Under the proposed AFCARS regulations, HHS has recommended collecting additional data regarding ICWA-related data in AFCARS. HHS has already required Title IV-B State plans for ICWA through a Program Instruction (PI) document [ACYF-CB-PI-14-03 (2014)]. In the 2010-1014 PI, HHS required states the include in their Child and Family Services Plans (CFSP) "a description, developed in consultation with Indian Tribes in the State, of the specific measures taken by the State to comply with the [ICWA]." HHS went even further, and required "States without federally-recognized tribes within their borders… [to] still consult with tribal representatives." ACYF-CB-PI-14-03 (2014).

In accordance with ICWA, HHS required States to not only have consultation with Tribes, but also list in their CFSP these components: (1) "Notification of Indian parents and tribes of state proceedings involving Indian children and their right to intervene; (2) Placement preferences of Indian children in foster care, pre-adoptive, and adoptive homes; (3) Active efforts to prevent the breakup of the Indian family when parties seek to place a child in foster care or for adoption; and (4) Tribal right to intervene in state proceedings, or transfer proceedings to the jurisdiction of the tribe." ACYF-CB-PI-14-03 (2014).

In addition, under these Title IV-B requirements, HHS also recommends that States should also "[i]nclude information on any changes to laws, policies, or procedures, and/or a description of any trainings implemented to increase compliance with ICWA that occurred during the last year and during the last five years." ACYF-CB-PI-14-03 (2014).

For the 2015-2019 CFSP, HHS has not only required States to follow these same requirements, but also requires States to "describe the process used to gather input from tribes for the development of the 2015-2019 CFSP" as well as "information on the outcomes or results of these consultations." States must also describe its "plan for ongoing coordination and collaboration with tribes in the implementation and assessment of the CFSP and monitoring and improvement of the state's compliance with the ICWA," along with "any barriers to this coordination and the state's plans to address these barriers." In addition, States must also "[p]rovide a description… as to who is responsible for providing the child welfare services and protections for tribal children… whether they are under state or tribal jurisdiction."

Furthermore, States must also identify sources of data to assess the state's ongoing compliance with ICWA, including input obtained through tribal consultation, and assess the state's level of compliance with the ICWA. Finally, a State must also describe the "specific steps the state will take during the next five years to improve or maintain compliance with ICWA based on the discussion with tribes."

There is no statistical data required on Indian children from State or Tribal child and family care agencies. There is also no data on State compliance with ICWA. Under § 429(c), the ACF already possess and exercises the requisite authority to collect ICWA data. 42 U.S.C. 479(c)(3)(A)-(D).

The AFCARS regulations should follow the same requirements for Title IV-B Agencies in ICWA data reporting, as seen in the in the PIs released by HHS. [ACYF-CB-PI-14-03 (2014)]. HHS has defined "Title IV-E Agency" "as the State or Tribal agency administering or supervising the administration of the title IV-B and title IV-E plans." 77 F.R. 896. Under this definition, Title IV-B Agencies may also be Title IV-E Agencies. Due to this, ACF should also include similar ICWA data requirements in AFCARS.

In addition, the SSA also requires AFCARS to "provide comprehensive national information" regarding "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." 42 U.S.C. 479(c)(3)(d). Not only does this encompass Title IV-B Agencies, but also Title IV-E Agencies, which HHS provides direct Title IV-E funding to Tribes and Tribal child and family service programs under the Fostering Connections to Success and Increasing

Adoption Act of 2008. The American Indian / Alaska Native children in these Title IV-B or Title IV-E Agencies are ICWA children, and that data should also be collected in order to "ensure that the [AFCARS] system functions reliably throughout the United States." 42 U.S.C. 479(c)(4).

Under this legal and policy background, and as recommend by HHS, we recommend ACF add the following data elements and questions to the AFCARS in order to comply with ICWA.

Proposed AFCARS Regulations:

Section 1355.43(b)(3)(i): *Child's race.* In paragraph (b)(3), the ACF proposes to require the Title IV-E agency to report information on the race of the child. Consistent with the Office of Management and Budgets (OMB) standards, self-reporting or self-identification is the preferred method for collecting data on race and ethnicity. This means that the Title IV-E agency is to allow the child, if age appropriate, or the child's parent(s) or legal guardian(s) to determine the child's race. In the most recent Supplemental Notice of Proposed Rulemaking (SNPRM) the ACF now recommends that "[a]n American Indian or Alaska Native child is identified by "origins in any of the original peoples of North or South America (including Central America), and maintains Tribal affiliation or community attachment.

