

November 17, 2023

Ms. Kathleen McHugh, Director
Policy Division, Children's Bureau
Administration for Children and Families
U.S. Department of Health and Human Services
330 C Street, SW
Washington, DC 20201

Re: Comments Regarding Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B (RIN 0970-AD03) Published September 28, 2023, in the *Federal Register*

Please accept the comments of the National Indian Child Welfare Association (NICWA) regarding the notice of proposed rulemaking (NPRM) published on September 28, 2023, in the Federal Register (RIN 0970-AD03). ICWA is a private, nonprofit Indian organization headquartered in Portland, Oregon. We are dedicated to the well-being of American Indian and Alaska Native (AI/AN) children and families and carry out our mission through public policy and advocacy, research, community development, and training and technical assistance with tribal, state, federal, and private agencies. We have extensive knowledge and expertise in federal child welfare programming, including the Department of Health and Human Services programs under Title IV-B and Title IV-E of the Social Security Act. Our comments will focus on the impacts of the NPRM for AI/AN youth and families.

Background: LGBTQI+ Identity and Native Youth

The discussion of LGBTQI+-identifying youth in the child welfare system is not complete without the acknowledgement of Two-Spirit youth and their relationship both to the child welfare system and AI/AN communities more broadly. "Two-Spirit" is a term used by many AI/AN communities to describe someone who has both a masculine and feminine spirit, and though the term has been used differently in different tribal communities throughout history, today it still largely carries that meaning, and is associated with LGBTQI+ identity and gender identity outside of the gender binary in Native and non-Native spaces (National Child Resource Center for Tribes, 2014). It is important to recognize the significance that Two-Spirit and LGBTQI+ identity has played in AI/AN communities throughout history, as Two-Spirit and LGBTQI+ people have often been considered sacred, valuable members of their communities. Although Two-Spirit identity is something different than other identities that fall under the sphere of LGBTQI+, it is important to recognize it as a distinct identity that many hold, including AI/AN youth. Two-Spirit people still play valuable, unique, and sacred roles in AI/AN communities today, so the distinct Two-Spirit identity must be understood both as a personal identity, and one with a role in AI/AN communities. AI/AN youth in the child welfare system who identify as Two-Spirit, LGBTQI+, or both, deserve to be placed in spaces that best respect this identity. The Indian Child Welfare Act of 1978 (25 USC §1901 et seq.) recognized the criticality of keeping AI/AN youth in state child welfare systems connected to their families and tribes. This promotes the best interests of AI/AN youth more generally and when it comes to understanding and connecting youth with culturally appropriate Two-Spirit and LGBTQI+ resources, consideration of keeping AI/AN youth in a safe and appropriate home in community must be enacted because of the significant historical relationship of Two-Spirit identities in AI/AN communities. Culturally relevant placements and LGBTQI+ supportive placements are not mutually exclusive and are factors that must be considered together in order to meet the best interests of AI/AN Two-Spirit and LGBTQI+ youth.

The National Resource Center for Permanency and Family Connections (NRCPPFC) and the National Resource Center for Tribes (NRC4Tribes) has released several resources on best practices for understanding Two-Spirit and LGBTQI+ identities in relation to tribal child welfare systems. Some of these

resources include webinars on Two-Spirit identities in AI/AN communities and how to best support Two-Spirit and LGBTQI+ youth within them, information on Two-Spirit societies, both local and virtual communities, across the country, and educational resources on Two-Spirit and LGBTQI+ youth in the child welfare system specifically (NRC4Tribes, 2014). The best practices for supporting Two-Spirit and LGBTQI+ youth outlined in these resources align closely with the efforts outlined in this NPRM, and include calling for education and training about what being Two-Spirit and LGTBQI+ means for those who are potential placements for Two-Spirit and LGBTQI+ youth, education about the additional harm that Two-Spirit and LGTBQI+ youth are at risk of [redacted], and the need to connect Two-Spirit and LGBTQI+-identifying youth [redacted].

The Ontario Federation of Indigenous Friendship Centres outlines how linked the histories of marginalization of Two-Spirit and LGBTQI+ identities are with the child welfare system (Native Youth Sexual Health Network and Ontario Federation of Indigenous Friendship Centres, 2015). The same systems that have displaced Indigenous youth from communities in the name of assimilation throughout history are connected to the systems that have marginalized and suppressed Two-Spirit identities. When Congress enacted the Indian Child Welfare Act (ICWA) they understood the importance of keeping AI/AN children connected to their tribal community, which is especially important for Two-Spirit and LGBTQI+ identifying youth because of the unique relationship tribal communities have with the Two-Spirit people within them. This important relationship should be taken into consideration when considering the most safe and appropriate placement for an LGBTQI+ individual who also has ties to an AI/AN community.

