May 19, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action – Indian Affairs
U.S. Department of the Interior
Via email to: comments@bia.gov

Re: Comments on Proposed ICWA Regulations

Ms. Appel:

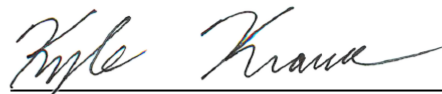
Below are my comments on the Department's proposed "Regulations for State Courts and Agencies in Indian Child Custody Proceedings."

My comments are generally divided by topic, and a table of contents is provided on the next page. I start by discussing some of what I believe to be the most significant substantive issues in comments one through four. The order of subsequent comments generally reflects the order of the proposed regulations rather than my perception of importance of the issues.

So as to provide context to my comments, I provide the following information regarding myself. I am an attorney and have had my own solo practice in Rapid City, South Dakota since 2009. I practice primarily in the area of family law. I have represented children in abuse and neglect cases on a court-appointed basis. I have also represented parents in such cases on both an appointed and retained basis. In addition to my South Dakota experience in this area, I was also part of the Children's Rights Clinic at Drake University during my final two semesters of law school. I have closely followed the general topic of Indian child welfare for several years now, and have written extensively about it on my website.

Although I have reviewed some other entities' comments on this topic, my comments are the product of my own work and opinions, and not those of any other group or entity.

Sincerely,



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**1. The Department should avoid overreaching in its regulatory interpretation of ICWA.**

There is substantial question as to whether the Department even has the legal authority to issue the proposed regulations. Even assuming the Department has the authority to issue regulations, those regulations are entitled to deference only when the statute they interpret (ICWA) is not clear and the Department's interpretation is a reasonable one. Overreach by the Department will result in the creation of legal grey areas, increased litigation, and greater opportunity to challenge the regulations as a whole.

It is unfortunate that the Department did not seek more input when creating its newest version of the "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings," (New Guidelines) upon which the proposed regulations are based. The New Guidelines were published in February of 2015 and given immediate effect. The New Guidelines are radically different from the 1979 Guidelines in both form and substance. As best I can tell, no draft was provided to interested parties for comment. This occurred despite previous assurances by the Department that proposed revisions would be published and an opportunity for comment would be provided. (See page 6 of the comments submitted by the American Academy of Adoption Attorneys – hereinafter "AAAA") Personally, I pay about as much attention to these issues as anyone not affiliated with an interested organization (e.g. NICWA or the AAAA – neither of which I am a member), and I did not learn that the New Guidelines were being issued until they were already published and effective. I had heard that comment was being sought as to *whether* the Guidelines should be revised, but not that a proposed revision was on the verge of publication. Less than a month after the publication of the New Guidelines, the Department published its proposed regulations based upon those Guidelines without seeking any input in the

interim. As such, I am very skeptical of the Department's efforts to solicit input on this topic thus far. It appears that the Department has been trying to purposefully avoid non-tribal input.

The Department may lack the authority to issue many of the proposed regulations. Notably, the Department itself determined that it lacked the authority to issue the 1979 Guidelines as regulations. The commentary to the 1979 Guidelines states:

> Nothing in the legislative history indicates that Congress intended this department 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 to an administrative agency such supervisory control over courts would be an extraordinary step. Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act.
>
> Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of congressional intent to that effect.
>
> Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Even if it is assumed that the Department does have the authority to issue the proposed regulations, there are multiple aspects of them that are contrary to the plain language of ICWA. Such regulations would not be entitled to deference under even the most deferential *Chevron* standard. *See Chevron U.S.A. Inc. v Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In these instances, the proposed regulations would only create confusion, litigation, and delayed permanency for children, and should therefore be amended accordingly.

The Department cannot administratively amend ICWA to be what it wishes it was. At best, the Department may be able to reasonably interpret ambiguous provisions of the statute. If the Department does so judiciously, it may be able to do some good. However, if the Department overreaches, it will create needless confusion and litigation, and end up failing the tribes, parents, and children it is seeking to help.

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**2. The option of anonymity should be preserved for biological parents who relinquish their child for adoption.**

One of the most glaring changes in the proposed regulations is their complete disregard of the privacy interests of birth parents who desire to quietly relinquish their child for adoption. The proposed regulations are replete with provisions impacting this privacy right of birth parents. I would suggest that strong consideration be given to the comments of the AAAA on this topic.

The sections of the proposed regulations relevant to the birth parent privacy issue include, but are not limited to, the following:

- § 23.107(4)(d) – "A request for anonymity does not relieve the obligation to obtain verification from the tribe(s) or to provide notice."
- § 23.111(a) – Provides for identical notice requirements in voluntary and involuntary proceedings.
- § 23.123 – Reiterates tribal verification and notice requirements in voluntary proceedings.
- § 23.128(c) – "[A] request for anonymity does not relieve the agency or the court of the obligation to comply with the placement preferences."

- § 23.131(a) – Any assertion of good cause to deviate from the placement preferences must be provided to the tribe.

There are at least three strong arguments for why the option of anonymity should be preserved for birth parents. They are:

1. Birth parents have constitutional rights to privacy and to direct the adoptive placement of their children that may be contrary to the proposed regulations.
2. The statutory language of ICWA provides for such anonymity.
3. It is good public policy.

I am not going to comment on the constitutional arguments other than to briefly note that they exist, that they are discussed briefly on pages 18 through 20 of the comments submitted by the AAAA, and that it would be a good idea to read the 2008 Iowa Supreme Court case *In re N.N.E.* 752, N.W.2d 1 (Iowa 2008) (Invalidating the placement preferences of the Iowa ICWA because the burden to deviate from them based on parental request was too high). I will comment much more extensively below on the other two arguments.

