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DEPARTMENT OF SOCIAL AND HEALTH SERVICES
CHILDREN'S ADMINISTRATION
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May 19, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action – Indian Affairs
U.S. Department of the Interior
1840 C Street NW, MS 3642
Washington, District of Columbia 20240

RE: Docket ID: BIA-2015-0001

Dear Ms. Appel:

The Washington State Department of Social and Health Services (DSHS) Children's Administration (CA) submits these comments regarding Docket ID: BIA-2015—0001: *Regulations for State Courts and Agencies in Indian Child Custody Proceedings.*

CA is the public child welfare agency for the state of Washington. It is the state's IV-E agency with an approved plan under which it meets federal child welfare specific regulatory requirements in order to receive federal funding from the U. S. Department of Health and Human Services (DHHS) Administration for Children and Families (ACF). We regularly work in collaboration with our federal partners to undertake obligations consistent with federal requirements. My staff works with families to identify needs and develop plans that support families and assure the safety and well-being of children. When that cannot be assured in a family's home, CA obtains placement and care authority; in Washington that accounts for about 8,900 children annually in out-of-home care. Of these, some 12.5% identify as having Native American ancestry, although not all children or families who identify as Native American meet the federal or state definition of "Indian" as defined in law.

The state of Washington is home to 29 federally-recognized Indian tribes with which my agency staff works to provide services, supports and, where needed, placement for Indian children. The federal Indian Child Welfare Act provides an important framework for the legal treatment of Indian children, Indian parents and Indian tribes. The commitment of the state of Washington to work collaboratively with, and with respect toward, federally recognized tribes and their members is further demonstrated by the state Indian Child Welfare Act adopted by our state legislature in 2011. It is within the context of this commitment to the safety of all children and with appreciation for the important role and work of all federally-recognized tribes that CA submits the following comments on the proposed BIA regulations.

As a prefatory comment, CA has no record of being asked to participate in the listening sessions that resulted in the updates to the 1979 State Court Guidelines issued in February 2015 nor was there an opportunity to make suggestions, propose language or otherwise provide input from a public child welfare perspective prior to their publication. Furthermore, it is not clear that any

state public child welfare officials participated in the development of the proposed regulations such that the resulting product lacks a safety or child-centered focus which is so critical to the child welfare community. To the extent any state public child welfare officials did participate, it appears that their concerns were not recognized or memorialized in the substance of the regulations since, again, the best interests of children along with protection for their safety, are lacking in the proposed regulations.

As an initial matter, CA agrees with those commentators who contend that the BIA lacks authority to promulgate these proposed regulations. The Secretary of the BIA was authorized to promulgate rules and regulations "within one hundred and eighty days after November 8, 1978" that were necessary to carry out the provisions of the chapter. 25 USC § 1952. The Secretary issued regulations during that timeframe related to its grant-making obligations in 25 USC§§1931-33. Beyond that, the BIA issued guidance to state courts specifically because it recognized it had no authority to issue rules governing state courts. In prior writings the BIA stated:

> Nothing in the legislative history indicates that Congress intended [the BIA] to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign an administrative agency such supervisory control over courts would be an *extraordinary* step. (Emphasis added).

BIA Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979). Now, 37 years after the act was passed, and despite no Congressional action giving authority, the BIA has changed course. For a further discussion of the extent to which the BIA lacks authority to promulgate these rules as proposed, see the extensive comments of the American Academy of Adoption Attorneys, April 19, 2015, pp. 3-8.

Nevertheless, your agency now has determined that not only state courts, but <u>also</u> public child welfare agencies, will be subject to the BIA's oversight and control. Unfortunately, the draft rules lack the child-centered and safety focus that is within the realm of public child welfare and they were developed without sufficient transparency and participation.

