



Miranda Lynch
Division of Policy
Children's Bureau
Administration for Children and Families
1250 Maryland Avenue, SW
8th Floor
Washington DC 20024

May 12, 2009

**Re: Request For Public Comment: Tribal Title IV-E (110-351, Fostering Connections Act) FR
Doc. E9-5505 Filed 3-12-09**

To Whom It May Concern:

CWLA (Child Welfare League of America) submits these comments in regard to the October 1, 2009 implementation of Title III of the Fostering Connections to Success and Increasing Adoptions Act of 2008 (PL 110-351). With the passage of this Act, and the new authority this provides to allow direct access of federal Title IV-E funding by tribal governments and consortia, the nation has an opportunity to advance the well-being of children living in Indian country. The provisions found in Title III of this new law were included in numerous stand alone bills introduced in congress over the past two decades by members of both political parties. With the roll out of these interim rules and the provision of critical technical assistance, the Department of Health and Human Services has an opportunity to address some of the inequities in funding and services that now exist due to the structure of the current Title IV-E program as it applies to children and who are eligible for child welfare services provided by tribal governments.

This new law provides an opportunity to address some of the current shortfalls in funding and can help to reverse a past history of policy that has not supported strong cooperative working relationships between mainstream public agencies and tribal governments. The opportunities presented in this new law can and should encourage collaboration between three key partners: tribal governments, state child welfare agencies and the federal government, in particular the Department of Health and Human Services HHS. As this new law is implemented and as more tribal governments take the option to establish Title IV-E Foster Care, Adoption Assistance and Kinship Guardianship programs, we urge the Department to invest the time and resources to assist in the implementation of these new plans.

Background: Tribal Title IV-E

In 1978, Congress passed the Indian Child Welfare Act (ICWA, P.L. 95-608) to preserve cultural and family ties among Native American children and families and to ensure respect for tribal authority in decisions concerning the placement of Indian children in out-of-home care.

ICWA requires states to identify Indian children and notify the child's parents and tribe of their rights to intervene in a custody proceeding. ICWA also requires certain procedures regarding the use of tribal courts, child custody proceedings, tribal intervention standards, and placement preferences. The act also establishes a two-part requirement for states before they remove an Indian child, including efforts to prevent the breakup of the Indian family and standards for court findings.

Congress took these steps and enacted this law as a result of actions and federal policies in the previous decades that resulted in the breakup of Indian families and the arbitrary separation of Indian children from their families in violation of what was in the best interest of these children.

Congressional hearings that began in 1974 and led to the passage of ICWA in 1978 focused on child welfare issues of Native American children in out-of-home placement, with particular attention on placing Indian children in non-Indian settings or families. Studies preceding these hearings showed that between 1969 and 1974, 25%–35% of all Native American children in some states were removed from their homes and placed in foster care or adoptive homes. In some states, Native American children were 13 times more likely to be removed from their families than non-Indian children.

Although ICWA established procedures and protections for placing Indian children in out-of-home care, adequate funding to provide these services did not follow. Tribal nations to this point have not had the option of receiving federal Title IV-E Foster Care and Adoption Assistance funds directly. As a result, most Native American children placed in out-of-home and adoptive settings through tribal courts are not eligible for federal foster care maintenance or adoption assistance payments. In some instances tribes have negotiated agreements with states that allow them to access Title IV-E funds.

In 2005, Congress directed the U.S. Government Accountability Office (GAO) to study the impact of ICWA and, in particular, determine if the ICWA requirements were causing delays in the placement of Native American children. The GAO study concluded that the ICWA requirements did not result in poorer outcomes for children.

In 2008, as part of a larger child welfare reform package of legislation, the Fostering Connections Act (110-351), tribal governments or consortia were allowed to directly apply for Title IV-E funding to run their own Title IV-E foster care, adoption assistance, Kinship guardianship and Independent Living programs.

As HHS takes steps to implement the new tribal provisions of this law there are some key actions the Department can take to help facilitate a successful implementation in these areas where Tribal governments choose to carry out their own Title IV-E programs. Key questions include: how to effectively transition from current state control to Tribal control, how to address key funding issues such as designating the FMAP rate for calculating a Tribes matching requirements, how to create and encourage cooperation between the state child welfare agency and Tribal child welfare agency, the role and requirements regarding data collection and data

collection systems and the role of Title IV-B programs and its intersection with Tribal Title IV-E.