> **We recommend ACF also ask if the child is a member or eligible for membership in a state or federally-recognized Indian Tribe? If yes, enter the name of the Tribe.**

Given the broad nature of the ACF definition to include Native peoples of South and Central America, in order to track ICWA compliance, ACF needs to also ask for tribal affiliation to determine whether the child falls under the scope of ICWA. Second, by asking which Tribe the child may belong too, it will allow statistical data to develop on an individual Tribal basis.

Section 1355.44(c)(3)(i): *Termination of Parental Rights Petition.* The ACF proposes to require the "title IV-E agency to report each date the title IV-E agency filed a petition to terminate parental rights (TPR) regarding the child's biological, legal, and/or putative parent(s). If the parent is deceased, ACF proposes that the title IV-E agency indicate 'deceased.'"

> **We recommend ACF also include whether the child is a member of or eligible for membership in a state or federally-recognized Indian Tribe, and if so, in the termination proceedings, did the Tribe receive notice (Y/N); did the Tribe intervene (Y/N); did the Tribe seek to transfer the case (Yes – Case was transferred; Yes – But the case was**

not transferred; No.) If the Tribe attempted to transfer the case, but was denied, enter the reason why.

By asking these additional questions, AFCARS will be collecting information on State ICWA compliance. These questions cover requirements from the ICWA, including §1911 covering an Indian Tribe's jurisdiction over Indian child custody proceedings, and §1912 regarding pending court proceedings.

Section 1355.43(c)(4): *Date of judicial finding of abuse or neglect*. In paragraph (c)(4) ACF proposes that the Title IV–E agency collect and report to AFCARS the date of the first judicial finding that the child has been subject to child abuse or neglect, if applicable. If there has been no judicial finding of child abuse or neglect by the end of the report period, the Title IV–E agency must report "no date." Possible reasons no date would be available include if there is a voluntary relinquishment, a voluntary placement agreement (VPA) between the Title IV–E agency and the child or his or her parent(s) or legal guardian(s) or there is no abuse or neglect disposition by the end of the report period.

We recommend ACF also include whether the child is a member of or eligible for membership in a state or federally-recognized Indian Tribe, and if so, in the judicial proceedings, did the Tribe receive notice (Y/N); did the Tribe intervene (Y/N); did the Tribe seek to transfer the case (Yes – Case was transferred; Yes – But the case was not transferred; No.) If the Tribe attempted to transfer the case, but was denied, enter the reason why.

By asking these additional questions, AFCARS will be collecting information on State ICWA compliance, like in the Title IV-B requirements. These questions cover requirements from the ICWA, including §1911 covering an Indian Tribe's jurisdiction over Indian child custody proceedings, and §1912 regarding pending court proceedings.

Section 1355.43(d)(3): *Environment at Removal*. The ACF is proposing to require "the title IV-E agency to report whether the child was living in a household with his or her parent(s), relative(s) or legal guardian(s), or if the child was living in a justice facility or a medical/mental health facility or in another situation not so described at the time of each removal."

We recommend ACF also include into this list "other member of the Indian child's tribe," "a member of the child's extended family," or "other Indian families."

Although parent(s), relative(s) or legal guardian(s) may also fall under this list, by adding this language AFCARS will take into consideration the traditional and

historical practice of extended families, who are not always related to the child, within Native American communities. This language is also consistent with the placement preferences of ICWA. 25 U.S.C. § 1915.

Section 1355.43(d)(5)(xxvi): *Voluntary Relinquishment for Adoption*. The ACF is not proposing any changes to this requirement. The ACF proposes "that the title IV-E agency continue to collect and report whether a voluntary relinquishment was a circumstance associated with the child's removal for each removal reported." "Voluntary relinquishment" is defined as "the child's parent(s) assigning, in writing, physical and legal custody of the child to the title IV-E agency, for the purpose of having the child adopted."

