

WHY DO WE NEED THE INDIAN CHILD WELFARE ACT AND MICHIGAN INDIAN FAMILY PRESERVATION ACT?

Michigan Court Improvement Program
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Acknowledgments

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Overview

- The federal Indian Child Welfare Act (ICWA) was enacted in 1978
- ICWA is not based on the racial or ethnic status of Native Americans, but rather, the tribes' political status as sovereign nations
- ICWA is “remedial” in nature and aims to correct over 200 years of failed government policy and practices toward the Native American people

Overview

- The Michigan Indian Family Preservation Act (MIFPA) was signed into law January 2013
- MIFPA strengthens and clarifies some of ICWA's provisions to increase compliance in Michigan

What are ICWA & MIFPA trying to remedy? *Prior ill-conceived government policies*

European settlement and U.S. Federal Governmental policies resulted in a severe decline in the Native American population

- 1492: between 10 and 12 million Native Americans inhabited the US (for over 15,000 years tribal communities thrived before the arrival of Europeans)
- 1900: around 250,000 Native Americans survived
- 2009: a little over 3 million Native Americans (still less than one third of the population before European settlement)

What are ICWA & MIFPA trying to remedy? *Indian Boarding Schools*

- Over 150 years of Indian Boarding Schools paid for by the federal government
- Schools were funded by the federal government although often operated by churches
- Generations of Indian children were forcibly removed from their parents and tribes to be raised in a military like environment
- The Bureau of Indian Affairs was authorized by Congress to withhold a parent's food rations and supplies if they refused to send their child to Boarding School (1893 Congressional BIA Authorization)

What are ICWA & MIFPA trying to remedy? *Indian Boarding Schools*

- Children were taught their Native culture was “bad, heathen” and were severely punished for speaking their Native language.
- Children were “cleansed” upon arrival – this consisted of taking their Native clothing, scrubbing them down, cutting their long hair (valued for spiritual and cultural significance), giving them an Anglo-Saxon name, requiring all children to wear “standard issue” clothes, and forcing them to practice Christianity rather than their own spiritual beliefs.
- Failure to comply with the rules resulted in beatings, isolation, starvation and even death.

Mt. Pleasant Boarding School



What are ICWA & MIFPA trying to remedy? *Indian Boarding Schools*

- When the youth graduated and attempted to return to their tribes, they found they no longer fit into their tribal culture.
- Most youth did not remember their language and had not learned tribal customs.
- Most youth spoke, acted and thought like “white Americans,” but were not accepted by broader society because they “looked” Indian.
- Generations of these youth suffered from a lack of personal and cultural identity, and were lost to their tribes.

Boarding Schools’ Impact on Tribes and Tribal Parenting

- Many youth who graduated from the Boarding Schools were taught their tribal identity was something to be ashamed of. Because of this, many did not return to their tribes. As they became parents themselves, they often did not share their tribal identity or aspects from their tribal culture with their children.
- The strict military style boarding school model provided ill preparation for becoming a parent and coping with real world stressors.

Boarding School Impact – Historical Trauma

- “Historical trauma is a cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma.”
Dr. Maria Yellow Horse Braveheart, PhD
- Historical trauma is a common side effect of the boarding school experience and is present in the populations we work with today.

Michigan Indian Boarding Schools

- The Mount Pleasant Indian Industrial Boarding School operated from June 1893 until June 1934 with an average annual enrollment of 300 students.
- The Harbor Springs Holy Childhood of Jesus Christ Indian Boarding School opened in 1829 and closed in 1983.
- For more information on Boarding Schools go to:
<http://www.sagchip.org/ziibiwing/planyourvisit/pdf/AIBSCurrGuide.pdf>

What are ICWA & MIFPA trying to remedy? *Indian Adoption Project*

- In 1958, the Child Welfare League of America (CWLA) and the BIA partnered under a 9 year federal contract for the purpose of placing Indian children with “white” families
- This program operated on the premise that Indian children were better off in non-Indian families
- At the time, the program was believed to be a victory for civil rights and enlightened adoptions because it crossed racial lines.

What are ICWA & MIFPA trying to remedy? *Indian Adoption Project*

- The Project was discontinued in 1967, although the beliefs and practices it was founded upon continued.
- In 2001, the CWLA apologized for the “hurtful, biased, and disgraceful course of action” they took to encourage and support the “rescuing” of Indian children from their culture and their families.

