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**WISCONSIN LEGISLATIVE COUNCIL  
STAFF MEMORANDUM**

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Memo No. 14-4

TO: MEMBERS OF THE SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: David L. Lovell, Principal Analyst

RE: The Safe Haven Law and the Indian Child Welfare Act: Informal Discussion on November 19, 2014, and Further Options for Legislation

DATE: November 25, 2014

At its October 16, 2014 meeting, the Special Committee on State-Tribal Relations discussed the Wisconsin safe haven law and the Indian Child Welfare Act (ICWA) and options for legislation to achieve the policy objectives of ICWA in the context of the safe haven law. That discussion concluded with a directive from the committee that staff form a study group including tribal staff and others to further develop such options. For this purpose, Representative Mursau, chair of the Special Committee, convened an informal meeting on Wednesday, November 19, 2014, to which all interested persons were invited to attend and participate. That discussion did not result in agreement on any specific policy proposals. However, a number of options were discussed and there was apparent agreement that certain options warrant further discussion, in future meetings of that informal group or in the Special Committee.

This Memo describes the options that appeared to have greatest support in the November 19 discussion, relating to obtaining information from a parent relinquishing a child under the safe haven law that will allow county social services staff to determine whether the ICWA applies to the case. It then discusses limitations under federal law of using hospital admission information for this purpose. It also discusses options related to sharing the information regarding a child's tribal identity.

The November 19 discussion did not develop options in detail. To present a more complete outline, the descriptions in this Memo provide details not discussed by the group. In some cases the Memo presents alternatives, which are shown in brackets. As always, please

note that the committee members remember that the committee is not bound to any of these options, nor to any of the details of the options as presented in this Memo.

### **TERMINOLOGY: "INDIAN CHILD"**

ICWA applies to child custody proceedings affecting an Indian child. It defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." [25 U.S.C. s. 1903 (4).] In this Memo, "Indian," when used as an adjective describing a child, and "Indian child" have this meaning.

### **OBTAINING INFORMATION FROM RELINQUISHING PARENT**

The group discussed options for seeking information from a parent, at the time that the parent relinquishes a child, that would allow county social services staff to determine whether the child is Indian, so that staff can determine whether the ICWA may apply. The options are based, in large part, on requirements in current law and on current practices.

In general, a person who relinquishes custody of a child under the safe haven law may remain anonymous and no person may induce or coerce the person into revealing his or her identity. [s. 48.195 (2) (a), Stats.] However, Department of Children and Families (DCF) rules specify that, if a parent voluntarily gives identifying information, the person taking custody of the child must make a reasonable effort to obtain the following:

- Information regarding the social and health history of each parent of the newborn, and of the families of each parent as prescribed by the department.
- Information on the ethnicity and race of the newborn, including whether the newborn is of American Indian heritage and, if so, any tribal affiliation.
- The name, address, telephone number, and any other identifying information of each parent, and any person assisting a parent in the relinquishment.

[s. DCF 39.09 (1), Wis. Adm. Code.]

In testimony to the committee, Tricia Burkett, Director of Safe Place for Newborns, indicated that most, if not all hospitals, fire stations, and police departments where she conducts trainings on how to respond to a parent making a safe haven relinquishment have packets of materials prepared and available to give to the parent. The packets include information regarding the importance to the future of a relinquished child of information regarding the child's social background and health history, forms that can be used to provide such information, and a self-addressed, stamped envelope for the parent to return the form to the agency that received the child.

In the November 19 discussion, Jodi Johnson, Vice-President of the Wisconsin Hospital Association, described the procedures hospitals follow when a child is relinquished in a hospital. She indicated that most relinquishments taking place in a hospital follow an in-patient delivery. She said that, when a mother states her intention to relinquish the child, hospital social work

staff are brought in to provide information to the parent regarding her options and to seek the information described above, as appropriate.

An option for seeking information from a relinquishing parent, based on the discussion on November 19, is as follows:

1. Require that a person who receives a child relinquished under the safe haven law give to the relinquishing parent a packet of information including all of the following:
  - a. A statement that:
    - i. The parent has a right to remain anonymous.
    - ii. The provision of any identifying information is voluntary on the part of the parent and the choice to not provide that information will not affect the parent's ability to relinquish the child.
    - iii. Any identifying information provided by the parent will be treated as confidential.
  - b. An explanation of the importance to the future well-being of any child of information regarding the child's social and health history.
  - c. An explanation of the importance to an American Indian child of a social and cultural connection to the child's tribe and clan and the potential benefits of tribal enrollment.
  - d. A form to provide information regarding the social and health history of the child and of each parent of the child.
  - e. A form to provide information regarding any tribal affiliation of the child, including the identity and tribal affiliation of both parents of the child. [Specify that, to the extent applicable, the form shall allow for the use of tribal enrollment numbers or other means of identifying a parent without using the parent's name.]
  - f. A postage-paid envelope addressed to the social services department of the county in which the relinquishment occurs and instructions to use the envelope to return the completed forms.
2. Direct the person to make a good faith effort to do all of the following:
  - a. Review the materials in the packet under item 1. with the parent, including an explanation of the information described in item 1. b. and c.
  - b. Assist the parent to complete the forms described in item 1. d. and e. and return the completed forms to the county social services department.
3. Direct DCF to promulgate rules to implement items 1. and 2. Direct DCF to consult with the federally recognized American Indian tribes and bands in this state in developing rules to implement item 1. c. and e.