In addition to the fact these rules exceed the scope of the authority granted to the BIA by Congress, at least some of the regulations are likely unconstitutional. In other places, the proposed regulations appear to be drafted by people wholly unfamiliar with state court child welfare legal proceedings and, as a result, the proposed regulations are so poorly drafted that there will be significant confusion as to how to implement these rules if they are enacted. Of utmost importance is that these proposed rules fail to protect the Indian children with whose safety my agency is charged. In addition they create a system whereby those Indian children (and more broadly any child with potential Native American ancestry) will be less safe and will be less able to achieve permanent homes.

I will address the most problematic proposed regulations individually, identifying the proposed regulation and singling out the most troubling language. I will then identify the legal and, where applicable, social work practice issues affected by the proposed regulation. Where possible I will identify language to improve the proposed regulations. I must note, however, that it is the

fervent hope of public child welfare officials in Washington state that a new process that includes child welfare stakeholders will be undertaken. It is only with the fullest and most transparent participation of all people concerned with Indian children, including public child welfare stakeholders, that any proposed regulations will adequately balance the important interests of federally recognized tribes with the overarching needs to provide safety for and meet the best interests of all children.

§23.2 – Definitions

> *Active Efforts* means actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act....

As an initial matter, it is unclear what authority the BIA has to make a determination that one section of a federal statute imposes requirements above that of another federal statute, particularly one that is outside the scope of the agency's expertise. As noted by other commentators, deference to agency decision-making is only appropriate regarding statutes the agency has been entrusted to administer. *Chevron Inc., v. Natural Resources Defense Council*, 467 U.S. 837 (1984)(*See* Comments above regarding why the BIA exceeded its authority to administer the ICWA). But *Chevron* deference only applies where the agency received "congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington, v. F.C.C.*, 133 S.Ct. 1863 (2013) quoting *U.S. v. Mead Corp.*, 533 U.S. 218 (2001). The BIA plainly has no statutory authority over child welfare and as such has no authority to determine the definition of reasonable efforts and how active efforts would so compare. Even the agency charged with implementing federal child welfare statutes has not gone so far as to impose a reasonable efforts definition. Instead, the HHS Administration for Children and Families' Child Welfare Policy Manual states that *courts* must determine what efforts are sufficient in each individual case. ACF Children's Bureau Child Welfare Policy Manual, Section 8, Title IV-E, Subsection 8.3C.4 "Reasonable Efforts," Question 1. This is yet another example of how the BIA has exceeded its authority.

In addition to the problematic definition offered by the BIA, the agency purports to require states to undertake "active efforts" beyond those required by the federal Indian Child Welfare Act. Specifically, in the federal statute at 25 U.S.C. §1912 "active efforts" are required in the context of providing services. The law states: "whether the party seeking foster care placement of, or termination of parental rights to, an Indian child can satisfy the state court that such active efforts were made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family and that the efforts were unsuccessful." That is the only place in the federal act which uses the phrase "active efforts." Yet in the proposed regulations active efforts are required in a number of ways for a number of purposes: to prevent removal (§23.106), to work with tribes to verify membership (§23.107(b)(2)), to assist parents with return of their children following emergency removal (§23.113(f)(9)), to avoid removal (§23.120(a)) and to find placements (§23.131(c)(4)). To the extent that the BIA has any authority, it is neither to define the term nor to require active efforts in any situation except the one so required by Congress.

> *Imminent physical damage or harm* means present or impending risk of serious bodily injury or death.

The proposed regulations now purport to contain a definition of abuse, but that definition does not go far enough to identify all types of potential child abuse which could be inflicted. There is no definition of serious emotional harm or neglect, sexual abuse or other maltreatment included in the proposed regulations. This issue is more fully addressed in the section on emergency removal below. To remedy this shortfall the definition of child abuse and neglect must be expanded.

§23.103 – When does ICWA apply?

> (d) If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.