<u>The statutory language of ICWA provides for birth parent anonymity.</u>

The proposed regulations' evisceration of birth parents' privacy rights stems from three separate obligations found in the proposed regulations: (1) to comply with the placement preferences, (2) to obtain verification of membership from tribe, and (3) to notify the tribe of court proceedings. These will be addressed in turn.

<u>1. Placement Preferences</u>

The statutory language of ICWA and the 1979 Guidelines clearly recognize the privacy interest of birth parents. Section 1915(c) of ICWA clearly states that "where a consenting parent evidences a desire for anonymity, the court or agency *shall* give weight to such desire in

applying the preferences." (emphasis added) The 1979 Guidelines state at Section F.1.b that, "*Unless a consenting parent evidences a desire for anonymity*, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision." (emphasis added) The commentary to that Section states that "the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities." Section F.3.a of the 1979 Guidelines also allows deviation from the placement preferences based on the "request of the biological parents." The commentary to Section F.3 of the 1979 Guidelines states that:

> The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (I) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons.

Under existing law and the 1979 Guidelines, it is possible for birth parents to maintain anonymity by choosing the adoptive placement for their child. A court can then find good cause to deviate from the placement preferences based upon parental request. This still complies with ICWA without giving notice to a parent's entire family and tribal community.

The proposed regulations, in particular § 23.128, obliterate a birth parent's right to privacy by requiring notice to not only the tribe, but *all* members of the extended family and *all* Indian foster homes in the state. Part (c) of that Section indicates that a "court should consider whether additional confidentiality protections are warranted," but does not indicate what such protections might be, and suggests that all of the aforementioned notifications must still be provided. Notably, the proposed regulations use the permissive "should" rather than the mandatory "shall" used in the statute.

Given that parents likely have a constitutional right to substantially direct their children's adoptive placements even over the objection of their tribe, the proposed regulations do little to

promote placement in accordance with the placement preferences in voluntary proceedings. *See In re N.N.E.*, 752, N.W.2d 1 (Invalidating the placement preferences of the Iowa ICWA because the burden to deviate from them based on parental request was too high.) All the proposed regulations do is deter birth parents from the option of adoption in the first place due to privacy concerns.

2. Verification of Status

The proposed regulations state at § 23.107(a) that agencies "must obtain verification, in writing, from all tribes in which it is believed the child is a member or eligible for membership, as to whether the child is an Indian child." They further state at § 23.107(d) that a "request for anonymity does not relieve the obligation to obtain verification from the tribe(s)." It is unclear how an agency is supposed to both comply with this obligation and the other obligation at § 23.107(d) to "keep relevant documents confidential and under seal." By their very nature, membership eligibility determinations require personally identifying family information.

The commentary to the 1979 Guidelines explicitly recognizes that anonymity should not be compromised when seeking a verification of status. The commentary to Section B.1 of the 1979 Guidelines states:

> This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Recognizing that the need to preserve anonymity trumps the need to verify status with the tribe is necessary to comport with the unambiguous statutory intent of ICWA that requests for anonymity be respected.

The mandate of the proposed regulation to obtain tribal verification in every case is also substantially overbroad. The first reason for this is that sufficient proof may be provided by the

parties that the child is an Indian child. For example, the parties may stipulate that the child is an Indian child or produce tribal enrollment documents. The second reason is that a court may act on the assumption that the child is an Indian child and comply with the other requirements of ICWA (e.g. enhanced termination requirements) even without verification from a tribe. The third reason is that if both parents of a newborn are not tribal members (something they could testify to), their child is not an Indian child even if the child is eligible for enrollment based on more distant ancestry. *See* 25 U.S.C. § 1903 (defining an "Indian child").

3. Notification of Proceedings

The primary notification requirement in ICWA is at Section 1912(a) and applies only to involuntary proceedings. Section 1913 of ICWA, which deals with voluntary proceedings, does not contain a tribal notice requirement. Every court to address the issue has concluded that notice to tribes is not required in voluntary proceedings. *See Rancheria v. Buckmeier*, No. 07-CV-4023-DEO, Order dated March 3, 2010 (N.D. Iowa) (*citing Navajo Nation v. Super. Court of the State of Washington*, 47 F. Supp. 2d 1233, 1238 (E.D. Wash. 1999); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989); *In re Phillip A.C.*, 149 P.3d 51, 59, 60 n.44 (Nev. 2006)).

The 1979 Guidelines also recognize that tribes have no right to notice of voluntary proceedings. The commentary to Section B.1 of the 1979 Guidelines states:

> Under the Act confidentially is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. The most common voluntary placement involves a newborn infant.
> Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones.

The proposed regulations make the notice requirements of voluntary and involuntary proceedings identical at § 23.111. That section also requires that a substantial amount of identifying information, including the document initiating the proceedings, and the mailing address and telephone number of all parties. Failing to recognize any distinction between voluntary and involuntary proceedings is not a reasonable interpretation of ICWA.

<u>It is good public policy to provide for the option of birth parent anonymity.</u>

Eliminating the option of birth parent anonymity will harm the parents and children ICWA was meant to protect. This is made apparent by examining the options available to birth parents who are contemplating giving up their child for adoption.

Under existing law, a birth parent can, at least in theory, relinquish their child for adoption without the knowledge of their family or tribe. To do so, the birth parent would need to participate in the court proceedings, request that the proceedings be kept quiet, and take part in determining the child's placement. Under these circumstances, a court can find good cause to deviate from the placement preferences based upon the parent's request, and no tribal or family notification is necessary.

Parents usually want a better life for their children, and many parents believe that keeping their children away from their family is necessary to accomplish that. It is a common occurrence in abuse and neglect cases for a child's entire family to be plagued by alcohol problems. The birth parent may have intimate experience with abuse, possibly sexual in nature, perpetrated by family members. Telling an expectant mother that her family and tribal community must receive notice of an adoptive placement is almost certain to be a deal-breaker for a mother whose child was conceived as a result of rape or incest. A recent New York Times articles suggests that over

half of high-school age girls on the Pine Ridge Reservation have been raped. Joe Flood, *What's Lurking Behind the Suicides?*, N.Y. Times, May 16, 2015.