Eligibility For Title IV-E

Early indications to HHS are that up to seventy-three Tribes located in twenty-one states have filed with the Department their interest in applying for Title IV-E funds. This represents a new partnership between HHS and tribal governments that will evolve over time as new circumstances dictate. This will require a strong and on-going consultative process between the federal government and tribal governments which should extend to any regulatory process as well as the actual implementation of individual Tribal Title IV-E plans. One issue that may immediately arise is around the link between Title IV-E and Title IV-B programs. Many of the protections for children are found in Title IV-B part 1, Child Welfare Services (CWS). CWS is a relatively small discretionary block grant of approximately \$280 million. For many tribes the funds they are eligible for would not cover the cost of the application process. CWLA believes it is possible to allow tribes eligibility for Title IV-E funds by requiring the protections without requiring that the actual Title IV-B funding be drawn down.

Effort to Negotiate in Good Faith Between Tribal and State Governments

A key factor in serving all children in Indian country whether they are covered by a new Tribal IV-E program or continue to be served under the state plan is good faith bargaining between the state child welfare agency and the Tribal government or consortium. As part of this new law, Congress amended the state plan requirements under Section 471 directing states to negotiate in good faith with any Indian Tribe, Tribal organization or Tribal consortium that requests to develop an agreement with the state to run all or part of the Title IV-E program. This good faith direction also covers tribal access to resources such as administration, training and data collection. CWLA encourages HHS to outline key indicators that can offer evidence of such good faith. This might include states offering in-kind services, funding or access to data collection technology and support services such as access to Title IV-B funded services.

Population and Service Areas

Critical tasks for tribes in developing Title IV-E plans will be to define a service area and defining the population to be served within this service area. The new law (Sec. 479B) requires a description of the areas served and population served and an assurance that the plan will be in effect for all areas and population covered by such a plan.

A service area could include a reservation or it could include members of a tribe who do not reside on the same reservation. There is also the issue of whether or not non-enrolled members or non-Indian children and families residing on a reservation will be covered. In reviewing this issue we examined the regulations that were developed in carrying out the Tribal TANF plans created under the 1996 welfare act (PRWORA, P.L. 104-193). In its comments, HHS offered Tribes flexibility in defining their service area as a way to balance out those Tribal requests that allow flexibility and those that proposed more specific requirements as a way to address potential disagreements. Part of the rationale was that this would be the most effective way to address different approaches that may exist between Tribal governments. The Department pointed out that in some instances, such as in the state of Oklahoma, there were disagreements between Tribes as to how service areas would be drawn up and that this flexibility might help address these potential disagreements.

In line with this decision HHS also indicated that for those service areas that did not cover all non-enrolled families or non-Indian families, the state would continue to carry the responsibility for these families. This approach may also encourage cooperation between the Tribal and the state plans and encourage good faith efforts to come to an agreement that would assure coverage for all eligible families.

The HHS regulations also allowed the Tribe to submit a plan that described a service area as being an entire reservation, a portion of the reservation, or a reservation and a “near reservation area.” It will be critically important that the authority of tribal governments (and consortia of tribal governments) to define service areas and populations be honored in the Title IV-E regulations and by states.

Termination of Current Tribal – State Agreements, Tribal IV-E Plans

Current Title IV-E agreements exist between some tribal governments and state child welfare agencies and it is possible a state may choose to terminate such an agreement in light of the new law. After several years it is also possible that a tribal government may choose to end its Title IV-E plan due to a lack of resources. In such instances there needs to be an orderly process to assure continued coverage and protection for children in Title IV-E programs whether covered by state plans or Tribal plans regardless of such changes.

Once again relying on HHS regulation for the Tribal TANF program in 1998, HHS established a policy for “retrocession” of a TANF plan. While it was written to cover the possibility that a Tribe would choose at some future point to end their Tribal TANF plan, it was based on some important principles that may offer assistance in guiding HHS. The principles included the goals that there be minimal disruption of services to the family, enough time for the government authority to make an informed decision on whether or not to terminate a plan, and adequate notice to the other governmental party now responsible for services to the effected families.

On this rational HHS proposed that a termination could not take place until at least 120 days notice to HHS before the end of the federal fiscal year (September 30). At the same time, the second party affected by the termination would receive at least a 90 day notice. This notice provision is especially critical in those instances in which a state terminates its cooperative agreement with a tribe but the tribe does not or cannot take over or apply for Title IV-E control. Whether this time frame is adequate, is up to future discussion, but we propose that it be at least this long.

