January 29, 2014

Senator Brad Ashford, Chair
Judiciary Committee
P.O. Box 94604
Lincoln, NE 68509-4604

RE: LB 928

Dear Senator Ashford and members of the Judiciary Committee:

I am writing in regard to LB 928. The Department of Health and Human Services (DHHS), Division of Children and Family Services is fortunate to have the opportunity to serve thousands of Nebraska children, adults, and families every day. This includes the opportunity to serve the children, adults, and families of the Native American population. Many times working with this population requires compliance with the Nebraska Indian Child Welfare Act (NICWA) and the Federal Indian Child Welfare Act (ICWA). LB 928, if adopted, will change the Nebraska Indian Child Welfare Act in many ways. While many of the changes reflect principles of best practice, codifying them in statute presents legal implications. For this reason, a number of provisions in the bill produce concerns impacting the administration and implementation of NICWA.

LB928 expands ICWA and places additional duties on DHHS

This bill would expand the application of NICWA beyond what is required by the federal ICWA. By striking the language on page 9, line 10, the definition of "Indian child" would be expanded to include a child eligible for enrollment, even if the child's parent is not a member of a tribe. This has the potential to increase the number of cases in which NICWA applies and place increased burdens on DHHS, including a potential fiscal impact if the number of NICWA cases increases enough to require additional staff.

The bill would also expand NICWA notice requirements beyond federal law, requiring DHHS to notify the child's tribe(s) any time the Indian child, parent, or custodian is *offered* services by DHHS, whether or not the family actually participates in such services. There is currently no such requirement in state or federal law. Further, sharing information in this manner would most likely violate state and federal confidentiality laws. It is also questionable how this provision would be implemented, as Nebraska jurisprudence dictates that NICWA can only be invoked by a judicial determination. There will be no court to make such a finding in non-court involved cases.

LB928 also places additional responsibilities on DHHS that do not currently exist in either state or federal law. Section 9 establishes new requirements for a juvenile court petition. Although

the county attorney will be charged with filing the petition, DHHS would most likely be responsible for providing such information. This includes information and records that DHHS may not have in its possession, particularly at early stages of the proceeding. The legal impact of not being able to provide such information is unclear but could potentially result in a dismissal of the case even when the petition is legally justified.

The provisions starting on page 20, line 8, also provide new duties for DHHS. This section requires DHHS to submit a written statement to the court prior to a termination proceeding or voluntary relinquishment, in all cases in which DHHS is a party or *was previously* providing assistance. Of first concern is the potential assignment of duties to DHHS in cases in which it is no longer involved. Second, the written statement is to include jurisdictional information. This would require legal analysis and therefore would require that a DHHS attorney be utilized for this work. Third, it requires DHHS to provide information on contact or communication agreements. DHHS does not participate in or facilitate the preparation of any such agreements and cannot accept a relinquishment if it is conditioned upon any such agreements. Finally, much of the other information required by this provision is more readily available to the court through its existing case file.

LB928 adds provisions more proscriptive than federal law and diminishes flexibility

This bill adds several definitions and other provisions that diminish the ability of the courts and DHHS to consider circumstances on a case-by-case basis.

LB928 proposes to add a definition for "active efforts." The federal ICWA does not define this term. Part of the reason for this is that its meaning varies from case to case. Adding a definition in state law would narrow the issues for the court to consider. A definition of active efforts will also bind DHHS workers to a prescribed set of efforts that must be made on every NICWA case. Having such a checklist in statute places an increased burden on DHHS to direct its attention only to the checklist of statutory requirements, rather than best interests in individual cases. Later in the bill, it adds that such active efforts must be provided "in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian Child's tribe or tribes." (page 16, lines 3-5). Though such considerations are best practice, such a restrictive definition may result in a diminished ability to comply with active efforts as a matter of law. Court findings that DHHS has not met each and every item listed in the statutory definition, even when not appropriate in a particular case, would jeopardize the State's ability to draw down federal IV-E funds in such cases. Also of concern is that the definition of active efforts includes language requiring that DHHS provide assistance and services to the Indian Child's extended family. According to Page 7, lines 5-6, in order for DHHS to comply with the active efforts requirement, DHHS must provide the Indian Child frequent family time in both the Indian Child's home and the homes of the Indian Child's extended family. Again, while this is a good practice to consider, it is not appropriate in every case and also involves transportation costs and visitation supervision costs, as well as having an effect on the daily routine of the child and the foster family.

The bill would also define a "qualified expert witness" in a manner much more restrictive than federal guidance, thus reducing the pool of individuals who could fill the role of a qualified expert witness.

The Bureau of Indian Affairs Guidelines[1] regarding who might be regarded as a qualified expert witness, which have been repeatedly affirmed by Nebraska's appellate courts,[2] are as follows:

1. A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

2. A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

3. A professional person having, substantial education and experience in the area of his or her specialty.

Comparing this list to the definition in LB928, it is clear that LB928 is more proscriptive and effectively means that only a tribal member could serve as a qualified expert witness. It is already difficult for prosecutors to locate qualified expert witnesses. This restriction will make it even more difficult to do so.

The bill's attempt to define the term "best interests" is also concerning. Courts should have the flexibility to make best interests determinations on a case-by-case basis. The definition in LB928 is not only more restrictive than federal law, but it is more restrictive than the Juvenile Code that is applied in all non-NICWA cases.

LB928 would also codify good cause to deviate from the placement preferences under NICWA. This is once again more restrictive than the federal law.

LB928 creates areas of uncertainty and ambiguity

The bill provides that a determination of paternity may be based solely on tribal custom rather than through a legal determination of paternity. The definition of "parent" would also seem to require the court to disregard a biological parent if tribal law or custom dictates that another individual be treated as a parent. Because paternity is such a fundamental issue in juvenile court proceedings this language could have far-ranging implications, including constitutional problems. This language also potentially creates jurisdictional issues regarding paternity determinations.

Section 6 contains new language regarding transfer of cases to tribal courts. At Line 17, there is reference to the Court transferring jurisdiction to the "tribes," plural; the Court cannot transfer a case to multiple tribes. This section also includes a definition of "good cause." The term good cause is used in context in this bill: (1) in reference to when a state court does not have to transfer a case, and (2) when a tribal court may refuse transfer. It is unclear to which "good cause" this definition is meant to apply. As a technical note, the section seems to contain some numbering errors and perhaps some structural issues.

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[1] See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67,584, to 67,595 (1979) (not codified).

[2] *See e.g., In re Interest of C.W.*, 239 Neb. 817 (1992) and *In re Interest of Shayla H.*, 17 Neb.App. 436 (2009)

I greatly appreciate the opportunity to share the above concerns and recommendations. We have met with Senator Coash and stand ready to continue to work with Senator Coash and the Committee to help assure that best practices are followed when working with our State's Native American population.

Sincerely,

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Division of Children & Family Services
Department of Health and Human Services

Cc: State-Tribal Relations Committee