Many parents also do not trust their tribal institutions. As a family law practitioner in Rapid City, I have fielded many calls from prospective clients with potential legal matters in tribal courts. I have also had conversations with a number of other proud tribal members residing in South Dakota. Mistrust of tribal institutions and allegations of corruption and nepotism are extremely common. I recently heard of child abuse and neglect case files, which are supposed to be confidential, being stored in a public space by a tribal agency. It should come as no surprise that many birth parents would not want their child's fate or the confidentiality of their case to be in the hands of tribal entities that they, often justifiably, do not trust.

Birth parents may also want to avoid the social pressures and stigma associated with relinquishing a child for adoption. A birth parent may rightfully fear condemnation by their family and community.

Removing the option of a quiet adoption process will make other options more appealing. One such option is abortion. Another is taking advantage of "safe haven" laws to anonymously abandon a child after birth (e.g. SDCL 25-5A-27 through SDCL 25-5A-36). If a parent anonymously abandons a child under a safe haven law, it will be virtually impossible to determine if the child is an Indian child. There is also no opportunity for an "open adoption," and it will be much more difficult for the child to reconnect with its birth family and Indian heritage later in life. As such, utilization of safe haven laws is an inferior option to an adoption where the birth parents can participate but still keep the case quiet. Some parents consider the safe haven option under current law specifically because of the increased anonymity, so leaving it as the only option to preserve anonymity would almost certainly increase its use.

The proposed regulations should be extensively revised so that they recognize the differences between voluntary and involuntary proceedings and preserve the option of birth parent anonymity in voluntary proceedings.

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**3. The proposed regulations too narrowly define "good cause" to deny transfer of a case to tribal court.**

Section 1911(b) of ICWA states as follows:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary*, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

At issue is what constitutes "good cause" to not transfer the case.

The 1979 Guidelines took the approach of identifying a non-exclusive list of situations that *may* provide good cause to deny a transfer. That list, found at Section C.3, includes:

> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
> (ii) The Indian child is over twelve years of age and objects to the transfer.
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

The proposed regulations, at § 23.117, take the approach of only listing things that a court *may not* consider when making the good cause determination. In doing so, the proposed regulations specifically rebuke the first (timeliness) and fourth (tribal contacts) criteria of the 1979 Guidelines, as well as the 35 years of case law based on those criteria. The proposed

regulations also specifically prohibit considering whether the transfer would result in a placement change. The relevant part of proposed § 23.117 reads:

> (c) 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; or
>> (3) The tribal court's prospective placement for the Indian child.

The wholesale exclusion of considerations of timeliness, tribal contacts, and placement change goes too far. I will discuss these criteria below.

Timeliness

The 1979 Guidelines states at Section C.1 that "The request [to transfer] should be made promptly after receiving notice of the proceeding." The primary policy argument for the timeliness requirement is to prevent unnecessary delays that will result in harm to the child. The commentary to Section C.3 of the 1979 Guidelines states that:

> Long periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

The commentary to Section C.1 of the 1979 Guidelines states that:

> Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

The policy justification of preventing unnecessary and harmful delay is just as valid today as it was in 1979. However, the blanket timeliness language of the 1979 Guidelines was not well

tailored to this policy objective. As such, new guidelines should include better-tailored language, but should not prohibit the consideration of timeliness entirely.

There are often very good reasons to avoid transferring cases at an early stage. I have spoken with a tribal court judge who prefers to leave cases in state court until after adjudication (the “guilt or innocence” phase of the proceeding) so as to facilitate due process. Parents are entitled to an appointed attorney in state court, but most tribal courts cannot afford to provide them. Witnesses and evidence are also more likely to be located near, and available in, state court. Following adjudication, tribes or parents may decide the case should be left in state court so that parents have access to additional resources to help them improve themselves and get their children back. States must engage in active efforts to reunite the family, and usually have greater resources at their disposal for that purpose than tribes (e.g. transportation assistance funds and workers to facilitate visits). Tribal resources may also be located too far away from where the parents live to be of use, as tribal members live all over the country.

Requiring that a request to transfer be made at the earliest opportunity ignores the multiple justifications that may exist for delaying transfer and is not necessary to prevent harmful delay. As such, there should be no requirement to request transfer at the earliest opportunity.

Concerns regarding harmful delay are at their peak when a transfer is requested at or near the final dispositional hearing in a case. This is the point at which parental rights are often terminated. A parental request to transfer at this stage is almost always an attempt at forum shopping by a parent who realizes he or she is going to lose the case. Such a parental request is likely to do nothing but cause delay if not made in conjunction with a tribal request to transfer, because the tribe is much more likely to decline transfer in those situations. Courts must retain the authority to quickly reject such transfer requests by parents, otherwise it will become

common for parents' attorneys to request transfer at the final dispositional hearing in order to prevent the termination of their client's rights a little longer. Children will suffer due to such tactics.

A tribal request to transfer at or near the final dispositional hearing usually results from the tribe disagreeing with the likely disposition of the case. Unlike a parental request for transfer at a late stage, a tribal request is very unlikely to be for the purpose of delay. If a court denies a tribal request to transfer due to timeliness, it should be able to identify a specific permanent placement that would be delayed, such as guardianship or adoptive placement with a named person or persons (e.g. the child's relative or current foster parents). Simply changing a child's status, such as terminating rights so as to free up a child for adoption, is not specific, and usually means that more searching needs to be done to identify a permanent placement. In that situation, concerns about unnecessary delay are greatly diminished, making transfer more appropriate.

