

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Public Health Service****42 CFR Part 36**

RIN 0917-AA02

**Indian Child Protection and Family Violence Prevention Act Minimum Standards of Character****AGENCY:** Indian Health Service, Public Health Service, HHS.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Indian Health Service (IHS) is proposing to establish regulations as mandated by section 408 of the Indian Child Protection and Family Violence Prevention Act (the "Act"), that prescribe minimum standards of character and suitability of employment criteria for individuals who are employed or are being considered for employment in positions with duties and responsibilities that involve regular contact with or control over Indian children.

**DATES:** Comments must be received on or before May 24, 1999.

**ADDRESSES:** Written comments may be sent to Betty J. Penn, Regulations Officer, Indian Health Service, Twinbrook Metro Plaza, Suite 450, 12300 Twinbrook Parkway, Rockville, Maryland 20852. Comments will be made available for public inspection at this address from 8:30 a.m. to 5:00 p.m., Monday–Friday beginning approximately two weeks after publication of this notice.

**FOR FURTHER INFORMATION CONTACT:** Ramona Williams, Child Protection Coordinator, Office of Mental Health/Social Services, Indian Health Service, 5300 Homestead Road, NE., Albuquerque, New Mexico 87110, (505) 248-4245. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** The IHS is proposing regulations as mandated by section 408 of the Act, that prescribe minimum standards of character for individuals with duties and responsibilities that involve regular contact with or control over Indian children. The minimum standards of character prescribed in these proposed rules can be found in § 36.405.

The Act requires that minimum standards of character prescribed by these regulations ensure that no individuals appointed to positions involving regular contact with or control over Indian children shall have been found guilty of or entered a plea of nolo contendere or guilty to an offense under

Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons. The IHS is proposing that the minimum standards of character have been met only after individuals in positions involving regular contact with or control over Indian children have been the subject of a satisfactory background investigation, and it has been determined that these individuals have not been found guilty of or entered a plea of nolo contendere or guilty to an offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons.

If an individual has been determined to be unsuitable for employment in a position involving regular contact with or control over Indian children, the IHS is proposing that adjudicative standards may be used to ensure that the individual is suitable for employment in a position, if available, that does not involve regular contact with or control over Indian children. This would require a determination that the individual's prior conduct will not interfere with the performance of duties and will not create a potential risk to the safety and well-being of any Indian children.

The Bureau of Indian Affairs (BIA) published final regulations at 25 CFR part 63 establishing minimum standards of character and suitability of employment as required by the Act. The IHS is proposing minimum standards of character similar to those of the BIA so that similar standards will be applied by each agency. The Act requires that tribes or tribal organizations who receive funds under the Indian Self-Determination and Education Assistance Act (ISDEA), Pub. L. 93-638, employ individuals in positions involving regular contact with or control over Indian children only if the individuals meet standards of character no less stringent than those prescribed under these regulations. Thus, the minimum standards of character as proposed by these rules will become the basis for tribes or tribal organizations to use when developing their own minimum standards of character and suitability for employment of individuals.

Federal employees are regularly subject to the additional suitability criteria contained in 5 CFR part 731 as a condition of employment. In addition, section 231 of the Crime Control Act of 1990, Pub. L. 101-647, 42 U.S.C. 13041, provides that an individual employed by a Federal agency by direct hire or

under contract may be disqualified from consideration or continuing employment if such individual has been convicted of a sex crime, an offense involving a child victim or a drug felony, or any other crime if such conviction bears on an individual's fitness to have responsibility for the safety and well-being of children.

Tribes or tribal organizations may but are not required to apply additional criteria in determining whether an individual is suitable for a position with duties and responsibilities that involve regular contact with or control over Indian children. Any additional suitability criteria beyond the minimum standards of character required by these proposed rules would be determined by each individual tribe or tribal organization in accordance with its own personnel policies and procedures. Standards of character established by tribes or tribal organizations should be used to determine whether an individual is suitable for employment in a position that permits contact with or control over Indian children. If not, the individual may only be placed in a position that does not permit regular contact with or control over Indian children.