AI/AN children make up 1% of all children in the country, but are disproportionately represented in the child welfare system, with 2.7% being placed outside of their homes in state foster care (NICWA, 2021). LGBTQ+ youth who are AI/AN, as well as other youth of color in the foster care system, are disproportionately affected by disruption in placements (Poirier, 1-26) This NPRM highlights the specific ways that youth of color who also identify as LGBTQI+ are overrepresented in the child welfare system, and experience harm at higher rates than their white counterparts. While there is not significant, reliable data identifying if LGBTQI+ youth are overrepresented in tribal child welfare systems, it is assumed that there is lower risk of AI/AN Two-Spirit and LGBTQI+ not receiving culturally appropriate services and placements. It is in the best interest of AI/AN Two-Spirit and LGBTQI+ youth that all aspects of their identity and cultural identity are taken into consideration to achieve safe and appropriate care.

NICWA's Experience Advocating for the Best Interests of AI/AN Two-Spirit and LGBTQI+ Youth

In 2013, NICWA released a report outlining standards of care for Two-Spirit and LGBTQI+ AI/AN youth (NICWA, 2013). This finding draws upon research that AI/AN youth are more likely to identify as LGBTQI+ than non-Native youth, so policies that call for safe and appropriate placements and services for LGBTQI+ individuals are especially pertinent when looking at state and tribal child welfare cases that involve AI/AN youth. Because of the specific ways that culture and LGBTQI+ identity interact, especially with AI/AN youth, this report also calls for state and tribal child welfare agencies to consider the need for safe placements and culturally-appropriate services that embrace a child's identity, including providing the child with services that are supportive of what it means to be Two-Spirit in the youth's community if applicable.

The report calls for many of the same standards of finding a safe and appropriate placement, including community outreach as part of the search and placement process, so the LGBTQI+ identifying youth has access to a supportive community surrounding them and education for social workers and communities to promote the use of appropriate and affirming language and services. This NPRM mentions many ways that family, child welfare personnel, and foster parents can learn how to affirm and support the identity of LGBTQI+ youth, including learning how to address the specific needs of the individual, seeking access to clothing and hygiene products to support the youth's identity, and addressing a youth with their chosen name and pronouns. As part of appropriate and supportive care, we understand the necessity to have

conversations on the complexities of gender affirming care (including the use of correct pronouns and names, as mentioned above) and strategies that will inform services and placement decisions. These conversations are essential in every community, not just with social services, but also with other agencies and our larger community too.

Providing Appropriate Care for Two-Spirit and LGBTQI+ Youth and Meeting ICWA Requirements

Besides placement in appropriate homes for AI/AN Two-Spirit and LGBTQI+ youth, a key focus of this NPRM is facilitating a child's access to appropriate community services. Many AI/AN communities and households that youth will be placed in are located in rural areas, where services are often less resourced and harder to access. Ensuring Two-Spirit and LGBTQI+ youth have access to supportive services can take more creativity in rural areas and may require more reliance on informal supports from extended family and other tribal community members. ICWA requires that AI/AN children and youth and their birth parents are provided active efforts (25 USC § 1912(d)) to strengthen families and prevent out of home removal and contains placement preferences for AI/AN youth who are placed in foster care, guardianship or adoptive homes. Active efforts would include efforts to connect AI/AN youth with age-appropriate, culturally appropriate services to promote the child's well-being and connection to their culture, family, and tribal community. If resources like age-appropriate LGBTQI+ support groups or out-of-home LGBTQI+ affinity groups are not available in a given area, resources must be made available on how the youth may safely access virtual support, or otherwise have the ability to find and use resources that support their LGBTQI+, Two-Spirit, cultural, and tribal identity. We recommend that ACF include a statement in the Final Rule that recognizes the differences in access to services that exist in different communities and encourage states and tribes to creatively work to develop, market, and provide needed services for this population. Active efforts under ICWA recognizes that while sometimes culturally appropriate services are not always immediately available, states agencies are required to be creative and collaborative with tribes in developing alternative service options rather than only rely on existing services. We think this guidance is needed in the Final Rule to stimulate greater resource and service development and help AI/AN Two-Spirit and LGBTQI+ youth have their unique needs met, especially in jurisdictions that have resource and service challenges. These resources and services need to be made on behalf of the entire community that aims to support LGBTQI+ youth in foster care, including the birth family and substitute caregivers of the youth, case workers, and general community members, all of whom should be best educated and informed on how to help the youth access resources and support.

We also urge case workers and child welfare agencies to look beyond what formal supports or services may be offered in a given area and identify informal supports, such as culturally appropriate Two-Spirit or LGBTQI+ mentorships, that might be present, though not obvious, for a child to experience, and therefore be fully supported in and out of their placements.