U.S. Congress explores the need for the Indian Child Welfare Act

- April 8, 1974 Congress began a series of hearings regarding Indian child welfare in the United States. Numerous experts and witnesses from across the country gave testimony under oath.
- The disturbing facts revealed in those hearings illustrated that the U.S. Federal and state government's had a well-known policy of removing Indian children from their families and tribes to assimilate them into white American culture by placing them into white families or institutions.
- It became clear that the United States had a crisis of massive proportions on their hands.
- Official government policy destroyed the fabric of Indian families and endangered the very existence of tribal governments.

U.S. Congress explores the need for the Indian Child Welfare Act

Association on American Indian Affairs Studies from 1969 and 1974 showed that:

- 25-35% of *all* Indian children were separated from their families and placed in foster homes, adoptive homes or institutions
- The national rate of removal for Indian children was *25 times higher* than for non-Indian children
- 85% of all Indian children in foster homes were in non-Indian homes
- Only 1% were removed due to abuse
- 99% were removed due to "neglect or social deprivation" which cited examples such as an Indian reservation was deemed an unsuitable place for a child to live, adoptive parents are able to provide a better home, poverty, poor housing due to lack of plumbing & overcrowding, and that the Indian family sent children to tribal school rather than public school.

U.S. Congress explores the need for the Indian Child Welfare Act

Statement of Dr. Robert Bergman, Indian Health Service, Gallup, N. Mexico

“Separating Indian children from their parents and tribes has been one of the major aims of governmental Indian services for generations. The assumption is that children and particularly those in any kind of difficulty would be better off being raised by someone other than their own parents. The purpose of the first boarding school on the Navajo reservation as stated in its charter in the 1890's was "to remove the Navajo child from the influence of his savage parents.” Hearings before the Subcommittee on Indian Affairs, April 8 and 9, 1974, P128.

What was the result of the Boarding School and Adoption Project Policies?

Testimony of Mr. William Byler, Executive Director, Association on American Indian Affairs

“Statistical and anecdotal information show that Indian children who grow up in non-Indian settings become spiritual and cultural orphans. They do not entirely fit into the culture in which they are raised and yearn throughout their life for the family and tribal culture denied them as children. Many Native children raised in non-Native homes experience identity problems, drug addiction, alcoholism, incarceration and, most disturbing, suicide.”

ICWA to remedy what official government policy broke by promoting the following goals:

1. Protect the best interests of Indian children and families *as determined by tribes*
2. Promote the stability and security of Indian families
3. Recognize and strengthen the role of tribal governments in determining child custody issues

Indian Child Welfare Act

- After 4 years of Congressional testimony, hearings, and debate, ICWA was enacted to prevent further unwarranted removal of Indian Children from their families and tribes
- ICWA established ***minimum Federal standards*** for the removal of Indian children from their families, and the placement of Indian children in foster or adoptive homes or institutions that reflect the values of Indian culture
- Required notification to tribes and recognized tribes' rights in their most precious resource, their children
- The Act purposefully makes it more difficult for state actors to remove Indian children from their homes

We have ICWA, why do we need MIFPA?

- Need for improved compliance with ICWA in Michigan identified from: appellate court decisions, Tribal and state agency feedback at Tribal State Partnership meetings, Urban Indian State Partnership meeting input, Court Improvement Program member feedback, and the ICWA Court Resource Guide and Court Rules special committee member feedback.
- AFCARS trend data reflecting less than 15% of Native American children in Michigan are placed with a Native American Caregiver.

Appellate Cases Illustrate the Challenges of ICWA Compliance

In re Hanson, 188 Mich App 392; 470 NW 2d 669 (1991).

The client, an adult adoptee, sought information about her biological parents to enroll in her tribe and obtain “**other information as may be necessary to protect any rights flowing from the individual's tribal relationship**”. The trial court refused to provide the records as required by §1917 of the ICWA. Michigan Indian Legal Services appealed, won a reversal, and the client obtained her records.

Appellate Cases Illustrate the Challenges of ICWA Compliance

Empson-Laviolette v. Crago, 280 Mich App 620; 760 NW 2d 793 (2008).

This case involved a guardianship. Often overlooked is the broad reach of ICWA to all “child custody proceedings”. In this case the trial court ruled that a guardianship order was not subject to ICWA and refused to return the child to the mother when she ended the voluntary guardianship. The Court of Appeals agreed with Michigan Indian Legal Services that ICWA applied to guardianships and ordered the return of the child to the mother.

Appellate Cases Illustrate the Challenges of ICWA Compliance

In re Roe, 281 Mich App 88; 764 NW 2d 789 (2008).

In this termination of parental rights case the court did not find, as required by ICWA, “ **that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.**” Michigan Indian Legal Services appealed. The Court of Appeals agreed that the termination order should be reversed because ICWA was not followed.