Under the Act, Indian tribes or tribal organizations are responsible for identifying individuals in positions within their tribal programs whose duties and responsibilities involve regular contact with or control over Indian children. The Act requires tribes or tribal organizations to conduct background investigations of these individuals. Tribes or tribal organizations are not required to follow the United States Office of Personnel Management (OPM) requirements for background investigations for Federal employees. However, in order to meet the minimum standards of character under these proposed rules, tribes or tribal organizations must ensure that background investigations are completed on individuals with duties and responsibilities that involve regular contact with or control over Indian children. The background investigations require a criminal history background check, including a fingerprint check through the Criminal Justice Information Services Division of the Federal Bureau of Investigation (FBI), under procedures approved by the FBI, and inquiries to State and tribal law enforcement agencies. The IHS has entered into an interagency agreement with the BIA to assist tribes and tribal organizations to access fingerprint/National Criminal History checks through existing FBI files and data bases of individuals being considered for or

placed in positions identified by the tribal programs as having regular contact with or control over Indian children.

The IHS presented an earlier draft of these proposed rules at the 14th Annual National Indian Health Board Consumer Conference. In addition, the IHS provided a copy of the draft proposed rules to the tribal leader of each federally recognized tribe for their review and comment. These proposed rules were modified to reflect the comments received.

Pending publication of these proposed rules, the IHS issued policy guidance requiring IHS personnel staff to identify positions involving regular contact with or control over Indian children, to conduct background investigations of individuals in these positions, and to identify those individuals who do not meet the minimum standards of character under section 408 of the Act. These proposed rules have taken into consideration the agency's experience in implementing section 408 of the Act.

The Department has determined that where an individual has been convicted of or pleaded guilty or nolo contendere to one of the enumerated crimes in section 408 of the Act, the IHS does not have the discretion to retain that individual in a position involving regular contact with or control over Indian children. We believe this is true regardless of such factors as the date of incident, circumstances of incident, rehabilitation or other relevant factors that might result in a determination that the individual is not a potential risk to Indian children. However, the individual must be given an opportunity to explain, deny, or refute unfavorable and incorrect information before an adjudication is final. The IHS would have the discretion to remove that individual to a position not involving regular contact with or control over Indian children after a determination is made that Indian children will not be placed at risk.

There are several terms in section 408 of the Act that were not defined by Congress. The IHS is proposing to define these terms in these regulations to remove any ambiguity created by the statute. The IHS has defined these terms based on the agency's experience in implementing section 408 of the Act.

The term *regular contract with or control over Indian children* is not defined in the Act. The IHS has defined the term in these proposed rules to apply to those positions where the responsibility for Indian children is within the scope of the individual's duties and responsibilities or where the

individual has access to Indian children on a recurring or foreseeable basis that could potentially place an Indian child at risk. The IHS has developed a list of possible positions within the agency that might involve regular contact with or control over Indian children. The IHS has discretion to identify those positions on this list, on a case-by-case basis, to determine whether the duties and responsibilities of a particular position involve regular contact with or control over Indian children as defined by these proposed rules.

In addition, Congress did not define the terms crimes against persons or crimes of violence. The IHS is proposing to define the terms crimes against persons and crimes of violence for purposes of these proposed rules. The Act does not distinguish between felonies and misdemeanors, and thus, it has been determined that the Department does not have discretion to distinguish between felonies and misdemeanors in defining these terms. For example, if a crime is categorized as a crime against persons under Federal, State, or tribal law, a conviction or plea (even if a misdemeanor) would require termination or bar the individual from employment in a position involving regular contact with or control over Indian children. In determining whether an offense falls within these categories, reference may be made to the applicable Federal, State, or tribal law under which the individual was convicted or pleaded guilty or nolo contendere.

The IHS welcomes comments regarding these proposed rules from the public and especially the tribes and tribal organizations affected by them. Interested persons may submit written comments regarding the proposed rule to the location identified in the ADDRESSES section of this document.

#### Executive Order 12866

This proposed rule is a significant regulatory action under Executive Order (E.O.) 12866 and requires review by the Office of Management and Budget (OMB). Depending upon the number of positions for which determinations of suitability for employment are required, the cost of the background investigations (including the cost of each FBI fingerprint check) may have an economic effect on each tribal government and tribal organization under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.* and require additional outlays by tribal governments, tribal organizations, and the Federal Government. These costs are not projected to exceed \$100 million. The cost of background investigation of Federal employees by the OPM are

estimated to be \$475,000. The cost of FBI fingerprint checks requested by tribes is approximately \$20,000. In addition, the IHS is expected to expend \$90,000 per year to support one staff position and related costs associated with tribal requests for FBI fingerprint checks processed through the BIA.