Worded as proposed, this language will result in overbroad application of the Indian Child Welfare Act in violation of the constitutional rights of children. Application of the ICWA to children who meet the Indian child definition is permissible under an equal protection analysis due to their participation or membership in a sovereign political entity. *In re Beach*, 159 Wn. App. 686, 694 (2011). Treating children as Indian children solely due to their racial or ethnic identification has been found to be unconstitutional by at least one state supreme court. *In re A.W.*, 741 N.W.2d 793, 810 (Iowa 2007). This proposed regulation will require state courts and agencies to over apply the statute thereby violating the rights of children who may identify ethnically or racially as Native American but yet not meet the Indian child definition. In addition, as a practical matter, in many instances there is no response from tribes to the inquiries of state child welfare agency staff. This failure to respond results in confusion on the part of social workers as to whether or not the ICWA applies which then leads to delays in permanency, disruption of placements and other negative outcomes for children in care.

§23.106 – When does the requirement for active efforts begin?

> (b) Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe.

This is another example of the over application of the phrase "active efforts" beyond what is stated in the federal Indian Child Welfare Act. *See* Comment to §23.2, above.

§23.107 – What actions must an agency and State court undertake in order to determine whether a child is an Indian child?

> (a) Agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the child is an Indian child, the

> agency must obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.
>
> (2) If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe, under paragraph (a) of this section.

This proposed regulation raises the same equal protection concerns regarding over application of the federal law's requirements to children based on their race. *See* Comment to §23.103, above. Furthermore, the application of the "active efforts" standard to working with tribes on verification is a requirement not found in federal statute. This is another example of the over application of the phrase for which the BIA lacks legal authority to impose. *See* Comment to §23.2, above.

§23.110 – When must a State court dismiss an action?

> (b) The court must make a determination of the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the State court must dismiss the State court proceedings, the agency must notify the tribe of the dismissal based on the tribe's exclusive jurisdiction, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.

This section fails to contemplate situations where a tribe has a memorandum of understanding with an agency requiring the agency to act notwithstanding the tribe's exclusive jurisdiction or where a tribe requests agency participation in an individual case due to a conflict of interest. An easy fix would be to add a sentence that acknowledges "unless a tribe otherwise requests" or some other language that allows for a tribe to voluntarily allow for child welfare agency participation.

§23.111 – What are the notice requirements for a child custody proceeding involving an Indian child?

> (h) No substantive proceedings, rulings or decisions on the merits related to the involuntary placement of the child or termination of parental rights may occur until the notice and waiting periods in this section have elapsed.

This section requires that pattern notice be sent registered mail return receipt requested to a tribe, parents and Indian custodian along with the dependency petition. It is unclear what is meant by "substantive proceedings, rulings or decisions on the merits" and how this applies to the shelter

care hearing that takes place under state law within 72 hours of a police protective custody, hospital hold or court ordered emergent removal of the child pursuant to RCW 13.34.050, RCW 26.44.050 and RCW 26.44.056. While a court's ruling in a shelter care hearing is not a substantive ruling on the merits of the underlying dependency petition (which in Washington would have been filed by the time of the shelter care hearing) the court is making a ruling on whether the child should remain out of the parents' care.

It is unclear how to reconcile the language in this section with the requirements regarding time limits in §23-112(a) and (c) and the emergency removal provisions. No shelter care hearing could ever meet the notice and time limit requirements of this proposed regulation if what is required is a legal notice by registered mail to tribes in advance of the shelter care hearing. If Indian children (and an even broader population of children if agencies are required to over apply the ICWA requirements) cannot be removed pursuant to the shelter care standard under state law under the timeframes provided under state law then they will be placed at substantial risk of serious harm while time passes to allow this notice to be completed.

§23.112 – What time limits and extensions apply?

> (a) No proceedings regarding decisions for the foster care or termination of parental rights may begin until the waiting periods to which the parents or Indian custodians and to which the Indian child's tribe are entitled have passed. Additional extensions of time may also be granted beyond the minimum required by ICWA.