Tribal Contacts and Placement Change

The extent of contacts with the tribe and whether transferring the case will result in a placement change are two of the most important factors in the decision making process of virtually any child who is the subject of abuse and neglect proceedings. Prohibiting consideration of these factors may be interpreted to limit a child's ability to object to transfer because the child's objection will probably be based on factors the court does not believe can be considered.

When a tribe attempts to transfer in the later stages of a case, it usually does so because it disagrees with the likely disposition of the case in state court. The placement intent of the tribe, if not explicit, is often readily apparent. To any child, where they are placed is, quite rationally,

their paramount concern. A child's rational objection to transfer should not be disregarded because the objection is based on concerns about a change in placement.

It is also not irrational for a child to object to transfer because the child does not identify in the slightest with the child's tribe. Some tribes, such as the Cherokee Tribe, have very liberal membership requirements and have become very aggressive about asserting themselves in court cases, sometimes with regard to children that are less than 1% genetically Indian and multiple generations removed from any connection to the tribe. *See e.g. In re M.K.T., C.D.T., and S.A.W.*, _____ P.3d _____ (OK Civ. App. 2015).

Courts should also retain some discretion to consider these factors as part of what amounts to an overall best-interests analysis at later stages of a case. This is especially true if timeliness can no longer be considered. Cases involving young children subsequent to the termination of parental rights provide evidence of the need to permit consideration of these factors. In a case where all the children are under 12 years of age and parental rights have already been terminated, the proposed regulations have rejected every justification from the 1979 Guidelines that could be used to decline transfer. The parents would lack standing to object post-termination. The children would be considered too young to object. Timeliness, which once could be a bar to transfer in and of itself, could no longer be considered at all. The placement desired by the tribe, which would likely be the most relevant best-interests factor, could not be considered. The proposed regulations could be interpreted to require transfer upon the request of the tribe in every case involving young children where parental rights have been terminated. This is not a reasonable or permissible construction of ICWA. Situations where declining transfer may be appropriate include cases involving the separation of siblings, cases

where a quality permanent placement option would be disrupted, and cases where the parents evidenced strong objections to tribal court jurisdiction before their rights were terminated.

Alternatives

An interpretation of ICWA that limits "good cause" to deny transfer to nothing more than a convenient forum analysis for the adjudicatory hearing is not a reasonable interpretation, and is not likely to receive deference from the courts.

One option is to revert to criteria more aligned with the 1979 Guidelines but with updated language related to timeliness.

Another option is a total re-write. One such possibility is below. This option discontinues the facade that the good cause determination is not a best-interests analysis. That has always been the primary consideration underlying the good cause exception, and one has to wonder what could possibly constitute good cause if not the child's best interests. The following language could be used to replace parts (c) through (e) of § 23.117 of the proposed regulations:

c) It is presumed that transfer is in the best interests of the child. Good cause to deny transfer exists only when there is clear and convincing evidence that transfer is not in the best interests of the child. The party opposing transfer has the burden of establishing that good cause exists to deny transfer.
d) The following facts may, but do not necessarily, indicate that transfer is not in the best interests of the child:
    1) The child is part of a sibling group and the tribe is unable to assume jurisdiction over all siblings.
    2) The transfer request is made by a parent at an advanced stage of the proceedings and will result in unreasonable delay.
    3) The child objects to the transfer. The weight given to the child's objection should depend upon the age and maturity of the child.
    4) The child has already spent significant time living in a setting that is likely to become the child's permanent placement.
    5) Parental rights have been terminated, the child has minimal connections to the child's tribe, and a parent of the child has expressed a desire that the case not be transferred.
e) As part of any best-interests analysis, the court shall consider the child's strong interest in having a connection to child's tribe, learning the child's culture, being a part of the tribal community, and developing a positive Indian identity.

f) Transfer requests can be made at any stage of the proceeding. Failure to request transfer at an earlier opportunity is not relevant to whether good cause exists to deny transfer.

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**4. The proposed regulations too narrowly define "good cause" to depart from the placement preferences.**

The proposed regulations, and the 1979 Guidelines before them, too narrowly define "good cause" for departing from the placement preferences. They do so by disregarding the rights of single parents and by not allowing the consideration of factors that are highly relevant to children's best interests. Guidance from the Department should be revised to drop the facade that the best interests of the child is not a consideration when making the good cause determination.

The Statutory, Guidelines, and Proposed Regulation Language

Section 1915 of ICWA provides for the preferential placement of children with their family and tribe, but allows for deviation from these placement preferences for "good cause." The relevant parts of Section 1915 of ICWA state:

> (a) Adoptive placements; preferences
> In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.
>
> (b) Foster care or preadoptive placements; criteria; preferences
> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with—
>
> (i) a member of the Indian child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an institution 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.

The 1979 Guidelines stated as follows regarding the good cause determination at part F.3:

> a. For purposes of foster care, pre-adoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:
> (i) The request of the biological parents or the child when the child is of sufficient age.
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.
> b. The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (a) shall be on the party urging that the preferences not be followed.

The proposed regulations take the same approach to the issue as the 1979 Guidelines by creating an exclusive list of considerations upon which the good cause determination can be based. The proposed regulations use essentially the same list of considerations as the 1979 Guidelines, but with additional restrictive language meant to limit their use. The corresponding language of the proposed regulations states as follows at § 23.131:

> (c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:
> 1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.
> 2) The request of the child, if the child is able to understand and comprehend the decision that is being made.
> 3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with ICWA.

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.

The proposed regulations on this topic are virtually identical to the language of the New Guidelines, except that they leave out the following language, which was tacked on to factor 3) above:

> The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.