#### Executive Order 12612: Federalism

The Department has determined that this proposed rule does not have significant federalism effects under E.O. 12612 and will not interfere with the roles, rights and responsibilities of states.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, agencies are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the OMB for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

Whether the information collection is necessary and useful to carry out the proper functions of the agency;

The accuracy of the agency's estimate of the information collection burden;

The quality, utility, and clarity of the information to be collected; and

Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting comment on each of these issues for the proposed information collection requirements discussed below.

#### Sections 36.410—What Questions Must the IHS Ask as Part of the Background Investigation?

All applicants for a position involving regular contact with or control over Indian children are required to undergo background investigations to determine whether they meet minimum standards of character for that position. This section describes questions that will be asked as part of the background investigation. Applicants must state whether they have been arrested, charged, convicted of or plead guilty to certain enumerated crimes. In addition, the individuals will be required to sign, under penalty of perjury, a statement verifying the truth of all of the information provided in the employment application and acknowledging that knowingly falsifying or concealing information is subject to fine or imprisonment, or both.

Finally, the applicant must sign an informed consent form authorizing a criminal record check.

The IHS anticipates there will be approximately 100 respondents who will require no more than 15 minutes each to respond to these questions and sign the required forms.

For comments that relate to information collection requirements, mail a copy of comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attention Allison Herron Eydt, IHS Desk Officer.

#### List of Subjects in 42 CFR Part 36

American Indians, Alaska Natives, Children, Child health, Employment.

Dated: September 21, 1998.

**Michael H. Trujillo,**

*Assistant Surgeon General, Director, Indian Health Service.*

Approved: December 10, 1998.

**Donna E. Shalala,**

*Secretary, Department of Health and Human Services.*

For the reasons set out in the preamble, the Department proposes to add subpart K to Part 36 of Title 42, CFR, as follows:

#### Subpart K—Indian Child Protection and Family Violence Prevention

Sec.

36.401 Purpose.

36.402 Policy.

36.403 Definitions.

36.404 What does the Indian Child Protection and Family Violence Prevention Act require of the IHS and Indian tribes or tribal organizations receiving funds under the ISDEA?

36.405 What are the minimum standards of character for individuals placed in, or applying for, a position that involves regular contact with or control over Indian children?

36.406 What are other factors, in addition to the minimum standards of character, that may be considered in determining placement of an individual in a position that involves regular contact with or control over Indian children?

36.407 What positions require a background investigation and determination of suitability for employment or retention?

36.408 Who conducts the background investigation and prepares determinations of suitability for employment?

36.409 Are the requirements for IHS adjudication different from the requirements for Indian tribes and tribal organizations?

36.410 What questions must the IHS ask as part of the background investigation?

36.411 What protections must the IHS and tribes or tribal organizations provide to individuals undergoing a background investigation?

36.412 How does the IHS determine suitability for employment and efficiency of service?

36.413 What rights does an applicant, volunteer, or employee have during this process?

36.414 When should the IHS deny employment or dismiss an employee?

36.415 What must the IHS do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?

**Authority:** 25 U.S.C. 3201; 5 U.S.C. 301; 42 U.S.C. 13041.

#### Subpart K—Indian Child Protection and Family Violence Prevention

##### § 36.401 Purpose.

The purpose of the regulations in this subpart is to establish minimum standards of character to ensure that individuals having regular contact with or control over Indian children have not been convicted of certain types of crimes or acted in a manner that placed others at risk or raised questions about their trustworthiness as mandated by the Indian Child Protection and Family Violence Prevention Act of 1990, Public Law 101-630, 104 Stat. 4544, 25 U.S.C. 3201-3211.

##### § 36.402 Policy.

In enacting the Indian Child Protection and Family Violence Prevention Act, the Congress recognized there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The minimum standards of character and suitability of employment for individuals ensure that Indian children are protected. In order to protect Indian children, the IHS has established minimum standards of character requiring completion of a satisfactory background investigation that ensures that no individuals who have been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons, are placed in positions involving regular contact with or control over Indian children.