Goals of MIFPA

- Increased ICWA compliance by strengthening and clarifying some of ICWA's provisions, and adding definitions for key terms
- Decreased confusion about requirements for guardianships and voluntary placements (more user friendly)
- By creating a state based Act, state governmental agencies are now aware of the law and its sister federal law
- Facilitate a child's relationship with his or her tribe

Contact Information

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Additional MIFPA/ICWA videos are available at the following site:

<http://webcast.you-niversity.com/youtools/companies/viewArchives.asp?affiliateId=128>

Supporting documentation for all MIFPA/ICWA webcasts can be found in the “Index of Training Materials” at the following site:

<http://courts.mi.gov/administration/scao/officesprograms/cws/childwelfareservicestraining/pages/default.aspx>

The archive of the March 8, 2013 training “Michigan Indian Family Preservation Act: New Indian Child Welfare Legislation” is available at the following site:

<http://webcast.you-niversity.com/youtools/companies/viewArchives.asp?affiliateId=133>



August 8, 2013

To whom it may concern:

As national organizations dedicated to the well-being of American Indian and Alaska Native children and families, we strongly support the American Bar Association (ABA) resolution urging full implementation of, and compliance with the Indian Child Welfare Act of 1978 (ICWA).

ICWA was enacted into law over 35 years ago in 1978 in response to the troubling practices of public and private child welfare and adoption agencies. Prior to its passage, child welfare agencies were removing American Indian and Alaska Native (AI/AN) children from their homes at alarming rates. A study done by the Association on American Indian Affairs found that, in the 1970s, prior to the passage of ICWA, 25–35% of all AI/AN children nationwide were removed from their homes by the child welfare system and that, of these children, 85% were being placed in non-Indian homes. Evidence suggested that many of these removals were a product of cultural bias and misunderstanding, and took place without due process, violating the rights of both children and families. In South Dakota, the number of AI/AN children in foster care was 16 times the number for other children, and in Washington, the number of AI/AN children who were adopted out was 19 times that for other children.

It was not just the rate at which children were being removed, but also the consequences of this practice, that caused Congress to act. Psychologists and other professionals testified before Congress that AI/AN children brought up in non-Indian homes suffered from a variety of adjustment and emotional disorders based on their removal and isolation from their families and culture. It was also noted that if these removal rates were allowed to continue it threatened the very existence of tribes.

As a result Congress enacted ICWA, which sets forth minimum federal standards for child custody proceedings involving Indian children who are members of (or children of a member and eligible for membership in) federally recognized tribes. ICWA also recognizes a tribe's inherent right to take jurisdiction and provide services to their own children.

ICWA has done much to correct the problem of unlawful removal of AI/AN children from their homes, communities, and cultures. However, there is research documenting non-compliance with most of the key provisions of ICWA, such as: 1) failing to identify Indian children and ensure they are receiving the protections of the law;ⁱ 2) inadequate or lack of notice to tribes and family members;ⁱⁱ 3) placing children outside the placement preferences without good cause or placing children in more restrictive setting than necessary.ⁱⁱⁱ Because ICWA has not been consistently complied with, AI/AN children are still overrepresented in foster care nation-wide and more frequently adopted out to non-Native homes.

Although AI/AN children face maltreatment at rates similar to the general population, they are just under 1 percent of all children in the United States, but 2 percent of all children who are in foster care.^{iv} The numbers are even more staggering when you assess specific states. For example, in Minnesota, although AI/AN children make up only 1.4% of the total population, they are more than 16% of children in foster care. In South Dakota, they are 13% of the population, but 52% of the children in foster care. In Montana, they are 9% of the population, but more than 38% of children in foster care. Finally, in Alaska, they are 17% of children, but over 51% of the children in foster care.^v Similarly, data tells us that that the adoption of Native youth into non-Native homes remains common practice. In 2008, more Native children in adoptive placements lived in non-Native adoptive homes than Native adoptive homes.^{vi}

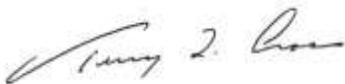
Full implementation of and compliance with ICWA are necessary to improve the circumstances and well-being of Native children. This can be achieved through the measures proposed in the ABA resolution, including increased tribal-state court collaboration; increased use of state-tribal agreements; enhanced tribal legal services, case management, and child welfare services; and significant increases in the

financial support provided to tribes by the U.S. Departments of Interior, Justice, and Health and Human Services.

As one of the world's largest voluntary professional organizations and as a national association of attorneys, the ABA is committed to improving the legal profession, eliminating bias and enhancing diversity, and advancing the rule of law throughout the United States and around the world. The ABA Resolution urging full implementation of and compliance with ICWA will give the ABA the authority it needs to fulfill this mission as it pertains to AI/AN children and families.

