

# CSI - Ohio

## The Common Sense Initiative

### Business Impact Analysis

Agency Name: The Ohio Department of Job and Family Services

Regulation/Package Title: Indian Child Welfare Act Updated Regulations and FYR

Rule Number(s): 5101:2-53-02, 5101:2-53-03, 5101:2-53-04, 5101:2-53-05, 5101:2-53-06,  
5101:2-53-07, 5101:2-53-08, 5101:2-53-09

Date: 09/01/2017

**Rule Type:**

☒ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

### **Regulatory Intent**

**1. Please briefly describe the draft regulation in plain language.**

OAC 5101:2-53-02, "General provisions of the Indian child welfare act (ICWA)" is a new rule that provides information regarding when ICWA requirements apply to child custody proceedings and when they do not apply.

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OAC 5101:2-53-03, "Determination of Indian status, Tribal eligibility and membership" describes provisions for determining a child's status as an "Indian child." The rule is being amended to reflect updated language included in the new federal regulations governing ICWA.

OAC 5101:2-53-04, "Indian child welfare act (ICWA) notice requirements" is a new rule that outlines requirements for notifying an Indian child's parents or Indian custodian, the Indian child's Tribe, and the Bureau of Indian Affairs (BIA) regarding a child custody proceeding involving the Indian child. Language that was removed from rule 5101:2-53-06 was placed into this rule.

OAC 5101:2-53-05, "Voluntary agreement for temporary custody of Indian child" describes the responsibilities of a public children services agency (PCSA) or a private child placing agency (PCPA) when executing an agreement for temporary custody of an Indian child. This rule is being amended to reflect updated language included in the new federal regulations governing ICWA.

OAC 5101:2-53-06, "Emergency removal and involuntary custody of Indian children" describes the responsibilities of PCSAs and PCPAs when an Indian child is in the agency's custody. This rule is being amended to reflect updated language included in the new federal regulations governing ICWA. Additionally, language regarding notification to the parents or Indian custodian, the Indian child's Tribe, and the BIA was removed and placed into new rule 5101:2-53-04.

OAC 5101:2-53-07, "Permanent surrender or parental consent to adoptive placement of Indian children" describes the responsibilities of PCSAs and PCPAs when an Indian child has been permanently surrendered for adoption by the parent or Indian custodian. This rule is being amended to reflect updated language included in the new federal regulations governing ICWA.

OAC 5101:2-53-08, "Placement preference of Indian children" describes the requirements of PCSAs and PCPAs for adhering to placement preferences when selecting a placement setting for an Indian child. This rule is being amended to reflect updated language included in the new federal regulations governing ICWA. The requirement for an agency to complete the JFS 01646 "Report of Indian Child Placement" (rev. 11/2007) is being removed and the form will be obsoleted.

OAC 5101:2-53-09, "Procedures for the transfer of Indian children to a Tribal court, a Tribal Title IV-E agency or an Indian Tribe with a Title IV-E agreement" identifies requirements for transferring child custody proceedings to a Tribal court, a Tribal Title IV-E agency, or an Indian Tribe with a Title IV-E agreement. Language was added to this rule to identify requirements when a parent, an Indian custodian, or an Indian child's Tribe requests the transfer of a child custody proceeding to Tribal court.

**2. Please list the Ohio statute authorizing the Agency to adopt this regulation.**

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| Rule Number  | Statutory Authority         |
|--------------|-----------------------------|
| 5101:2-53-02 | 5103.03, 5153.166           |
| 5101:2-53-03 | 5103.03, 5153.166           |
| 5101:2-53-04 | 5103.03, 5153.166           |
| 5101:2-53-05 | 5103.03, 5103.15, 5153.166  |
| 5101:2-53-06 | 5103.03, 5153.166           |
| 5101:2-53-07 | 5103.03, 5153.166           |
| 5101:2-53-08 | 5103.03, 5153.166           |
| 5101:2-53-09 | 5103.03, 5101.141, 5153.166 |

**3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

Yes. Rules 5101:2-53-02, 2-53-03, 2-53-04, 2-53-05, 2-53-06, 2-53-07, 2-53-08 and 2-53-09 implement ICWA as reauthorized by the "Child and Family Services Improvement Act" of 2006. They are being amended to reflect updated guidelines and new federal regulations that govern ICWA.