This section suffers from a similar problem as the notice provisions. In Washington, shelter care hearings occur within 72 hours following a police protective custody, hospital hold or court-ordered pickup of a child. RCW 13.34.060. If a child welfare agency must wait until 10 days after notice is *received* by the tribe before a hearing can be held then Indian children will either not be removed or be held away from his or her parents without court intervention or oversight for extended periods of time in violation of state law. If the term "proceeding regarding decisions for foster care" in the section above does not apply to hearings following emergency removal then the regulation should so state.

§23.113 – What is the process for the emergency removal of an Indian child?

> (a) Any emergency removal or emergency placement of any Indian child under State law must be as short as possible. Each involved agency or court must:
> (1) Diligently investigate and document whether the removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child;…
>
> (f) Temporary emergency custody should not be continued for more than 30 days. Temporary emergency custody may be continued for more than 30 days only if:

> (1) A hearing, noticed in accordance with these regulations, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child; or....
>
> (h) Once an agency or court has terminated the emergency removal or placement, it must expeditiously: ....
>
> (1) Return the child to the parent or Indian custodian within one business day; or
>
> (2) Transfer the child to the jurisdiction of the appropriate Indian tribe if the child is a ward of a tribal court or a resident of or domiciled on a reservation; or
>
> (3) Initiate a child custody proceeding subject to the provisions of ICWA and these regulations.

This section appears to only allow emergency removal when necessary to prevent *physical* harm. State law allows for removal when there is "reasonable grounds that the child's health safety and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child." RCW 13.34.050. Although the emergency removal provision of Washington's state ICWA references imminent risk of physical harm, it also references state law provisions regarding removal and as such Washington law is not as limited as this proposed regulation. Limiting emergency removals of Indian children (and anyone who *potentially might be* an Indian child if ICWA is applied overly broadly) to only those cases where children will suffer imminent physical harm will place them at greater risk of injury or death beyond that faced by their non-Indian peers. In enacting this law for their protection, it cannot be the case that Congress intended Indian children to be treated more poorly than non-Indians. As written, this definition does not sufficiently address the safety needs of Indian children and the definition should be expanded to allow the use of state law standards for removal.

As noted above, it appears that the BIA intends for the proposed regulations on notice and time limit to apply to 72 hour hearings. For the reasons already indicated, this is not possible due to the short turnaround between removal and court that is required by state law. If the time limit and notice provisions are implemented then Indian children would be held away from their parents even longer in violation of state law. In the alternative, no emergency removal of Indian children could occur thereby putting them at increased risk of injury or death.

One section requires a specific affidavit containing additional information about the Indian family. In Washington, those allegations are already included in the state's dependency petitions so a provision should be added to the proposed regulations indicating the additional affidavit is only needed if the petition does not already contain the information.

The proposed regulations require that once the emergency no longer exists then removal or placement must terminate unless one of three things occurs, the last of which is the filing of a child custody proceeding. This requirement is confusing and is not consistent with how the Washington dependency statute works because a dependency petition would be filed in advance of the "emergency removal" hearing. Another section imposes the requirement of a 30 day hearing with an Indian expert and a higher burden of proof. However in Washington a substantive hearing on the merits of the petition at a higher burden of proof is already required at 75 days following removal. These are additional examples where it appears that people who are expert in child welfare practice and the attendant legal proceedings did not participate in the crafting of the proposed regulations. Moreover, since there is no requirement in the federal statute to impose these changes there is again no authority for the BIA to require these changes in practice.

§23.114 – What are the procedures for determining improper removal?

> (a) If, in the course of any Indian child custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained, such as after a visit or other temporary relinquishment of custody, the court must immediately stay the proceeding until a determination can be made on the question of improper removal or retention, and such determination must be conducted expeditiously.
>
> (b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parents or Indian custodian, unless returning the child to his parent or custodian would subject the child to imminent physical damage or harm.

No standard is provided for when a person can request a stay and demand an additional hearing to determine whether removal was improper. As written, the regulations would allow for an additional hearing, potentially close in time to other hearings, with an unclear burden of proof. There is no authority in the federal statute for the BIA to require this additional process of state courts or agencies.