> **We recommend the ACF also require identification of whether the child is a member of or eligible for membership in a state or federally-recognized Indian Tribe. If so, was the parent's consent recorded before a judge? (Y/N)**

This requirement is also a legal requirement under the ICWA § 1913(a) Parental Rights and Voluntary Termination, which states:

> [A]ny parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such *consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.* The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. *Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.*" (emphasis added). 25 U.S.C. § 1913(a).

Adding this requirement will allow data to be developed regarding whether State's are complying with the ICWA requirements.

Section 1355.43(e)(4): *Other Living Arrangement Type*. In paragraph (e)(4), ACF proposes to require the Title IV-E agency to report whether a child is placed in one of thirteen living arrangements for a child who is not placed in a foster family home. These living arrangements include: group home – family operated, group home – staff operated, group home – shelter care, residential treatment center, child care institution, child care institution – shelter care, supervised independent living, juvenile justice facility, medical or rehabilitative facility, psychiatric hospital, runaway, whereabouts unknown, and placed at home.

Although AFCARS already defines "child care institution" as a "private facility, or public child care facility for more than 25, which is licensed by the State or *Tribal licensing / approval authority*," it only applies tribal licensing approval to a few of the identified AFCARS living arrangement types.

> **We recommend that the ACF include "institution[s] for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs," and allow all Tribal facilities to be identified in every living arrangement listed by the AFCARS regulations.**

This definition is one of ICWA's placement preferences under 25 U.S.C. § 1915(b). Adding this requirement will allow unique programs operated by Tribes to be included that are otherwise not listed under the AFCARS other living arrangement list.

Section 1355.43(e)(16): *Child's relationship to the Foster Parent(s).* The ACF proposes to require the Title IV-E agency to report the type of relationship between the child and the foster parent(s) from one of seven options: parental grandparent(s), maternal grandparent(s), other paternal relative(s), other maternal relative(s), sibling(s), non relative(s), and kin.

> **We recommend the ACF also report whether the foster parents are a "member of the Indian child's Tribe," "extended family as defined by the Tribe", or "other Indian families."**

This requirement reflects that a shared tribal membership can be the basis for a relationship between the foster parent and child that is different from that of non-tribal foster parent relationships. This rationale is similar to the "kin" category, which is defined by Title IV-E Agencies as "one where there is a psychological, cultural or emotional relationship between the child or the child's family and the foster parent(s)." By adding this requirement, the AFCARS data reporting would also comply with the placement preferences under ICWA. 25 U.S.C. § 1915(a).

Section 1355.43(e)(18)(i) and 1355.43(e)(21)(i): *Race of Foster Parent(s) – American Indian or Alaska Native.* Under both of these sections the AFCARS Regulations are collecting data on the race of the first foster parent and the second foster parent. In the most recent Supplemental Notice of Proposed Rulemaking (SNPRM) the ACF now recommends that "[a]n American Indian or Alaska Native child is identified by "origins in any of the original peoples of North or South America (including Central America), and maintains Tribal affiliation or community attachment.

We recommend the ACF also ask if the foster parent(s) is a member or eligible for membership in a state or federally-recognized Indian Tribe? If yes, enter the name of the Tribe.

By asking for tribal affiliation, tribal affiliation will indicate whether the foster placement is in compliance with ICWA's placement preferences. 25 U.S.C. § 1915(a). Finally, by asking which Tribe the individual may belong too, it will allow statistical data to develop on an individual Tribal basis.

Section 1355.43(f)(2): Permanency Plan. The ACF is proposing to require the Title IV-E agency to report "the type of permanency plan established for the child, for each permanency plan that is established for the child in every out-of-home care episode." The seven options include: reunify with parents or principal caretaker; live with other relatives; adoption; long-term foster care; emancipation; guardianship; and not yet established.

We recommend ACF also include into this list the option of the child living with "other member of the Indian child's tribe," "a member of the child's extended family," or "other Indian families."

Although the other options may also fall under these two additional placements, by adding this language AFCARS will take into consideration the traditional and historical practice of extended families, who are not always related to the child, within Native American communities. This language is also consistent with the placement preferences of ICWA. 25 U.S.C. § 1915.

Section 1355.43(g)(3): *Exit Reason*. The ACF proposes to require the Title IV-E agency to collect and report information on the reason for the child's exit from out-of-home care. Specifically, the Title IV-E agency may indicate the exit reason as: reunify with parent(s) or legal guardian(s), live with other relatives, adoption, emancipation, guardianship, runaway or whereabouts unknown, death of child, transfer to another agency, or other.