The New Guidelines contain further commentary on this topic in the introductory summary of updates:

> The updated guidelines also specify that it is inappropriate to conduct an independent analysis, inconsistent with ICWA's placement preferences, of the ''best interest'' of an Indian child. The provisions of ICWA create a presumption that ICWA's placement preferences are in the best interests of Indian children; therefore, an independent analysis of ''best interest'' would undermine Congress's findings.

The Department's proposed regulations define "good cause" so narrowly that courts would be left with virtually no flexibility in this area. This is not a reasonable interpretation of ICWA, and therefore will not receive deference from the courts. The introductory commentary to the 1979 Guidelines states that:

> [T]he legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.

The Oklahoma Court of Civil Appeals has already gone out of its way to repudiate the New Guidelines on this topic. In a decision that almost certainly could have been made on other grounds, it stated:

> We disagree that the good cause determination should not include an independent consideration of the child's best interests. The Act itself recognizes that it is this country's policy "to protect the best interests of Indian children[.]" See 25 U.S.C.A. §1902. We also disagree that a court should disregard the length of time the child has spent in a non-ICWA placement and the typical bonding that the child experiences. Ordinarily, the specific circumstances of a child's background and those factors that surround a child's removal and placement would be highly relevant and very important. The BIA Guidelines' intentional disregard of these factors results in one-size-fits-all approach to the placement of children with any tribal affiliation. That result may bear little resemblance to what is really in the child's best interests, despite the self-serving pronouncements in the BIA Guidelines.

*In re M.K.T., C.D.T., and S.A.W.*, ____ P.3d ____, ¶10 (OK Civ. App. 2015). Additional rebukes of the Department's interpretation should be expected if it overreaches on this topic.

Existing Judicial Interpretations

The overwhelming majority of courts explicitly recognize that the criteria set out in the 1979 Guidelines are not exclusive and that best-interests factors can weigh on the good cause determination. Some of the court decisions endorsing this approach, all of which are from different jurisdictions, are listed below:

- *In re Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983) ("The Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus.")
- *In re Adoption of F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993) ("Whether there is good cause to deviate in a particular case depends on many factors including, but not necessarily limited to, the best interests of the child")

- *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992) ("Good cause is a matter of discretion, and discretion must be exercised in light of many factors. These include but are not necessarily limited to the best interests of the child")
- *In re Baby Boy Doe,* 902 P.2d 477, 489 (Idaho 1995) ("The trial court considered appropriate factors in its "good cause" analysis, such as … the certainty of psychological and emotional trauma if the child is removed from the adoptive parents, and the likelihood of emotional damage if the child has contact with the father")
- *In re A.E.*, 572 N.W.2d 579, 585 (Iowa 1997) ("We think the 'good cause' for deviating from the § 1915(b) preferences depends on a fact determinative analysis consisting of "many factors including, but not necessarily limited to, the best interests of the child")
- *In re A.N.W.*, 976 P.2d 365, 370 (Colo. App. 1999) (condoning deviation where "removal of the child from her then current placement was likely to cause her irreparable harm")
- *In re K.R.C.*, 2010 WL 3155320 (Or. Ct. App.) ("'Good cause' properly and necessarily includes circumstances in which an Indian child will suffer serious and irreparable injury as a result of the change of placement.")
- *In re D.W.*, 2011 S.D. 8, ¶18, 795 N.W.2d 39 (2011) ("This Court has considered factors outside the BIA Guidelines in determining good cause in other ICWA matters.")
- *Navajo Nation v. Arizona Dept. of Economic Security*, 284 P.3d 29, 35 (Ariz. Ct. App. 2012) ("in determining the best interest of the Indian child, both the juvenile court and this Court should start with the presumption that ICWA preferences are in the child's best interest and then balance that presumption against other relevant factors to determine whether placement outside ICWA preferences is in the child's best interest")

- *In re Alexandria P.*, 228 Cal.App.4th 1322, 1355 (2014) ("The court also committed legal error by failing to consider Alexandria's best interests as part of its good cause determination.")
- *In re M.K.T., C.D.T., and S.A.W.*, ____ P.3d ____, ¶10 (OK Civ. App. 2015). ("We disagree that the good cause determination should not include an independent consideration of the child's best interests.")

It appears that only two states have concluded that a child's best interests should not be part of the good cause analysis. *See In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994) ("a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests"); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996) (holding that determining "'best interests,' is an unnecessary and inappropriate analysis under ICWA.") The seminal Minnesota decision still states that "it does not seem that a need for permanence or stability *cannot* be considered in determining whether good cause exists." *S.E.G.*, 521 N.W.2d at 363 (emphasis in original). Minnesota's holding in this regard is also tempered in practice by a willingness to deny transfer to tribal court. *See e.g. In re T.T.B.*, 724 N.W.2d 300, 309 (Minn. 2006) (denying transfer based on timeliness). Montana's holding is mitigated by its contrary rule that "the `best interests of the child' test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings." *In re Marriage of S.B.C.*, 2014 M.T. 345, ¶24 (citations omitted).

<u>Public Policy Considerations</u>

Where a child is placed directly implicates the child's best interests. Consideration of a child's best interests is even more important in the good cause analysis regarding the placement preferences than it is in the analysis regarding transfer, because a tribal court can still consider

the child's best interests following transfer and is under no obligation to follow the placement preferences.

The proposed regulations could be interpreted in a way that would mandate placement of a child in a home that every party to a proceeding, *including the tribe*, believes is contrary to the best interests of the child involved. Some states, including South Dakota in some circumstances, grant relatives of a child standing to challenge a refusal to place the child in their home. *See* SDCL 26-8A-29.1. In a situation involving a young child where parental rights have already been terminated or the parents are not participating, the proposed regulations would leave no discretion to grant placement to an exceptional non-relative over a minimally-adequate relative, even if every party to the proceeding, including the tribe, advocated placing the child with the non-relative.