§23.117 – How is determination of good cause not to transfer a case made?

> (a) In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child.
>
> (d) In addition, in determining whether there is good cause to deny the transfer, the court may not consider:

(1) The Indian child's contacts with the tribe or reservation;
(2) Socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems; orShow citation box
(3) The tribal court's prospective placement for the Indian child.

(e) The burden of establishing good cause not to transfer is on the party opposing the transfer.

Given the way the language is drafted, it is unclear what *would* constitute good cause and *how* a court could go about making a determination. Furthermore, this standard departs from the ability of the court to consider the best interests of the child, a founding hallmark of child welfare legal practice.

To remedy this section, the BIA should consult with child welfare experts as to how to make the good cause considerations child-focused, reflect what the court *can* consider in making a good cause determination and include the best interests of the child.

§23.119 – Who has access to reports or records?

(b) Decisions of the court may be based only upon reports, documents or testimony presented on the record.

As a technical point, the answer in the proposed regulation regarding decisions of the court does not relate to the question posed regarding access to reports of records. As written, subsection (b) suggests that agreed orders entered into between the parties could not be entered off the record or *ex parte* despite local practice and state statute that does not require that every court order be issued following a hearing. This will result in changes to legal practice and potential overload in state courts if all cases must be heard on the record. As with the other proposed regulations, this section goes far beyond what is required in the statute it purports to implement. The BIA lacks authority to so regulate child welfare legal practice.

§23.120 – What steps must a party take to petition a State court for certain actions involving an Indian child?

(a) Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, active efforts have been made to avoid the need to remove the Indian child from his or her parents or Indian custodians and show that those efforts have been unsuccessful.

This is yet another example of where the obligation to use "active efforts" is imposed on state agencies beyond that which is required in the federal statute. *See* Comment to §23.2 Definitions, above. Also, this section does not contemplate police protective custody or a hospital hold, two situations in which a child may be removed from his parents for emergent

child safety reasons, and which regularly arise before an agency may has made any efforts regarding a family because the agency was unaware of their needs. In those cases, agency staff may not have had the opportunity to make any efforts to prevent removal. Nevertheless, removal may still be appropriate to protect child safety and any proposed regulations should recognize that such situations may arise.

§23.121 – What are the applicable evidence standards?

> (a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious physical damage or harm to the child.
>
> (c) Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding.

These sub-sections are internally in consistent. One says no foster care placement can occur unless continued custody is likely to result in serious physical damage or harm. The other sub-section indicates that evidence must show a causal relationship between conditions and "serious *emotional* or physical damage" a term that, as noted above, is not defined. Also, because of the imprecise language that is used here that is inconsistent with earlier sub-sections, it is unclear what is meant by "effectuating a foster care placement" and also unclear to what hearings this standard would apply.

§23.122 – Who may serve as a qualified expert witness?

In Washington, often tribes will not respond to requests by agency lawyers to provide testimony. This lack of response results in continuances of dependency and termination trials which delays permanency for children. The regulation would result in better outcomes for Indian children if it included a requirement that tribes respond to requests to provide an expert or a provision to relieve the agency of the obligation to identify a tribal (as opposed to agency) Indian expert if the tribe fails to respond.

§23.128 – When do the placement preferences apply?

> (a) In any preadoptive, adoptive or foster care placement of an Indian child, ICWA's placement preferences apply; except that, if the Indian child's tribe has established by resolution a different order of preference than that specified in ICWA, the agency or court effecting the placement must follow the tribe's placement preferences.

(b) The agency seeking a preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in §§ 23.129 and 23.130 of these regulations, and explain why the preferences could not be met. A search should include notification about the placement proceeding and an explanation of the actions that must be taken to propose an alternative placement to:

(1) The Indian child's parents or Indian custodians;
(2) All of the known, or reasonably identifiable, members of the Indian child's extended family members;
(3) The Indian child's tribe;
(4) In the case of a foster care or preadoptive placement:

(i) All foster homes licensed, approved, or specified by the Indian child's tribe; and
(ii) All Indian foster homes located in the Indian child's State of domicile that are licensed or approved by any authorized non-Indian licensing authority.