Additionally, we recommend that HHS examine ways that would discourage states from terminating Title IV-E agreements with tribes before those tribes have had the ability to assess their options and their best interest in regard to applying for an IV-E plan. The option of maintaining access to Title IV-E by agreement with a state if that works better for the tribe and the states should be still be a viable alternative and should be evidence of good faith between a state and tribal government.

FMAP Rate Calculation, In-Kind Contributions

In calculating a Tribal plan’s Federal Medical Assistance Percentage (FMAP) rate we propose that HHS examine data collected from states, the Census Bureau, the Bureau of Indian Affairs, other federal programs, Tribal records and other information a Tribe may suggest. Once an FMAP rate is determined we propose that HHS offer Tribal governments a timeframe to submit additional data and propose potential corrections. In addition, even though it would only apply to a fifteen month timeframe, CWLA suggests that the temporary increase in the FMAP rate of 6.2 percentage points resulting from enactment of the American Recovery and Reinvestment Act (ARRA) be applied to any approved Tribal plan covering that same period.

In determining the definition of in-kind contribution we urge the department to extend this definition to funds generated within the applying tribal community, meaning that in-kind contributions are not limited to contributions submitted by another tribe or entity. There may be funds generated by another tribal department outside of child welfare that could qualify under these definitions as well.

Access to State Information, Title IV-E Eligibility

Data collection and technology will be a critical element not only in implementing Title III of the Fostering Connections Act but as it relates to state systems. CWLA asks that HHS examine ways and technological improvements that can streamline and modernize state child welfare data systems. As we have indicated in previous communications with HHS, this is an area that is in need of improvement. Where it is possible for states to assist Tribal plans in data collection and data collection systems, we think this should be considered an indication of good faith efforts between states and Tribal governments. In addition, any guidance and regulation issued must recognize the fact that the Tribal governments are not a part of the Interstate Compact on the Placement of Children (ICPC). Procedures need to exist for the timely placement of children, and Tribes, at a minimum, must have access to the same information that is provided through the ICPC.

CWLA also urges HHS to examine ways in which all of child welfare data collection systems can be better coordinated, including child welfare Tribal-state links and also state-private agency links.

As HHS moves forward to provide technical and other assistance to states, Tribes and private agencies in this area, it will also be important for Tribes and states to have a way to determine which children are eligible and ineligible for Title IV-E funding under the foster care, adoption assistance and the kinship care option as eligibility, at least in part, is still linked to the AFDC programs as it existed in July 16, 1996. Since July 1996, Tribes have had the ability to run their own TANF programs yet the new Fostering Connections Act requires a Tribal assurance that only children meeting that AFDC eligibility will be covered by such federal funding.

State Health Planning and Tribal Access

As part of the Fostering Connections Act, Congress strengthened the health planning requirements for children in foster care. Under the new law, state child welfare agencies are to work with the state Medicaid agency to develop a plan through consultation that will address health screenings, storing and updating of electronic health records, continuity of health care services, oversight of prescription medication and consultation with health professionals including physicians on the appropriate medical care. As part of its guidance we urge HHS to direct and assist states in how they are to involve Tribal IV-E plans in this consultation and planning process and how these systems might link. This is especially true in regard to electronic records and implementation of both the new child welfare law as well as changes enacted as a result of the American Recovery and Reinvestment Act (ARRA).

Title IV-E Independent Living/Chafee Program

Since the John H Chafee Independent Living program is a block grant that supplements the other sections of Title IV-E, HHS will have to determine how to allocate some portion of the fixed amount that is awarded to a state to qualifying Tribes located in that state. In determining how this allocation is arrived at we would again suggest an examination of the process that is used to allocate the TANF block grant in states where a Tribal government has taken the option to run their own public assistance program. As part of that process a state submits data to HHS, and Tribes have the opportunity to submit additional information that may assist in the determination of final allocations between a Tribal plan and the state plan. Regulations should include the bases upon which these determinations will be made.

Conclusion

On behalf of CWLA, its members, and the children and families we serve, we thank you for the opportunity to comment on implementation of this new law. We again stress how very critical this new law and its execution are to our national child welfare policies. We are challenged by the fact that minority populations including Native American children are overrepresented in our child welfare system. Some of this is due to practice, some due to indifference or bias, and some due to a lack of resources and investment. By implementing this new law in the most effective way possible, CWLA believes we can help address, at least in part, one element of this important issue. We offer our continued support and assistance as this process moves forward.

Sincerely,

A handwritten signature in black ink that reads "Christine James Brown". The signature is written in a cursive, flowing style.

Christine James-Brown
President/CEO
Child Welfare League of America