ICWA provides the protections necessary to keep AI/AN children safely in their families and communities, and connected to their culture—its compliance ensures that the child welfare and adoption systems serve the best interest of *Indian* children. We urge you to support this Resolution; our children can't wait any longer.

Sincerely,



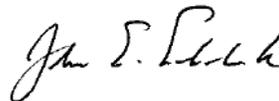
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ⁱ Jones, B.J., Gillette, J.A., Painte, D., & Paulson, S. (2000, December). Indian child welfare act: A pilot study of compliance in North Dakota; Bellonger & Rubio (2004). An Analysis of Compliance with the Indian Child Welfare Act in South Dakota. Denver, CO; National Center for State Courts; Lakewood, CO.: North American Indian Legal Services.

ⁱⁱ Brown, E.F., Limb, G.E., Chance, T. & Munoz, R. (2002). The Indian Child Welfare Act: An examination of state compliance in Arizona. Seattle, WA: Casey Family Programs; Portland, OR: National Indian Child Welfare Association; Waszak S. (2010) Contemporary hurdles in the application of the Indian Child Welfare Act. American Indian Culture and Research Journal, 34(1), 121-135.

ⁱⁱⁱ Jones, B.J., Gillette, J.A., Painte, D., & Paulson, S. (2000, December). Indian child welfare act: A pilot study of compliance in North Dakota; Bellonger & Rubio (2004). An Analysis of Compliance with the Indian Child Welfare Act in South Dakota. Denver, CO; National Center for State Courts; Lakewood, CO.: North American Indian Legal Services.

^{iv} Summers, A., Woods, S., & Donovan, J. (2013). Technical assistance bulletin: Disproportionality rates for children of color in foster care. National Council of Juvenile and Family Court Judges: Reno, NV.

^v Summers, A., Woods, S., & Donovan, J. (2013). Technical assistance bulletin: Disproportionality rates for children of color in foster care. National Council of Juvenile and Family Court Judges: Reno, NV.

^{vi} Kreider, R.M. (2011) *Interracial Adoptive Families and Their Children: 2008* in *Adoption Factbook V* Alexandria, VA: National Council for Adoption, 109 Retrieved from: <https://www.adoptioncouncil.org/publications/adoption-factbook.html>

AMERICAN BAR ASSOCIATION

**COMMISSION ON YOUTH AT RISK
NATIONAL NATIVE AMERICAN BAR ASSOCIATION
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE
CENTER FOR RACIAL AND ETHNIC DIVERSITY
COMMISSION ON HOMELESSNESS AND POVERTY**

REPORT TO HOUSE OF DELEGATES

RESOLUTION

RESOLVED, that the American Bar Association urges the full implementation of, and compliance with, the Indian Child Welfare Act (25 U.S.C. §§1901-63).

FURTHER RESOLVED, That the ABA encourages federal, state and tribal governments to provide the training and resources necessary to fully implement and enforce compliance with the Indian Child Welfare Act.

FURTHER RESOLVED, That the American Bar Association urges:

- (a) state court collaborations with tribal courts, tribal court improvement programs, tribal governing bodies, and other tribal authorities to protect American Indian and Alaska Native children and to ensure appropriate treatment of, and resources for, American Indian and Alaska Native families and children at all levels of government;
- (b) increased use of federal Title IV-E cooperative agreements and memoranda of understanding between states and Tribes to enable Tribes to operate their own child protection programs;
- (c) assistance to Tribes and tribal courts in enhancing legal services, case management, and child welfare services functions;
- (d) efforts to reduce the disproportionate number of American Indian and Alaska Native children removed from their homes; and
- (e) significant increases in the financial support provided Tribes and tribal courts by the U.S. Departments of Interior, Justice, and Health and Human Services that enhance services to American Indian and Alaska Native children and their families, and to the legal and judicial systems that serve them.

FURTHER RESOLVED, That the American Bar Association encourages and supports efforts of state and local bar associations, legal services organizations, law schools, child welfare and adoption agency legal counsel, and other legal assistance providers to develop training and materials that educate the legal profession on requirements of the Indian Child Welfare Act and improvement of its implementation.

REPORT

In 1978, after more than four years of hearings, testimony and debate, Congress enacted the Indian Child Welfare Act¹ (hereinafter “ICWA”) in response to the “alarmingly high percentage of Indian families ... broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.”² Congress also noted “that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”³

Prior to enactment of ICWA, state government actors followed a pattern and practice of removing between 25 and 35 percent of all Indian children nationwide from their families, placing about 90 percent of those removed children in non-Indian homes.⁴ Recognizing the disparate treatment faced by American Indian and Alaska Native (AI/AN) children and families in the mainstream child welfare and adoption systems, ICWA was drafted with the express purpose of preserving the familial and cultural ties of Indian families.

