Pokégnek Bodéwadmik · Pokagon Band of Potawatomi
Tribal Council

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June 11, 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; Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The Pokagon Band of Potawatomi Indians ("Pokagon Band") is a federally recognized sovereign government located in Indiana and Michigan. However, our citizen-children live throughout the United States and this is why the Pokagon Band is again submitting comments in support of the need for accurate and thorough reporting of information concerning Indian children by Title IV-E and IV-B state agencies. It cannot be said enough that our children are the future of the Pokagon Band and that future is threatened when the Indian Child Welfare Act ("ICWA") is not followed. Accurate data reporting enhances the application of the ICWA because the December 14, 2016 Final Rule, 81 Fed. Reg 90524 ("Final Rule") mandated such reporting and included ICWA data elements and sanctions for failing to report those ICWA data elements. Until the Final Rule takes effect, ICWA compliance by Title IV-E and IV-B agencies will remain inconsistent and in some instances, nonexistent.

Enhancing data collection consistent with the ICWA isn't a burden. It is a responsibility. We are far removed from the days of data collection by pen and paper. With the advances of technology many of the data elements required in the Final Rule are collected in the context of any ICWA case and maintained on various state digital platforms. Yet, despite modern means of data collection, current collection of data by Title IV-E and IV-B agencies regarding Pokagon Band children is often inaccurate. Implementation of the Final Rule, as is, will enhance the type of data collected and the consistency of the data collected.

The Pokagon Band supports the inclusion of the data elements included in the Final Rule and provides these additional comments in response to those questions posed in the original solicitation of RIN 0970-AC72.

General Comments:

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of the changes included in the Final Rule. As stated in the Final Rule, at 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

Nothing has changed since ACF made clear in the Final Rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the Final Rule's data collection requirements.

The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates the Department of Health and Human Services (HHS) collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. The Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities and others after reviewing the Administration of Children and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately,

the Final Rule was published on December 14, 2016 (Final Rule), and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of each opportunity with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. 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 the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months as of the date of the March 15, 2018 notice, all states are or should be in the process of implementing them. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." Final Rule, at 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The Executive Order requiring this review is not a sufficient basis for the agency to act where it provides an insufficient basis for reasonable decision-making relying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the executive orders fail to provide justification to deviate from the statutory requirement for regulations.

Pokagon Band comments to the questions provided in the ANPRM (at page 11450):

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

No response.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provides the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any data provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

Tribes and states properly relied on the Final Rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

All the data elements are important to understanding and assessing the foster care population in general and, specifically, for Indian children. Case review does not promote consistency or objectivity in reporting. Case review is also limited by state confidentiality laws and limits those who can participate in case review. It is better for children to focus on implementation of the Final Rule than to again question the need for it.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most. In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. The ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

The Pokagon Band appreciates the opportunity to again comment on the Final Rule. Any hindrance or stoppage of ICWA data point collection significantly impacts our children and our ability to adequately respond as a government and limits our ability to collaborate with our state partners for best practices. In the interest of protecting our children and families, the Pokagon Band submits these comments.

Respectfully,

John P. Warren

John P. Warren, Chairman
Pokagon Band of Potawatomi Indians