TOHONO O'ODHAM NATION OFFICE OF THE CHAIRMAN AND VICE CHAIRWOMAN

Verlon M. Jose
CHAIRMAN

Carla L. Johnson
VICE CHAIRWOMAN

April 16, 2024

Xavier Becerra
Secretary
U.S. Department of Health & Human Services

Jeff Hild
Principal Deputy Assistant Secretary
Administration for Children and Families

Rebecca Jones Gaston, MSW
Commissioner
Administration on Children, Youth and Families

Aysha E. Schomburg, J.D.
Associate Commissioner
Children's Bureau

Address: 200 Independence Ave, SW, Washington, DC 20201

Submitted electronically via regulations.gov

Re: Adoption and Foster Care Analysis and Reporting System, Notice of Proposed Rulemaking (RIN 0970-AC98)

I. Introduction

The Tohono O'odham Nation, a federally recognized Tribe located throughout southwestern Arizona submits this comment in response to the Administration for Children and Families proposed rule regarding amendments to the Adoption and Foster Care Analysis and Reporting System (Docket No. ACF-2024-0001; RIN 0970-AC98; Amending 45 CFR § 1355.44; Out-Of-Home Care Data Elements) requiring state title IV–E agencies to report more detailed information on ICWA's procedural protections in section 1355.43(b) and to add data elements on ICWA's procedural protections for requests for transfers to tribal court, termination/modification of parental rights, and foster care, pre-adoptive and adoptive placement preferences

The Tohono O'odham Nation welcomes the new changes proposed by the Administration for Children and Families regarding ICWA data inputs in AFCARS with minor revisions. First, we would ask that the reason for a transfer denial to tribal court be stated. Second, data on voluntary foster care placements should also be submitted. This additional data will benefit tribes, agencies, and policymakers by helping them better understand how ICWA functions nationally and make any necessary adjustments.

A. Historic Importance

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to address the widespread practice of State entities removing American Indian children from their homes without an understanding of traditional American Indian child-rearing practices. Throughout the 1960s and 1970s, American Indian / Alaskan Native (AI/AN) 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. Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . .." 25 U.S.C. § 1901(4).

Congress enacted ICWA to "*protect the best interests of Indian children* and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture." H. Rep. 95-1386, at 8 (emphasis added). ICWA thus articulates a strong "federal policy that, where possible, an Indian child should remain in the Indian community." *Mississippi Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 37 (1989) (citing H. Rep. 95-1386 at 24). Federal regulations supporting this policy will be helpful in creating consistency across the states.

ICWA cannot be fully understood without first understanding the interrelated history of violence against Indigenous children. Opponents of ICWA have frequently characterized the statute as either a "constitutional outlier"—based on inaccurate assumptions of the federal government's role in family law and in protecting Indian Children—or an outdated and unnecessary law. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children And The Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 889 (2017). However, American Indian children have always been the horrible focus of American Indian law and policy. Often, the targets of kidnapping, American Indian children, were used by military strategists as leverage points to dampen Indian nations' resistance to colonialism. *Id.* at 890. Those children not kidnapped were subject to the denial of rations and shelter commonly employed by the American military and its precursors, with many becoming orphans. *Id.* When negotiating with tribes, "American diplomats … made thinly-veiled threats about the welfare of Indian Children if Indian nations continued to resist." *Id.* With their people in mind, tribes negotiated with an eye toward their children. *Id.* As a result, many treaties ratified in the eighteenth and early nineteenth centuries had provisions for American Indian children to be guaranteed safety, education, land, and general welfare. *Id.* These treaties would ultimately become some of the earliest examples of the general trust responsibility that the United States Government continues to owe American Indians, Native Alaskans, and Native Hawaiians. *Id.*

After the Civil War, the United States' strategy shifted from direct warfare to a war on Indigenous families. *Id.*at 891. It was during this time that "federal, state, and religious officials again turned to kidnapping and imprisoning Indian children in oppressive boarding schools, isolating them from their

families, nations and lands." *Id. Between* 1819 and 1969, four hundred and eight boarding schools were funded by the federal government in whole or part. Bureau of Indian Affairs, *Federal Indian Boarding School Initiative Investigative Report* 6 (2022). For over a hundred and fifty years, American Indian, Native Alaskan, and Native Hawaiian kids were forcibly taken from their homes to "strip [them] of [their] tribal lore and mores, force the complete abandonment of [their] native language, and [to] prepare [them] for never again returning to [their] people." *Id.* at 51. At the boarding schools, the children were subject to cruel military training, intense labor, overcrowding, dilapidated living quarters, and many other horrors. *Id.* at 56, 58, 59, 73. The intergenerational trauma produced by these boarding schools is still felt to this day. The significance of this has been understood and made a priority by the current administration with the creation of the Federal Indian Boarding School Initiative.