There are several situations where departing from the placement preferences may be appropriate but is not permitted by the proposed regulations. One involves the separation of siblings. It is very possible for sibling groups to be comprised of both Indian and non-Indian children. The irony of using a law intended to help preserve family connections to rip apart a sibling group should be self-evident.

The other common situation where deviating from the placement preferences may be appropriate is where a child has already spent a substantial amount of time in a placement that is likely to become permanent and it would be harmful to uproot the child from that placement. This occurs most frequently with foster parents who wish to adopt a child they have had in their care for a substantial length of time. Some children removed as infants may have spent essentially the entirety of the early years of their lives in that one home.

There is justifiable concern that allowing deviation from the placement preferences because it would be in a child's best interests to remain in his or her current placement would eviscerate the effectiveness of the placement preferences because the majority of initial foster care placements are in non-Indian homes. For an example, see pages 18 of the comments on the proposed regulations submitted by Robert T. Anderson et al. However, this concern can be substantially mitigated in at least the following four ways:

1. Diligent efforts to find an appropriate placement for the child earlier in the case.
2. Requiring that the child be in a placement for significant or particular length of time before a court can consider the harm that is likely to be caused by removing the child from that placement.
3. The use of the heightened "clear and convincing" burden of proof.
4. Ensuring that other relevant factors are considered as part of the best interests analysis, such as facilitating the child's connection to her tribe, culture, and Indian identity.

Children should be able to expect that the adults controlling their lives (e.g. judges, social workers, lawyers, and tribal representatives) actually do their jobs and work to find them a permanent home in a timely fashion. What happens to a child over the course of a case, potentially lasting years, cannot be ignored. It is almost always apparent whether reunification is likely several months before the final dispositional hearing, if not only several months into the case. All parties involved should engage in concurrent planning and work to find a permanent home for the child in a timely fashion. Tribes can limit the number of children permanently placed in non-Indian homes by acting diligently to find appropriate placements as early as possible. A rule that incentivizes diligent tribal action to find appropriate placements will result

in the best outcomes for children and is the best public policy. The practice of some tribes to let the state court proceedings play out to the point of termination of parental rights before doing a diligent search for placements causes harmful delay and is detrimental to the best interests of children. Public policy should not encourage such practices.

Alternatives

The following language is a possible option to replace parts (c) and (d) of § 23.131 of the proposed regulations:

(c) A determination that there is good cause to depart from the placement preferences should be based on one or more of the following considerations:

1) The request of all parents of the child who are participating in the proceedings.
2) The request of the child. The weight given to the child's request should depend upon the age and maturity of the child.
3) The unavailability of a placement that complies with the placement preferences.
4) The best interests of the child. The following shall apply to any departure from the placement preferences based upon the best interests of the child:
    i) The court shall consider the child's strong interest in having a connection to child's tribe, learning the child's culture, being a part of the tribal community, and developing a positive Indian identity.
    ii) The court shall consider any extraordinary physical or emotional needs of the child which require specialized treatment services outside of the home environment, and the availability of those services.
    iii) The court may consider whether significant harm to the child is likely to be caused by removing the child from a placement where the child has lived for more than a year. Ordinary bonding or attachment that may have occurred as a result of a shorter placement is not sufficient in and of itself to depart from the placement preferences.
    iv) The court may consider the success of a particular placement if the child has a history of multiple unsuccessful out-of-home placements.
    v) The court may not consider the socio-economic status of one placement relative to another so long as both placements meet the physical, mental, and emotional needs of the child.

It should be noted that this potential language changes the requirement of the proposed regulations that *both* parents request departure from the preferences to a requirement that "all parents of the child who are participating in the proceedings" request departure. This is due to the concerns raised earlier about retaining the possibility of anonymity in voluntary proceedings.

If the father of a child is unknown of fails to participate, it should still be possible to find good cause based upon the request of only the mother.

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**5. The domicile of a child of unmarried parents is not necessarily the same as the domicile of the mother.**

Relevant Language from the Proposed Regulations:

§ 23.2 Definitions.

*Domicile* means:

(2) For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother.

Argument:

It should not be assumed that a child is living with its mother in the case of unmarried parents. Many fathers of children born out of wedlock are the primary caretaker for their children. Often this is by court order, although sometimes it is not. This issue can be corrected by changing the language to read "the domicile of the Indian child's parent with whom the child spends the most time." For a case applying such a standard, see *In re J.D.M.C.*, 2007 SD 97, ¶20.

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**6. The proposed definition of "imminent physical damage or harm" is incorrect and potentially dangerous.**

Relevant Language from the Proposed Regulations:

§ 23.2 Definitions.

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

Argument:

This definition, especially the addition of the word "serious," is not supported by the statutory language and could cause children to be left in dangerous situations because the threat of physical harm is insufficiently serious.

ICWA uses the phrase "imminent physical damage or harm" at § 1922 as a necessary threshold for emergency removal. The Act does not use the modifier "serious," but easily could have done so. Adding the word "serious" creates a different and greater standard than used in the Act.

The words "serious bodily injury" have been judicially interpreted in other contexts in ways that would be inappropriate if used in child welfare situations. Some criminal assault statutes distinguish misdemeanor assault and felony assault by use of the word "serious." The South Dakota Supreme Court has defined "serious bodily injury" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health or limb." *State v. Bogenreif*, 465 N.W.2d 777, 780 (S.D. 1991) (quoting *State v. Janisch*, 290 N.W.2d 473, 476 (S.D. 1980)). Using that definition, an aggravated assault conviction was reversed when the only injuries were "black and blue marks, a puffed eye, and a swollen or cut lip." *Janisch*, 290 N.W.2d at 476.

The Department's proposed definition could lead to the conclusion that it is acceptable to harm Indian children as long as they are not hurt so badly that they require hospitalization. Simply deleting the proposed definition is a superior option.