We recommend ACF also include into this list the option of the child living with "other member of the Indian child's tribe," "a member of the child's extended family," or "other Indian families."

Although the other options may also fall under these additional placements, by adding this language AFCARS will take into consideration the traditional and historical practice of extended families, who are not always related to the child, within Native American communities. This language is also consistent with the placement preferences of ICWA. 25 U.S.C. § 1915.

Section 1355.43(g)(4): *Transfer to Another Agency*. ACF proposes that the Title IV-E agency indicate "Tribal Title IV-E agency" if the reporting Title IV-E agency transferred placement and care responsibility of the child to a Tribal Title IV-E agency; and the Title IV-E agency indicate "Indian Tribe or Tribal agency (non-IV-E)" if the reporting Title IV-E agency transferred placement and care responsibility of the child to an Indian Tribe, Tribal agency, Tribal organization or consortium that is not operating a title IV-E program directly.

> **We recommend ACF also include the name of the Tribe when a child is transferred to an Indian Tribe or Tribal Agency.**

By including this requirement, ACFARS will be able to collect information and data on an individual Tribal basis, and allow Tribes to develop statistics regarding their children, and child and family care programs.

Section 1355.43(h)(2): *Child's Relationship to the Adoptive Parent(s) or Guardian(s).* The current AFCARS regulations require the Title IV-E Agency to indicate "the type of relationship, kinship or otherwise, between the child and his or her adoptive parent(s) or legal guardian(s)." The options included under this category are: parental grandparent(s), maternal grandparent(s), other paternal relative(s), other maternal relative(s), sibling(s), non relative(s), and kin.

> **We recommend ACF also report whether the adoptive parents are a "member of the Indian child's Tribe," "extended family as defined by the Tribe", or "other Indian families."**

As indicated earlier, this can be the basis for a relationship that is more substantial than a non-relative placement. In addition, these categories are also categories listed under the placement preferences in ICWA. 25 U.S.C. § 1915(a). Collecting this data will also show whether a State is in compliance with ICWA, as required by Title IV-B reporting under HHS and ACF.

Section 1355.43(h)(4)(i) and Section 1355.43(h)(7)(i): *Race of Adoptive Parent(s) or Guardian(s) – American Indian or Alaskan Native.* Under both of these sections the AFCARS Regulations are collecting data on the race of the first adoptive parent and the second adoptive parent. In the most recent Supplemental Notice of Proposed Rulemaking (SNPRM) the ACF now recommends that "[a]n American Indian or Alaska Native child is identified by "origins in any of the original peoples of North or South America (including Central America), and maintains Tribal affiliation or community attachment.

> **We recommend the ACF also ask if the adoptive parent(s) is a member or eligible for membership in a state or federally-recognized Indian Tribe? If yes, enter the name of the Tribe.**

Tribal affiliation will indicate whether the adoptive placement is in compliance with ICWA's placement preferences. 25 U.S.C. § 1915(a). Finally, by asking which Tribe the individual may belong too, it will allow statistical data to develop on an individual Tribal basis.

Section 1355.43(h)(11) and Section 1355.44(c)(6): *Adoption or Guardianship Placing Agency*. ACF proposes to require the Title IV-E to indicate "Indian Tribe under contract/agreement" if an Indian Tribe, Tribal organization or consortium placed the child for adoption or legal guardianship through a contract or agreement with the reporting title IV-E agency.

> **We recommend ACF also include the name of the Tribe when a child is transferred to an Indian Tribe or Tribal Agency.**

By including this requirement, ACFARS will be able to collect information and data on a individual Tribal basis, and allow Tribes to develop statistics regarding their children, and child and family care programs.

Conclusion

The lack of consistent data about American Indian / Alaska Native children in the child welfare system is one of the biggest complaints from both state and tribal officials working toward ICWA compliance. The Federal government, through the AFCARS process, has the opportunity to collect and create a much needed consistent body of data.

Thank you for including ICWA-related data in AFCARS. We hope these recommendations are helpful to the Department of Health and Human Services and the Administration for Children and Families in its commitment to assessing the incidence, characteristics, and status of adoption and foster care in the United States, and develop the appropriate national policies with respect to adoption and foster care by including requirements that conform with the Indian Child Welfare Act.