

**MEMORANDUM**

**TO:** Michael Lynch, Ohio Department of Job and Family Services

**FROM:** Sydney King, Regulatory Policy Advocate

**DATE:** October 3, 2013

**RE:** **CSI Review – Indian Child Welfare Act (OAC 5101:2-53)**

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On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

**Analysis**

This rule package consists of four amended rules and is being reviewed by the Ohio Department of Job and Family Services (ODJFS) in accordance with the five-year review requirement of ORC 119.032. These rules provide requirements in order to implement the Indian Child Welfare Act. The Indian Child Welfare Act sets federal requirements that apply to state child custody proceedings involving American Indian children who are a member of or eligible for membership in a tribe. The rule package was filed with the CSI Office on September 11, 2013, and the comment period for the rules closed on September 16, 2013. One comment was received during the public comment period.

Rule 5101:2-53-03 describes provisions for determining a child's American Indian heritage and providing notice to the tribe or the Bureau of Indian Affairs. This rule was amended to provide clarity and avoid duplication with another rule.

Rule 5101:2-53-05 describes the responsibilities of the Public Children Services Agencies (PCSAs) and the Private Child Placing Agencies (PCPAs) when a temporary agreement for

temporary custody of an American Indian child has been requested by a parent or custodian. This rule has been amended to provide more clarity.

Rule 5101:2-53-06 describes the responsibilities of the PCSAs and PCPAs when an American Indian child is in the agency's custody. This rule has been amended to avoid duplication and provide clarity.

Rule 5101:2-53-08 describes the requirements of the PCSAs and PCPAs when an American Indian child is removed from home and the requirements to place the child in accordance with the ICWA placement preference. This rule has been amended to avoid duplication and provide clarity.

According to the BIA, the rules were reviewed during the Partners For Ohio's Families (PFOF) Initiative. The PFOF committee made recommendations for removing duplicative language and clarifying existing language. Stakeholders also had an opportunity to comment during the ODJFS policy clearance process from April 6, 2013 through April 30, 2013. Only one comment was received. The comment requested ODJFS to clarify when an agency should begin making efforts to determine if a child may have American Indian heritage. ODJFS amended the draft language to require the agency make sufficient inquiry about a family's American Indian heritage at the first face-to-face contact after a referral has been screened in.

ODJFS performed additional outreach to ODJFS licensing staff and Ohio Association of Child Caring Agencies (OACCA) to obtain the cost estimates for implementing the ICWA regulations and procedures. However, the BIA indicates that cases involving ICWA regulations are rare. Therefore, licensing staff and OACCA have been unable to determine any private child placing agencies that have had experience implementing the ICWA regulations

ODJFS states that the potential adverse impact on PCPAs is the administrative costs associated with compliance. The potential costs associated with Rules 5101:2-53-03, 5101:2-53-05, Rule 5101:2-53-06, and Rule 5101:2-53-08 include requirements to provide notifications regarding custody actions, document inquiries into a child's American Indian Heritage, follow placement preferences outlined in ICWA, and file a placement preference report. The potential adverse impact is necessary in order to comply with federal regulations.

According to the BIA, the adverse impact for Rule 5101:2-53-03 is the requirement of PCPAs to make sufficient inquiry regarding a child's American Indian heritage and notifying the child's possible tribe regarding court actions for removal or custody. The CSI office followed up and inquired about how the term "sufficient inquiry" is measured and if it was required for every child. ODJFS stated that for every referral that is screened in, the agency is required to inquire about whether each child has American Indian heritage and document that inquiry. This inquiry

could be as simple as asking the parent/guardian the question about whether or not the child has American Indian ancestry and documenting that in a case note.

The CSI office also inquired about certification revocation when a PCPA is not in compliance. According to ODJFS, if there is a finding of non-compliance during a certification review, and the PCPA does not agree with that finding, there is an appeals process. Agencies may appeal a finding of noncompliance to the foster care licensing supervisor and if the finding of noncompliance is upheld, the agency would need to complete a corrective action plan, which the licensing specialist would approve prior to the PCPA's implementation. All agencies and prospective agencies have hearing rights under Chapter 119 of the ORC.

The CSI Office is not suggesting any changes with respect to the rules or the BIA for the following reasons:

- The adverse impact found in Rule 5101:2-53-03 is minimal and other potential adverse impacts on businesses are justified.
- One comment was received and ODJFS amended the draft rule in order to provide more clarity.
- The BIA submitted by ODJFS is accurate and complete and does not raise any ongoing issues.
- Generally, the rule package satisfactorily meets the standards espoused by the CSI Office.

### **Recommendation**

For the reasons explained above this office does not have any recommendations regarding this rule package.

### **Conclusion**

Based on the above comments, the CSI Office concludes that the Department should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.

cc: Mark Hamlin, Lt. Governor's Office