B. Trust Responsibility

i. Generally

The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. Dating back as early as 1831, the United States for many recognized the existence of the Federal trust relationship toward Indian tribes. As Chief Justice John Marshall observed, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence ... marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. *See generally* Cohen's Handbook of Federal Indian Law§ 5.04[3] (Nell Jessup Newton ed., 2012); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

The U.S. Supreme Court has repeatedly opined on the meaning of the United States' trust responsibility. In *United States v. Jicarilla*, the Supreme Court recognized the existence of the relationship and noted that the "Government, following 'a humane and self-imposed policy . . . has charged itself with moral obligations of the highest responsibility and trust,' obligations 'to the fulfillment of which national honor has been committed.'"

ii. The United States' trust responsibility to Indigenous children

As Indian children were the primary focus of the military strategies employed by the United States and its precursors, so too were they the focus of treaty drafting. Many tribal negotiators acknowledged the vulnerability of their children and sought specific protections for children within the treaties forced upon them. *Fletcher*, 95 Neb. L. Rev. at 890. Particular provisions for children and orphans included safety, education, welfare, and land rights. *Id.* These treaties, in part, created a duty of protection and trust obligations from the United States to American Indian, Native Alaskan, and Native Hawaiian children. *Id.* at 893-94.

ICWA is an attempt by the United States to fulfill its trust responsibility to tribes and their children after centuries of harm. In 1978, Congress passed the Indian Child Welfare Act and declared "that Congress, through statutes, treaties, and in the general course of dealing with Indian tribes, [have] assumed the responsibility for the protection and preservation of Indian tribes .... And that the United States has a direct interest, as trustee in protecting Indian children." 25 U.S.C. § 1901. ICWA is, however, not a perfect solution. No data set tracks ICWA cases at the national level and provides information about those cases at the trial level. This means ICWA's operation in state courts is opaque.

The Administration for Children and Families proposed a rule regarding amendments to the Adoption and Foster Care Analysis and Reporting System, which will help strengthen ICWA and further the United States' trust and responsibility for Indigenous children.

II. Comments

Under the 2020 final rule promulgated by the Administration for Children and Families, AFCARS data elements regarding ICWA are superficial. The currently required data inputs primarily address if the child is Indian for the purposes of ICWA, whether ICWA applies, and if ICWA does apply, whether the state title IV-E agency sent notice to the appropriate tribe. Such data, while important, largely surrounds racial and political status. This data concurrently under and overcounts the number of children whom ICWA may impact. The proposed rule will provide a rich data set that will help 1) inform legislative and regulatory policies going forward, 2) indicate the need for training regarding certain ICWA practices, and 3) determine on the state and tribal level where further resources should be allocated. The Tohono O'odham Nation applauds the proposed data elements and requests the following additional changes to the proposed rule.

A. Knowing that a transfer to tribal jurisdiction was requested but ultimately denied does not provide sufficient information without knowing the good cause reason for the denial.

Currently, the Administration for Children and Families proposes under Section 1355.44(i) "Data Elements Related To ICWA" that a state title IV-E agency report whether a request for a transfer to tribal court was made and, if so, if it was denied. We would ask the Administration for Children and Families to require state title IV-E agencies to report *why* the transfer request was denied. Additionally, in the case of good cause we request that agencies be required to report what the state court determined to be good cause in that instance. Currently, under ICWA, a transfer to tribal court can be denied for three reasons: (1) good cause; (2) objection by either of the Indian child's parents; or (3) declination by the tribal court. 25 U.S.C. § 1911 (b). Understanding why cases are being denied and how often would provide valuable insight into state and tribal courts as well as welfare systems.

The knowledge that tribal jurisdiction was denied on its own—without knowing why it was denied—does not provide actionable data. By understanding the exact cause of the denial, tribes, the state, and the federal government can learn many things. Suppose parents have a high objection rate to transfer to tribal court. In that case, tribes, agencies, and states with information about tribal services and the tribal court systems that should be made available to parents, children's advocates, and state agencies. Alternatively, the data could show that certain tribes have a high record of declining jurisdiction. In that case, the data may indicate that 1) there is no current court system, 2) their child welfare system needs additional funding, or 3) their court system is overwhelmed and needs additional resources. In the instance of good cause, it is helpful to know what state courts consider to good cause to deny transfer. If an inconvenient forum is consistently a problem, it may show that state courts and tribal courts, where willing, need to work together to provide alternative forums, including via video conferencing. Finally, this data may help uncover unfair practices within state courts. As recently as 2015, a federal court "held that Rapid City judges had a pattern and practice of depriving Indian families of basic due processes rights when removing their children." *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015). Though not all state courts are malicious, it may indicate the need for state courts to have more extensive training on the nuances of ICWA. Having more data about ICWA practices, in return, provides the potential for fewer kids to be wrongly removed from their families and culture.

B. Data on voluntary foster care placement would be beneficial to the tribes and help protect families.

As proposed, the rule would collect very little data on voluntary foster care placements in AFCARS. However, collecting information on voluntary foster care placements would help remedy a statutory hole within ICWA. Section 1913, entitled "Parental rights; voluntary termination," does not offer the same procedural due process protections found under the involuntary proceedings as § 1912 does. *See, e.g., In re Esther V*, 248 P.3d 863, 871 (N.M. 2011). However, the proposed question only addresses voluntary termination of parental rights, but the voluntary section includes voluntary foster care placements. In practice, very few voluntary foster care placements, such as those done via a safety plan with the state agency or under the preventative services in Title IV-E, meet the requirements of Section 1913. Collecting this data would help with education on this issue and ensure federal coordination between the enforcement of Title IV-E funding goals and ICWA's protections.

Conclusion

We hope our support of the proposed rule and our recommendations are helpful to the Administration of Children and Families in its commitment to better understand the lived experiences of Indigenous children in the foster care and adoption system.

Sincerely,

Verlon M. Jose
Chairman, Tohono O'odham Nation