While we generally support the NPRM, we have concerns about how this NPRM could be interpreted and implemented with AI/AN Two-Spirit and LGBTQI+ youth in state care that need an out of home placement. ICWA contains placement preferences that emphasize out of home placements with relatives, tribal members, and other Indian families (25 USC § 1915(a) and (b)). Our concern is that state caseworkers or state courts might prioritize placements with families that don't meet ICWA's placement preferences on the basis they are perceived to have better access to services or supports that support Two-Spirit or LGBTQI+ identity. This concern comes from years of experience where AI/AN youth with special needs are sometimes placed outside of ICWA's placement preferences with little consideration of how to improve access to services and supports for prospective relative or tribal family placements. Supporting AI/AN Two-Spirit and LGBTQI+ youth should never be a zero-sum situation where an AI/AN youth is asked to sacrifice their tribal identity for their Two-Spirit or LGBTQI+ identity so we strongly recommend that the Administration for Children and Families include a statement that nothing in the Final Rule should be construed to affect the application of ICWA or that the Final Rule supersedes ICWA requirements. States must comply fully with ICWA. Similar clarifying language has been used by ACF in

regulations in other contexts, such as the regulations implementing the Adoption and Safe Families Act (65 FR 4020).

We support the NPRM's focus that requires consideration of LGBTQI+ youth's need for support systems outside of their home. We call for resources to be allocated to build the capacity of tribes to develop resources like these support groups, so Two-Spirit and LGBTQI+ youth are able to be in a place where they can connect with their culture, but still have identity-based support, and be able to have support systems that address both facets of their identity. This way, youth have access to culturally relevant support systems that can help support and affirm their identities, but in the case of the best practices outlined in ICWA, are still able to be connected to their family and kinship communities. The implementation of this proposed rule, to ensure Two-Spirit and LGBTQI+ youth can be placed in safe and appropriate placements that support their Two-Spirit and LGBTQI+ identities, does not preclude compliance with ICWA, and the importance of Native youth staying connected to their tribe, culture, and extended families.

We support this NPRM's efforts to ensure secure ways for a youth to request a safe and appropriate placement, with examples of how youth can call, text, or otherwise notify the agency caseworker or other personnel. For youth in placements in tribal communities, especially rural tribal communities, we ask that the consideration of technology infrastructure be taken into consideration. There are homes on reservations or in other rural tribal communities that might not have adequate technology infrastructure, but instead of considering this as a negative aspect for prospective placement for LGBTQI+ who need a secure way to contact child welfare agencies and have access to virtual support networks, other accommodations should be made. Lack of technology infrastructure should not consider a placement less safe or appropriate for a Two-Spirit or LGBTQI+-identifying youth.

We support this NPRM's calls for the youth's input on their case plan and placement that is best suited for them, and emphasize that child welfare workers should consider how the child's perception of identity is affected based on their ties to their community and extended family and include the assistance of a youth's tribe in developing case plan and placement goals. Tribal social workers and extended family members can be of great assistance in helping AI/AN youth as they explore and discuss their tribal and cultural identity that would not be available in cases with only state caseworker assistance. ICWA allows tribes to intervene in state child custody proceedings involving Indian children and requires collaboration with the child or youth's tribe in the work of providing active efforts and case collaboration. With this in mind, we recommend the Final Rule include a statement about the importance of including the youth's tribe and extended family members to help facilitate discussions with AI/AN Two-Spirit and LGBTQI+ youth regarding their service and placement needs.

Conclusion

It is in the best interest of youth who identify as LGBTQI+ to be able to exist in environments that are safe and accepting of their identities. This is especially pertinent for LGBTQI+ youth of color, and in Native communities, that extends to youth who identify as Two-Spirit, an identity that is culturally significant in Native communities across the country. AI/AN Two-Spirit and LGBTQI+ organizations have found that best practices for placing a child include many of proposed policies of education and community outreach found in this NPRM, and understand its importance for all LGBTQI+-identifying youth. Because AI/AN youth are overrepresented in state child welfare systems in the United States, and LGBTQI+ youth are included in this population, it is imperative to consider every facet of a child's identity, from gender identity to tribal belonging, to ensure appropriate services and placement for AI/AN youth. Tribal nations across the United States possess valuable insight, knowledge, relationships, and resources, including culturally relevant support for Two-Spirit youth, that is needed for AI/AN youth to feel supported, have appropriate placements, and can thrive overall. NICWA recommends that this NPRM include language that includes Two-Spirit identities in conjunction with discussion on LGBTQI+ identities. For example, as education and

training are provided to ensure foster care placements is safe and appropriate for LGBTQ+ youth, this is an opportunity to provide education using AI/AN specific resources, on Two-Spirit identities and their role in Native communities. NICWA also emphasizes the understanding that just because a tribal community might be more rural, more physically removed from formal LGBTQI+ supports, and potentially not possess the most up-to-date technology infrastructure for youth to connect to out-of-home support networks, informal means of supporting the students in their AI/AN communities, including culturally relevant support systems and mentors, should not be discounted. We emphasize that these factors should not preclude full implementation of ICWA, such as ICWA's active efforts requirements, and ICWA's placement preferences and recommend that the Final Rule include a statement that the Final Rule should not be construed to affect the application of ICWA or supersede its requirements.

We also support the NPRM's focus on youth being engaged in the development of their case plans and placement decisions and recommend the Final Rule include language that includes the youth's tribe and extended family in these processes.

We greatly appreciate the opportunity to provide comments on the proposed changes in this NPRM and look forward to continued partnership opportunities that support the safety and well-being of AI/AN youth, families, and tribal nations.

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