(e) Documentation of each preadoptive, adoptive or foster care placement of an Indian child under State law must be provided to the State for maintenance at the agency. Such documentation must include, at a minimum: The petition or complaint; all substantive orders entered in the proceeding; the complete record of, and basis for, the placement determination; and, if the placement deviates from the placement preferences, a detailed explanation of all efforts to comply with the placement preferences and the court order authorizing departure from the placement preferences.

The federal statute allows courts to depart from the placement preference if "good cause to the contrary" exists without offering restrictive conditions as to what to consider as good cause. 25 USC §1915. These regulations do not include a good cause exception until much further down in subsection (d) suggesting that somehow the regulations at subsections (a) –(c) are "more mandatory" and good cause will be more difficult to establish.

Currently, it can happen that a placement does not follow the preference and yet there is no objection from a tribe or parents and as such the issue is not always decided on the record. Significant workload increases will occur both for CA and its lawyers if there is a requirement to have some type of evidentiary hearing at each placement change even when there is no objection by a party. Such a requirement imposed on judges to determine good cause in the absence of a

disagreement between the parties puts the court in the role of case administrator and not arbiter of disputes. It is neither the role of judges to so act nor is it within the authority of the BIA or scope of ICWA to so require.

If the placement preferences in §§23.129 or .130 cannot be met, section (b) requires clear cogent and convincing evidence of a diligent search with the requirement to notify a long list of people/entities including all Indian foster homes about the "placement proceeding." The requirement that all approved foster homes and all Indian foster homes be notified is an onerous additional step for social workers, not found in the federal statute that potentially violates state and federal confidentiality laws regarding children in care. 42 U.S.C. §5106a(b)(2)(B)(viii), 42 U.S.C. §671(a)(8), 45 CFR §205.50, RCW 13.50.100 and RCW 26.44.125(6). Furthermore, this proposed regulation fails to recognize that placement changes that do not meet the preference are not always contested. The additional documentation requirements are similarly not required in statute and are overly burdensome.

§§23.129-.130 – What placement preferences apply in adoptive placements? What placement preferences apply in foster care or preadoptive placements?

(a) In any adoptive placement of an Indian child under State law, preference must be given in descending order, as listed below, to placement of the child with:
(1) A member of the child's extended family;
(2) Other members of the Indian child's tribe; or
(3) Other Indian families, including families of unwed individuals.

(b)The court should, where appropriate, also consider the preference of the Indian child or parent.

In any foster care or preadoptive placement of an Indian child:
(a) The child must be placed in the least restrictive setting that:
(1) Most approximates a family;
(2) Allows his or her special needs to be met; and
(3) Is in reasonable proximity to his or her home, extended family, and/or siblings.

(b) Preference must be given, in descending order as listed below, to placement of the child with:
(1) A member of the Indian child's extended family;
(2) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;
(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

The statute includes the language "in the absence of good cause to the contrary" in each paragraph which allows some flexibility for state courts when contested placement preference issues arise. 25 USC §1915 (a) and (b). That language should be added back in to the proposed regulation so that it reflects the law, although changes are needed to how the good cause determination is made as discussed below.

§23.131 – How is a determination for good cause to depart from placement preferences made?

> (a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child's tribe.

This section requires a hearing on the record. This is a departure from current practice which may or may not currently require a formal hearing. In many instances there is no dispute amongst the parties about the nature of the placement, even if it does not follow the placement preferences. There is no legal authority to require state courts and parties to manufacture a legal issue or controversy where one does not exist. The status quo should be preserved and where a tribe is not involved or has no objection to the placement, no hearing should be required. This is yet another proposed regulation where the BIA exceeded its authority by requiring "active efforts" to find a placement with the preferences, something that is not required in the federal statute. *See* Comment to §23.2, above. Good cause must be based on one or more factors including request of the parents or child, extraordinary physical or emotional needs of the child, unavailability of a placement (but only after active efforts and all the additional work required by §23.128(b) including the notice to all Indian foster homes section) which will result in additional workload and process that is currently not required and exceeds the federal statute.