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**7. The ultimate burden of proof regarding whether a child is an "Indian child" must remain on the party advancing that claim.**

Relevant Language from the Proposed Regulations:

§ 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.

Argument:

The case law is clear that the "burden of proof is upon the party asserting the applicability of ICWA to produce evidence for the court to decide whether a child is an Indian child." *In re Adoption of C.D.*, 2008 N.D. 128, ¶19, 751 N.W.2d 236 (multiple citations omitted).

The potential overwhelming burden of conclusively proving the negative – that a child is not an Indian child – dictates that the burden of proving the child is an Indian child must ultimately rest upon the party advocating as such. Reasonable inquiry requirements are likely fine, but at some point a court must be free to act if no concrete evidence is produced that a child is an Indian child.

Consider a private adoption action where there are clear grounds to terminate father's rights under state law, but father opposes the adoption. Father could delay almost indefinitely by simply sending a letter to the Court indicating that he thinks he maybe could be Indian and then kicking back and minimally participating. In that situation, the proposed regulations suggest that the petitioner's attorney would have to contact literally every tribe in the county to try to determine the child's status. In this hypothetical, father must at least bear the burden of providing enough information to reasonably narrow the inquiry.

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**8. It should be clarified that ICWA does not apply to custody disputes between a child's parents.**

Relevant Language from the Proposed Regulations:

§ 23.103  When does ICWA apply?

(e) ICWA and these regulations or any associated Federal guidelines do not apply to: …
(3) An award, in a divorce proceeding, of custody of the Indian child to one of the parents.

Argument:

Continuing to use the words "in a divorce proceeding" creates unnecessary confusion. ICWA is inapplicable to custody disputes between the parents of a child, and the majority of such custody disputes today do not occur in the context of a divorce case.

The creation of these new Regulations presents an excellent opportunity to clarify this very common misconception about ICWA.  When most people hear the phrase "child custody proceeding," they think of custody disputes between parents.  Only by wading through ICWA definitions can one deduce that custody cases between parents are not encompassed by the definition of a "child custody proceeding."  This creates significant confusion for lay individuals, as well as occasionally for attorneys and judges.  A clear statement of when ICWA does not apply can lessen this confusion.

The following are possible options for language at part (e)(3):

- Proceedings between parents regarding child custody and the incidents of custody.
- An award, in a divorce or custody proceeding between the parents of an Indian child, of custody of the child to one of the child's parents.

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**9. The proposed regulations should not use "and/or."**

The word "and/or" is used repeatedly in sections 23.107(b)(i) and 23.109.  Presumably this is meant to convey the use of an inclusive "or," meaning that the use or consideration of one

item in a list does not preclude the use or consideration of other items in the list as well. The way the current sections are written, simply "or" would likely be sufficient to convey the inclusive meaning. Of greater concern, using "and/or" in only part of the regulations may lead to the interpretation that "or" should be read in only the exclusive sense in the rest of the regulations, because "and/or" was used where the inclusive sense was intended.

A superior option is to construct lists in such a way that there is not ambiguity. For example, used of the phrasing below to start a list allows for a numbered list to follow without the use of a conjunction.

- All of the following shall be considered:
- One or more of the following shall be considered:
- Any of the following may be considered:

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**10. The proposed regulations contain two different lists of factors for determining a child's tribe when the child is eligible for membership in more than one tribe.**

Sections 23.109(c)(1) and 23.109(c)(2)(ii) of the proposed regulations both list factors to be considered when designating a child's tribe when the child is eligible for membership in more than one tribe. These lists are not identical. There should be only one list of factors for this purpose.

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**11. The first pleadings in a custody case should contain the information required by Section 209 of the UCCJEA.**

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is a uniform law that has been adopted in virtually every state (Massachusetts is the lone oddball holdout). It

governs child custody jurisdiction, including jurisdiction in abuse and neglect cases. *See* Section 102(4) of the UCCJEA (defining "child-custody proceeding")

Section 209 of the UCCJEA lists information that is supposed to be submitted to the court with the first pleading in a child-custody proceeding. Such information includes the names and addresses of anyone the child has lived with for the past five years, the names and addresses of anyone who claims legal or physical custody rights, and information regarding any prior court proceedings regarding custody. The information required by Section 209 of the UCCJEA is necessary to allow a court to determine whether it has subject matter jurisdiction in the case pursuant to that statute. However, it is also the sort of information needed to determine whether a tribe may have exclusive jurisdiction pursuant to ICWA due to the child being domiciled on a reservation or already being a ward of a tribal court.

Section 23.113(d) of the proposed regulations lists information to be included in an affidavit when there is an emergency removal of a child. A reference to Section 209 of the UCCJEA may make sense. In my experience, it is common for the UCCJEA to be ignored in abuse and neglect situations.

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**12. Requiring a factual determination regarding the necessity of continued removal at every hearing related to emergency custody may result in fewer protections for parents.**

Relevant Language from the Proposed Regulations:

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

> (e) At any court hearing regarding the emergency removal or emergency placement of an Indian child, the court must determine whether the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

Argument:

As a result of the Oglala Sioux Tribe v. Van Hunnik federal class action, court procedures related to emergency removal and the start of abuse and neglect cases are in a state of flux and may change across the country in coming years. There is a substantial legal grey area as to what due process requires. South Dakota law currently requires a hearing within two business days (48 hours) following removal. That hearing is usually the first opportunity to appoint counsel for the parents and child and advise them of their rights. The feasibility of conducting a full evidentiary hearing at this point is highly questionable.

One possible outcome of the federal suit that would likely comply with both due process and ICWA would involve no longer pretending that 48 hour hearings are evidentiary hearings. Rather, the 48 hour hearing could be a probable cause hearing, advisory hearing, and chance to appoint counsel. Parents could then be advised of and guaranteed the right to a proper evidentiary hearing within a time-certain (e.g. 7 days). A procedural scheme of this nature would almost certainly pass constitutional muster and comply with ICWA.