##### § 36.403 Definitions

*Crimes against persons* means an offense that has an element the use, attempted use, or threatened use of

physical force or other abuse of a person and includes, but is not limited to, homicide; assault; kidnapping; false imprisonment; reckless endangerment; robbery; rape; sexual assault, molestation, exploitation, contact, or prostitution; and other sexual offenses. In determining whether an offense falls within this category, reference may be made to the applicable Federal, State, or tribal law under which the individual was convicted or pleaded guilty or nolo contendere.

*Crimes of violence* means:

(1) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(2) Any other offense that is a felony and that, by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense. In determining whether an offense falls within this category, reference may be made to the applicable Federal, State, or tribal law under which the individual was convicted or pleaded guilty or nolo contendere.

*Indian* means any individual who is a member of an Indian tribe, as defined in this section.

*Indian child* means any unmarried person under the age of eighteen who is either a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Individuals* means persons with duties and responsibilities that involve regular contact with or control over Indian children and includes but is not limited to the following:

(1) Employees in the competitive or excepted service, the Commissioned corps, or the Senior Executive Service in the IHS;

(2) Individuals who perform service for or under the supervision of the IHS while being permanently assigned to another IHS office or to another organization, such as a Federal agency, State, or tribe;

(3) Individuals who volunteer to perform services for or under the supervision of the IHS;

(4) Individuals who contract with the IHS to perform services in IHS facilities. *Must* is used in place of shall and indicates a mandatory or imperative act or requirement.

*Regular contact with or control over an Indian child* means responsibility for an Indian child within the scope of the individual's duties and responsibilities or access to Indian children on a recurring and foreseeable basis that could potentially place an Indian child at risk.

*Tribal organization* as defined in the ISDEA, means the recognized governing body of any Indian tribe or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

**§ 36.404 What does the Indian Child Protection and Family Violence Prevention Act require of the IHS and Indian tribes or tribal organizations receiving funds under the ISDEA?**

(a) The IHS must compile a list of all authorized positions with duties and responsibilities that involve regular contact with or control over Indian children; investigate the character of each individual who is employed or is being considered for employment in such a position; and prescribe minimum standards of character that each individual must meet to be appointed to such positions.

(b) All Indian tribes or tribal organizations receiving funds under the authority of the ISDEA must identify those positions that permit regular contact with or control over Indian children; conduct an investigation of the character of each individual who is employed or is being considered for employment in a position that involves regular contact with or control over Indian children; and employ only individuals who meet standards of character that are no less stringent than those prescribed for the IHS.

**§ 36.405 What are the minimum standards of character for individuals placed in, or applying for, a position that involves regular contact with or control over Indian children?**

The minimum standards of character shall mean a benchmark of moral, ethical, and emotional strengths established by character traits and past conduct to ensure that the individual is competent to complete his/her job without harm to Indian children. The minimum standards of character shall

be considered met only after the individual has been the subject of a satisfactory background investigation. The background investigation shall include a review of:

(a) The individual's trustworthiness, through inquiries with the individual's references and places of employment and education;

(b) A criminal history background check, which includes a fingerprint check through the Criminal Justice Information Services Division of the FBI, under procedures approved by the FBI, and inquiries to State and tribal law enforcement agencies for residence for the previous 5 years listed on the individual's application; and

(c) A determination as to whether the individual has been found guilty of or entered a plea of nolo contendere or guilty to any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons.

**§ 36.406 What are other factors, in addition to the minimum standards of character, that may be considered in determining placement of an individual in a position that involves regular contact with or control over Indian children?**

(a) All Federal employees are subject to suitability criteria contained in 5 CFR Part 31 as a condition of employment.

(b) Section 231 of the Crime Control Act of 1990, Pub. L. 101-647, 42 U.S.C. 13041, provides that an individual may be disqualified from consideration or continuing employment if such individual has been convicted of a sex crime, an offense involving a child victim or a drug felony, or any other crime if such conviction bears on an individual's fitness to have responsibility for the safety and well-being of children.

(c) Tribes or tribal organizations may but are not required to apply additional criteria in determining whether an individual is suitable for a position with duties and responsibilities that involve regular contact with or control over Indian children. Any additional suitability criteria established by tribes or tribal organizations beyond the minimum standards of character described in § 36.405 would be determined by each individual tribe or tribal organization in accordance with its own personnel policies and procedures.