**4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

The requirements of these rules do not exceed the federal requirements.

**5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The purpose of the regulation in rule 5101:2-53-02 is to provide information about general provisions of ICWA including when ICWA applies to a child custody proceeding and when it does not apply as well as when a PCSA or PCPA has a reason to know that a child is an Indian child.

The purpose of the regulation in rule 5101:2-53-03 is to provide procedures for inquiring and verifying whether a child is a member of or eligible for membership in a tribe and therefore subject to ICWA regulations.

The purpose of the regulation in rule 5101:2-53-04 is to provide instruction on notifying an Indian child's parents or guardian, the Indian child's Tribe, and the Bureau of Indian Affairs when the Indian child is the subject of a child custody proceeding.

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The purpose of the regulation in rule 5101:2-53-05 is to ensure that voluntary placement for temporary custody cases that are subject to ICWA are conducted in compliance with ICWA regulations.

The purpose of the regulation in rule 5101:2-53-06 is to ensure that agencies are in compliance with state law and with ICWA regulations when emergency removal of an Indian child from his or her home is necessary.

The purpose of the regulation in rule 5101:2-53-07 is to ensure that agencies are in compliance with state law and with ICWA regulations when a parent permanently surrenders an Indian child.

The purpose of the regulation in rule 5101:2-53-08 is to ensure that an Indian child who is removed from his or her home is placed into a substitute care setting in accordance with the placement preferences outlined by the ICWA.

The purpose of the regulation in rule 5101:2-53-09 is to ensure that agencies are in compliance when ICWA requires that an Indian child is transferred to the jurisdiction of a Tribal court and to ensure that IV-E records are transferred when applicable so that a child remains IV-E eligible upon transfer.

The overarching public purpose of ICWA, passed in 1978, is to protect the best interests of Indian children and promote the stability of Indian tribes and families. These rules carry out the objectives of ICWA.

**6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Compliance with rules 5101: 2-53-02, 2-53-03, 2-53-04, 2-53-05, 2-53-06, 2-53-07, 2-53-08, and 2-53-09 is not being tracked. However, agencies undergo compliance reviews once every two years as part of the recertification process which includes compliance with the requirements of these rules. Agencies are expected to comply with ICWA regulations whenever applicable.

**Development of the Regulation**

**7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

Rules 5101:2-53-02, 2-53-03, 2-53-04, 2-53-05, 2-53-06, 2-53-07, 2-53-08, and 2-53-09 were posted on [www.ohiorulereview.org](http://www.ohiorulereview.org) prior to review. This website allows stakeholders to provide suggestions prior to rules being amended. Additionally, the legislative committee for the Public Children Services Association of Ohio was provided the opportunity during a recent meeting to provide input into these rules. Finally, Chapter 5101:2-53 was in clearance July 26, 2017 through August 9, 2017.

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**8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

There were no comments received on [www.ohiorulereview.org](http://www.ohiorulereview.org) during the posting period and the PCSAO legislative committee provided no input.

There were several clearance comments made by two county children services agencies. Many of the clearance comments were regarding federal language that cannot be removed from the requirements. Other clearance comments were regarding grammar and an error in the language, and suggested edits were made to the rule language.

**9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

Not applicable.

**10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

There were no other alternatives considered for rules 5101:2-53-02, 2-53-03, 2-53-04, 2-53-05, 2-53-06, 2-53-07, 2-53-08, or 2-53-09 as the rules mirror federal language.

**11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

Rules 5101:2-53-02, 2-53-03, 2-53-04, 2-53-05, 2-53-06, 2-53-07, 2-53-08, and 2-53-09 require specific processes in order to ensure compliance with federal ICWA regulations.

**12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

There is no duplication as these rules specifically implement the requirements of the ICWA and there are no other rules that do.