A requirement that an evidentiary determination be made at "any court hearing regarding the emergency removal" could jeopardize the previously described procedural scheme. If a full evidentiary hearing is required at the very first hearing following removal, states could take the approach of extending the deadline within which such hearings would have to be held. Seven-day hearings could replace 48 hour hearings. The proposed regulations could have the unintended consequence of reducing procedural protections for parents. Part (e) of Section 23.113 should simply be deleted.

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**13. The proposed regulations impermissibly leave out emotional harm as a basis for foster care placement or termination of parental rights.**

Parts (a) and (b) of § 23.121 of the proposed regulations require findings that continued custody "is likely to result in serious physical damage or harm to the child" in order for a court to order foster care placement or the termination of parental rights. These proposed regulations essentially restate parts (e) and (f) of Section 1912 of ICWA. However, they misstate the clear statutory standard, which is that continued custody "is likely to result in serious *emotional or* physical damage to the child."

The Department has no authority to drastically change the clear legal standards of ICWA by excluding considerations of emotional harm. Hopefully this was nothing more than an oversight in the initial publication of the proposed regulations.

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**14. The attempt in the proposed regulations to clarify the evidentiary requirements is confusing and potentially dangerous.**

Relevant Language from the Proposed Regulations:

§ 23.121 What are the applicable standards of evidence?

> (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.
>
> (d) Evidence that only shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical-damage to the child.

Argument:

As drafted, the proposed part (c) does not make sense because there is no second object of the preposition "between." Use of the word "between" in this context requires two objects

(e.g. Clear and convincing evidence must show a causal relationship between X and Y.) The remainder of part (c) contains only the X, but no Y.

The proposed part (d) has the potential to be remarkably dangerous language. If children are removed from a home where both parents are using and producing methamphetamine, that is almost certainly sufficient evidence that continued custody is likely to result in serious emotional or physical damage to the child. However, under the proposed regulations, it could be argued that the evidence only shows the existence of inadequate housing and substance abuse, and that these are, by definition, inadequate reasons for foster care placement. Certainly this is not the Department's intended result.

What it appears the Department was trying to do with parts (c) and (d) was to require findings by the court regarding just *how* particular conditions make it likely that a child will be harmed. For example, a parent's substance abuse creates a risk of serious harm *because* the child has no able caretaker while the parent is using, the parent brings the child around dangerous individuals when using, or the child is being exposed to substances that will detrimentally affect the child's health.

The problem which these proposed regulations target is presumably a perception that courts are finding that children are likely to suffer serious emotional or physical harm without adequate evidence for that finding. This sort of problem is not likely to be remedied with any quick regulatory fix, especially a confusing one such as that in the proposed regulations. Simply deleting parts (c) and (d) is a superior option to the language as proposed.

Another alternative is to replace parts (c) and (d) with revised language that more clearly expresses the intent behind it. Below is possible alternative language:

> (c) Clear and convincing evidence must show a causal relationship between the existence of particular facts and the likelihood of serious emotional or physical

> damage to the particular child who is the subject of the proceeding. Evidence that only shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior is not sufficient in and of itself without additional findings regarding how these conditions create a likelihood of serious emotional or physical damage to the particular child who is the subject of the proceeding.

In this revised language, the phrase "conditions in the home" was purposefully changed to "facts" so as to prevent any exclusion of facts particular to the parents, such as a propensity to physically or sexually abuse their children, rather than the living environment.

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**15. The proposed regulations incorrectly state when a parent's consent to the termination of their rights may be revoked.**

Relevant Language from the Proposed Regulations:

§ 23.127 How is withdrawal of consent to voluntary adoption achieved?

> (a) A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption, *whichever occurs later.*

Argument:

This proposed regulation contradicts the clear statutory authority of ICWA, and will mislead parents regarding their timeframe for revocation. Parents who voluntary terminate their rights cannot revoke their consent thereto at any time prior to the finalization of the adoption. The relevant language of ICWA, found at Section 1913(c), states:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, *as the case may be*, and the child shall be returned to the parent.

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**16. The proposed regulations overstate the efforts that must be made to comply with the placement preferences.**

Relevant Language from the Proposed Regulations:

§ 23.128 When do the placement preferences apply?

> (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:
>
> > (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.

Argument:

> Section 1915(b) of ICWA states as follows:
>
> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—[family or tribal options]

This section of ICWA contains two mandatory objectives that take precedence over placement with family or tribally affiliated options. They are (1) placement in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met, and (2) placement within reasonable proximity to the child's home, taking into account any special needs of the child.

ICWA recognizes the child's right not to be shipped hours away to live in the closest available Indian foster home when non-Indian foster homes are available near the child's home. This right to have their children placed near home is also important to parents seeking to maintain contact and reunite their family. ICWA also recognizes the child's right not to be placed in an Indian operated institution when a more family-like setting is available in a non-Indian foster home.

The objective of keeping the child close to home often makes it unnecessary and pointless to notify every Indian foster home licensed by the child's tribe or located in the state, as required by § 23.128(b)(4) of the proposed regulations. The regulations should be revised to reflect as such.

The proposed regulations also neglect to consider that attorneys and private adoption agencies are usually not privy to lists of every Indian foster home in a state. Having such a list would be a necessary prerequisite to providing notice to every Indian foster home.

It is also highly questionable how much Indian foster care providers would want to receive something in the mail every time an Indian child was placed in foster care. This could amount to hundreds of pieces of mail each year. A sizeable number of foster parents are licensed for the purpose of caring for relatives, and do not wish to have non-relatives placed in their home.

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