**§ 36.407 What positions require a background investigation and determination of suitability for employment or retention?**

(a) All positions that allow an individual regular contact with or

control over Indian children are subject to a background investigation and determination of suitability for employment. The IHS has compiled a list of positions within the agency in which the duties and responsibilities could involve regular contact with or control over Indian children. The list will be periodically updated and made available at all IHS Personnel Offices upon request. Positions should be reviewed on a case-by-case basis to determine whether the individual in that position has regular contact with or control over Indian children.

(b) Tribes and tribal organizations may use the list compiled by the IHS or develop a list of positions within their program that involve regular contact with or control over Indian children.

**§ 36.408 Who conducts the background investigation and prepares determinations of suitability for employment?**

(a) The IHS must use the Office of Personnel Management (OPM) to conduct background investigations for Federal employees. The IHS must designate qualified security personnel to adjudicate the results of background investigations.

(b) Indian tribes and tribal organizations may conduct their own background investigations, contract with private firms, or request that a Federal agency conduct investigations. (FBI criminal history record information, however, may only be received or evaluated by governmental agencies, including tribal government agencies, and may not be disseminated to private entities.) The investigation should cover the past five years of the individual's employment, education, etc.

**§ 36.409 Are the requirements for IHS adjudication different from the requirements for Indian tribes and tribal organizations?**

(a) In addition to the minimum requirements for background investigations found in § 36.405, IHS's adjudicating officials must review the results of searches by State human services agencies, the OPM National Agency Check and Inquiries, the OPM Security/Suitability Investigations Index, and the Defense Clearance and Investigations Index.

(b) All IHS employees who have regular contact with or control over Indian children must be reinvestigated every five years during their employment in that or any other position that allows regular contact with or control over Indian children.

(c) Indian tribes or tribal organizations may but are not required to adopt portions of the rules in this subpart that

are specifically applicable to employment within the IHS in conducting background investigations and adjudicating suitability for employment in tribal positions that allow regular contact with or control over Indian children.

**§ 36.410 What questions must the IHS ask as part of the background investigation?**

(a) Applications for employment with the IHS must include the following questions:

(1) Has the individual been arrested or charged with a crime involving a child? If yes, the individual must provide the date, explanation of the violation, disposition of the arrest or charge, place of occurrence, and the name and address of the police department or court involved.

(2) Has the individual ever been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons? If yes, the individual must provide an explanation of the violation, place of occurrence, date and disposition of the court proceeding, and the name and address of the police department or court involved.

(b) The IHS must require that the individual sign, under penalty of perjury, a statement verifying the truth of all information provided in the employment application and acknowledging that knowingly falsifying or concealing a material fact is a felony that may result in fines up to \$10,000 or 5 years imprisonment, or both.

(c) The IHS must inform the individual that a criminal history record check is a condition of employment and require the individual to consent in writing to a criminal history record check.

**§ 36.411 What protections must the IHS and tribes or tribal organizations provide to individuals undergoing a background investigation?**

(a) The IHS must comply with all policies, procedures, criteria, and guidance contained in other appropriate guidelines, such as the OPM policies, procedures, criteria, and guidance.

(b) Indian tribes and tribal organizations must comply with the privacy requirements of the Federal, State, or other tribal agency providing the background investigations. Indian tribes and tribal organizations may establish their own procedures that safeguard information derived from background investigations.

**§ 36.412 How does the IHS determine suitability for employment and efficiency of service?**

(a) Adjudication is the process employers use to determine suitability for employment and efficiency of service. The adjudication process protects the interests of the employer and the right of applicants and employees. Adjudication requires uniform evaluation to ensure fair and consistent judgment.

(b) Each case is judge on its own merits. All available information, both favorable and unfavorable, should be considered and assessed in terms of accuracy, completeness, relevance, seriousness, overall significance, and how similar cases have been handled in the past.

(c) The adjudicating official who conducts the adjudication must first have been the subject of a favorable background investigation.

(d) Each adjudicating official must be thoroughly familiar with all laws, regulations, and criteria involved in making a determination for suitability.