**13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

When the rules are final filed, a transmittal letter will be generated explaining the changes to the rules and the rationale for the changes. The transmittal letters can be viewed at [http://emanuals.odjfs.state.oh.us/emanuals/GetDocument.do?nodeId=%23node-id\(59\)&docId=Document\(storage%3DREPOSITORY%2CdocID%3D%23node-](http://emanuals.odjfs.state.oh.us/emanuals/GetDocument.do?nodeId=%23node-id(59)&docId=Document(storage%3DREPOSITORY%2CdocID%3D%23node-)

### **Adverse Impact to Business**

**14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community;**

The rules in Chapter 5101:2-53 contain requirements for private child placing agencies (PCPAs). Requirements must be met to obtain and/or maintain certification by the State of Ohio. There are currently 26 certified PCPAs in Ohio.

**b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

5101:2-53-02 – Requires the agency to follow all of the Indian child welfare rules and guidelines when there is a reason to know that a child, subject of a child custody proceeding, is an Indian child.

5101:2-53-03 – Requires the agency to make sufficient inquiry to determine if a child meets the definition of an Indian child or if there is reason to know that the child is an Indian child. Requires the agency to send inquiry to possible Tribes to verify whether the child is a member or eligible for membership in the Tribe.

5101:2-53-04 – Requires the agency to send notification to an Indian child's parents or custodian and each Tribe where the child is or may be a member, or eligible for membership if a biological parent is a member. Requires the agency to send a copy of the notification to the Bureau of Indian Affairs.

5101:2-53-05 – Requires the agency to submit a notification of a voluntary placement agreement to the designated agent of a child's tribe or the tribal court and document in the case record various custody information.

5101:2-53-06 – Requires the agency to notify the parents or Indian custodian and the Indian child's Tribe or Tribal court of all juvenile court proceedings involving foster care placement, termination of parental rights, pre-adoptive or adoptive placement and send various notification reports to the court and all parties involved.

5101:2-53-07 – Requires the agency to provide notification to a Tribe of all juvenile court proceedings affecting the Tribal member. Requires the agency to provide information to an Indian child who was adopted, but has reached age eighteen and is requesting the information about Tribal affiliations of the individual's biological parents.

5101:2-53-08 – Requires the agency to follow the placement preferences outlined in the ICWA when placing an Indian child in a substitute care setting. The agency must provide a placement report to ODJFS.

5101:2-53-09 – Requires the agency to facilitate the transfer of a foster care or termination of parental rights proceeding to the jurisdiction of a child's Tribe when a request is made to do so by either parent, the Indian custodian, or the Indian child's Tribe. If the agency asserts that good cause exists for the court to deny the transfer, the rule requires the agency to provide the reasons in writing to the court and to the parties in the child custody proceeding. Requires the agency to provide records relating to the child custody proceeding to the Tribal court, if the Tribal court accepts the transfer.

**c. Quantify the expected adverse impact from the regulation.**

*The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.*

Efforts have been made to obtain an example of the cost when a private child placing agency is required to implement ICWA regulations. ODJFS licensing staff and the Ohio Association of Child Caring Agencies (OACCA) were asked to obtain feedback from private child placing agencies that have had experience implementing these regulations. Licensing staff and OACCA have been unable to determine any private child placing agencies that have had experience implementing the ICWA regulations.

**15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

The adverse impact is necessary to ensure compliance with federal regulations.

**Regulatory Flexibility**

**16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

There are no exemptions and no alternative means of compliance for rules 5101:2-53-02, 2-53-03, 2-53-04, 2-53-05, 2-53-06, 2-53-07, 2-53-08, or 2-53-09.

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**17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

There are no fines or civil penalties for non-compliance with these rules other than the forfeiture of certification of PCPAs through denial or revocation.

**18. What resources are available to assist small businesses with compliance of the regulation?**

ODJFS has regional offices with licensing specialists that will be assigned to assist the agency in compliance with the requirements of chapter 5101:2-53 when the agency determines that there is reason to know that a child is an Indian child.