This good cause section is significantly more child-focused than the prior good cause section in §23.117 related to good cause not to transfer jurisdiction. However, this section does not contemplate situations in which a child's tribe is not involved and thereby not available to consent to a placement which then triggers onerous search and notice requirements.

> (4) The unavailability of a placement after a showing by the applicable agency in accordance with § 23.128(b) of this subpart, and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

An additional problem is that sub-section (4) states that a placement is not "unavailable" if it "conforms to social and cultural standards of the Indian community in which the child or family

resides or has ties." This language, while close, is not identical to the language in the federal ICWA and its lack of precision may lead to an argument that good cause would not exist to not follow the placement preference where a potential placement could not pass a background check due to criminal history. This could potentially violate the Adoption and Safe Families Act, (P.L. 105-89) which disqualifies people convicted of certain crimes from serving as foster or adoptive parents. Sub-section (4) should be changed to indicate that inability to pass ASFA or state background check requirements is *per se* good cause not to follow the placement preference.

§23.133 – Who can make a petition to invalidate an action?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster care placement or termination of parental rights where it is alleged that ICWA has been violated:
(1) An Indian child who is the subject of any action for foster care placement or termination of parental rights;
(2) A parent or Indian custodian from whose custody such child was removed; and
(3) The Indian child's tribe.
(b) Upon a showing that an action for foster care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.
(c) There is no requirement that the particular party's rights under ICWA be violated to petition for invalidation; rather, any party may challenge the action based on violations in implementing ICWA during the course of the child custody proceeding.

It is unclear whether the ability to challenge the underlying proceeding relates only to the proceeding at issue or to a subsequent proceeding. In other words, as written it appears that a later adoption proceeding could be undone due to failures to follow ICWA in the underlying dependency or termination case. This section should be clarified to state that the ability to challenge and invalidate a "proceeding" applies only to the proceeding that is currently before the court.

§23.135 – When must notice of a change in a child's status be given?

(a) Notice by the court, or an agency authorized by the court, must be given to the child's biological parents or prior Indian custodians and the Indian child's tribe whenever:
(1) A final decree of adoption of an Indian child has been vacated or set aside; or
(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child; or
(3) Whenever an Indian child is removed from a foster care home or institution to another foster care placement, preadoptive placement, or adoptive placement.

(b) The notice must inform the recipient of the right to petition for return of custody of the child.

This section requires that biological parents must be given notice whenever one of the triggering events occurs. In the case of notifying a biological parent that an adoption decree has been vacated or adoptive parents' rights were terminated, this provision violates confidentiality since the biological parent at that point has no right to confidential information about the child. In the case of notification about a change in placement, this will create additional workload because the notice has to be in a form that includes information about the right to petition for return of the child which seems to contemplate that the notice be in writing. Oftentimes notification to tribes of a placement change might be by phone or e-mail and not completed on a prescribed form. Additionally, even though a tribe may be identified, not all tribes wish to actively participate. As such the section should be modified to allow for notification by whatever means is customary to a tribe that is actively participating. There must also be recognition in the proposed rule that confidential information cannot be shared in violation of federal law.

These proposed rules are a broad overexpansion of the requirements of the federal Indian Child Welfare Act that grossly exceed the authority given to the BIA by Congress. The proposed rules fail to adequately address the best interests of Indian children and likely violate the constitutional rights of those children who have Native American ancestry but who do not meet the Indian child definition. The BIA should undertake this rulemaking process anew with the full participation of state child welfare officials and their legal representative so that there is an appropriate balance between important tribal interests, the safety and welfare of Indian children and existing requirements in state and federal law.

Sincerely,

Jennifer A. Strus, Assistant Secretary
Children's Administration