(e) The adjudicating official must review the background investigation to determine the character, reputation, and trustworthiness of the individual. At a minimum, the background investigation must:

(1) Review each security investigation form and employment application and compare the information provided.

(2) Review the results of written record searches requested from local law enforcement agencies, former employer, former supervisors, employment references, and schools.

(3) Review the results of the fingerprint charts maintained by the Federal Bureau of Investigation or other law enforcement information maintained by other agencies.

(4) Review the information obtained through a background investigation and determine whether the individual has been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons.

(f) After an opportunity has been afforded the individual to respond, pursuant to § 36.413, and it is adjudicated that the individual has been found guilty of or entered a plea of nolo contendere or guilty to an enumerated offense under paragraph (e)(4) of this section, that individual shall not be placed or retained in a position involving regular contact with or control over Indian children.

(g) For individuals who have been determined to be unsuitable for employment in positions having regular contact with or control over Indian children, the IHS may use Federal adjudicative standards to certify that an individual is suitable for employment in a position, if available, that does not involve regular contact with or control over Indian children. The adjudicating official must determine that the individual's prior conduct will not interfere with the performance of duties and will not create a potential risk to the safety and well-being of any Indian children after consideration of the following factors:

(1) The nature and seriousness of the conduct in question.

(2) The recency and circumstances surrounding the conduct in question.

(3) The age of the individual at the time of the incident.

(4) Societal conditions that may have contributed to the nature of the conduct.

(5) The probability that the individual will continue the type of behavior in question.

(6) The individual's commitment to rehabilitation and a change in the behavior in question.

(7) The degree of public trust and the possibility the public would be placed at risk if the individual is appointed to the position.

**§ 36.413 What rights does an applicant, volunteer, or employee have during this process?**

(a) The applicant, volunteer, or employee must be provided an opportunity to explain, deny, or refute unfavorable and incorrect information gathered in an investigation, before the adjudication is final. He/she should receive a written summary of all derogatory information and be informed of the process for explaining, denying, or refuting unfavorable information.

(b) The adjudicating officials must not release the actual background investigative report to an applicant, volunteer, or employee. However, they may issue a written summary of the derogatory information.

(c) The applicant, volunteer, or employee who is the subject of a background investigation may obtain a copy of the reports from the originating (Federal, State, or other tribal) agency and challenge the accuracy and completeness of any information maintained by that agency.

(d) The results of an investigation cannot be used for any purpose other than to determine suitability for employment in a position that involves regular contact with or control over Indian children.

(e) Investigative reports contain information of a highly personal nature and must be maintained confidentially and secured in locked files. Investigative reports must be seen only by those officials who, in performing their official duties, need to know the information contained in the report.

**§ 36.414 When should the IHS deny employment or dismiss an employee?**

(a) The IHS must deny employment to an individual or dismiss an employee, when the duties and responsibilities of the position the individual person would hold or holds involve regular contact with or control over Indian children, and it has been adjudicated, pursuant to § 36.412 and § 36.413, that the individual has been found guilty of, or entered a plea of guilty or nolo contendere to, any Federal, State, or tribal offense involving a crime of violence; sexual assault, molestation,

exploitation, contact, or prostitution; or crimes against persons. The IHS has the discretion to place such an individual in a position, if available, that does not involve regular contact with or control over Indian children, if a determination has been made that such placement would not put Indian children at risk and the individual would be able to perform the duties and responsibilities of this position.

(b) Pursuant to section 231 of the Crime Control Act of 1990, Pub. L. 101-647, 42 U.S.C. 13041, as amended by Pub. L. 102-190, the IHS may hire an individual provisionally prior to the completion of a background investigation if, at all times prior to receipt of the background investigation during which children are in the care of the individual, the individual is within the sight and under the supervision of a staff person and a satisfactory

background investigation has been completed on that staff person.

**§ 36.415 What must the IHS do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?**

(a) The IHS may deny the applicant employment until the charge has been resolved.

(b) The IHS may deny the employee any on-the-job contact with children until the charge is resolved.

(c) The IHS may detail or reassign the employee to other duties that do not involve regular contact with children.

(d) The IHS may place the employee on indefinite suspension, in accordance with statutory and regulatory requirements, until the court has disposed of the charge.

[FR Doc. 99-7341 Filed 3-24-99; 8:45 am]

BILLING CODE 4160-16-M