## **OBTAINING INFORMATION FROM HOSPITAL ADMISSION RECORDS**

In the November 19 discussion and in other fora, it has been suggested that hospital admission information be used to identify Indian children relinquished under the safe haven law. These suggestions have prompted questions about limits on the use of such information established by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and, in particular, whether such information could be used for the suggested purpose.<sup>1</sup> As is explained in this section, it appears that HIPAA would prohibit the use of admission information for this purpose, and that none of the exceptions in HIPAA would apply to this situation. However, HIPAA does allow a state to petition for exemption from preemption in situations that might include the use of admission information for this purpose.

### **Use and Disclosure of Protected Health Information**

Under HIPAA, a covered entity may use or disclose protected health information only as specified in that law. Each of these terms is defined in detail. For purposes of this Memo, note that “covered entity” includes a hospital and “protected health information” includes information a hospital collects and maintains regarding the health or condition of an individual, the provision of health care to an individual, and payment for the provision of health care to an individual.

The principal allowed uses or disclosures are:

- To the individual who is the subject of the information.
- For treatment, payment, and health care operations.

HIPAA authorizes the use or disclosure of protected health information without the consent of the person who is the subject of the information under a number of additional circumstances, two of which could relate to the circumstances of a safe haven relinquishment.

### **Abuse, Neglect, or Domestic Violence**

A covered entity may disclose protected health information to a government authority authorized by law to receive reports of child abuse or neglect. In addition, it may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority authorized to receive reports of such abuse, neglect, or domestic violence, to the extent authorized or required by law. In most circumstances, the covered entity must promptly notify the person who is the subject of the information that the information has been released. [45 C.F.R. s. 164.512 (b) (1) (ii) and (c).]

While this circumstance may pertain in some cases of safe haven relinquishment, it is not a basis for routine disclosure of information regarding relinquishment of Indian children.

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<sup>1</sup> Similar limits on the use and disclosure of personal health information, and penalties for the unauthorized use or disclosure of such information, are established in state law. [ss. 146.82 and 146.84, Stats.]

### **Judicial and Administrative Proceedings**

A covered entity may disclose protected health information in the course of any judicial or administrative proceeding in response to an order of a court or administrative tribunal. [45 C.F.R. s. 164.512 (e).] This may provide a tribal court with valuable access to information in a pending case. However, because it is contingent on a request for the information from the court, it, too, is not a basis for routine disclosure of information regarding relinquishment of Indian children.

### **Preemption of State Law by HIPAA; Exception**

In general, any provision of HIPAA related to the privacy of protected health information that conflicts with a state law preempts the state law. There are a number of exceptions to this rule. Of pertinence to this discussion, a state law affecting the privacy of protected health information is not preempted by HIPAA if the Secretary of the U.S. Department of Health and Human Services (DHHS) finds that the state law is necessary for “purposes of serving a compelling need related to public health, safety, or welfare, and ... that the intrusion into privacy is warranted when balanced against the need to be served.” [25 C.F.R. s. 160.203 (a) (1) (iv).]

It can be argued that preventing the separation of Indian children from their tribes is a compelling need related to public welfare, as evidenced by the fact that Congress enacted ICWA specifically for this purpose. It can be further argued that using hospital admission information to identify Indian children relinquished under the safe haven law serves this need and that this intrusion into privacy is warranted when balanced against the identified need. An option the committee may want to consider is as follows:

1. Require that, when admitting an expectant mother for delivery, a hospital must collect information regarding any tribal affiliation of the mother and father of the child to be delivered.
2. Require that, if a person delivers in a hospital and then relinquishes the child under the safe haven law, the hospital must provide any information in its possession regarding any tribal affiliation of the mother and father of the child.
3. Direct the Governor to petition the Secretary of DHHS under 45 C.F.R. s. 160.204 to exempt the requirements of items 1. and 2. from preemption under 45 C.F.R. s. 160.203 (a). Specify that the requirements of items 1. and 2. take effect upon receipt of the exemption.

### **SHARING OF INFORMATION**

There was relatively little discussion of how information obtained regarding the tribal affiliation of a relinquished child should be shared. However, there appeared to be a common recognition that, in order to trigger the application of ICWA in the case of a relinquished Indian child, it would be necessary that this information be transmitted to the county and to the tribe. An option to achieve this is as follows:

1. Direct a county social services department that receives information that a child relinquished under the safe haven law is an Indian child to [immediately] [within [24] [48] [other] hours] notify the child welfare department or other appropriate agency of the tribe and provide that agency any identifying information regarding the child and the child's parents.
2. Specify that, if a county social services department has reason to believe that a child relinquished under the safe haven law is an Indian child but does not have information regarding the tribe to which the child may be affiliated, the department shall notify the appropriate agency of [the nearest Indian tribe to the county] [any Indian tribe located within \_\_ miles of the county] [each Indian tribe in this state].
3. Maintain the current law prohibition on disclosing identifying information regarding a parent who relinquishes a child under the safe haven law, subject to the exceptions in current law and additional exceptions necessary to implement the options described in this Memo.
4. Direct DCF to provide to each county social services department contact information for the tribal agencies described in 1. for each Indian tribe in this state.

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