Although ICWA has done much to improve these numbers, due in large part to lack of effective implementation and compliance in 2011 the National Council of Juvenile and Family Court Judges reported:

*Across the United States, Native American children are overrepresented in foster care at a rate of 2.2 times their rate in the general population, 21 states have some overrepresentation, and 26 percent of the states that have overrepresentation have a disproportionality index of greater than 4.1. In Minnesota, the disproportionality is index 11.6.*⁵

What makes these statistics even more sobering is that in many of these states the overwhelming majority of Native Americans resided on reservations where ostensibly the state courts and state or county child welfare agencies had no authority to order the removal of Native American children.⁶

This report will provide background on ICWA and explain its actual and intended impact on the child welfare system, adoption and child custody proceedings. This report will also detail challenges and barriers to full implementation of ICWA including a recent decision of the U.S. Supreme Court, as well as the effects of non-compliance. Lastly, this report will highlight successful State-Tribal collaborations and offer recommendations for strengthening ICWA to further the best interests of AI/AN children, ensuring the security and protection of their Tribes and families.

The ABA does not currently have a policy on ICWA. However, the ABA Section of Family Law publishes a legal guide to ICWA called the *Indian Child Welfare Act Handbook*.⁷ Additionally, in

¹ P.L. 95-608, Approved November 8, 1978 (92 Stat. 3069) Indian Child Welfare Act Of 1978. 25 U.S.C. §§1901-63.

² *Id.* at 1901.

³ *Id.*

⁴ Matthew L.M. Fletcher, The Origins of the Indian Child Welfare Act: A Survey of the Legislative History, Indigenous Law & Policy Center Occasional Paper 2009-04, <http://www.law.msu.edu/indigenous/papers/2009-04.pdf> (citing *Holyfield*, 490 US at 32-33 (citing Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong, 2d Sess, at 3 (statement of William Byler) (“1974 Hearings”))

⁵ Padilla, J. & Summers, A. (2011). Technical Assistance bulletin: Disproportionality rates for children of color in foster care. National Council of Juvenile and Family Court Judges: Reno, NV. Retrieved from:

http://www.ncjfcj.org/sites/default/files/Disproportionality%20TAB1_0.pdf

⁶ *Indian Child Welfare Act Handbook*. B.J. Jones, Mark Tilden, Kelly Gaines-Stoner; 2nd ed. 2008).

⁷ *Id.* at 2.

August 2001, upon submission by the ABA Commission on Homelessness and Poverty, the ABA approved a resolution⁸ calling on Congress to amend Title IV-E of the Social Security Act to provide direct tribal access to federal Title IV-E foster care and adoption funding for children under tribal court jurisdiction. And in August of 2008, the Commission on Youth at Risk's policy on Addressing Racial Disparities in the Child Welfare System was approved, calling on Congress to:⁹

1. broaden federal reviews of the child welfare system to address racial and ethnic disproportionality and fund reporting, analysis and corrective action responses;
2. help racial and ethnic minority families have ready access to services to prevent removals from home in both state and tribal systems,;
3. provide relevant cultural competence training;
4. provide for a racially and ethnically diverse legal and judicial workforce, and
5. make changes in law and policy to help decrease disproportionality by subsidizing permanent relative guardianships, giving relative caregivers financial support no less than non-relative caregivers, providing relative caregiver housing support and giving flexibility in having separate licensing and approval standards for kinship placements.

These policy recommendations mirror many of the goals of ICWA, including addressing the disproportionate number of AI/AN youth in the child welfare system, encouraging maintenance of the tribal kinship networks, and recognizing the need for a separate set of standards for identifying appropriate placements and interventions for AI/AN children and youth.

Overview of the Indian Child Welfare Act and the Events Preceding its Enactment

ICWA was preceded by an era of seeking to “civilize” and Christianize AI/AN people through boarding school placement and education that had the effect of permanently removing many Indian children from their families, cultures and identities. The federal government began sending American Indians to off-reservation boarding schools in the 1870s, when the United States was still at war with tribes.¹⁰ Students at federal boarding schools were forbidden to express their culture — everything from wearing long hair to speaking their native language.¹¹ About one hundred years later, an Indian Adoption Project was established by the Bureau of Indian Affairs (BIA) and the Child Welfare League of America (CWLA) to provide non-Indian adoptive homes for Indian children whose parents were thought to be incapable of providing a suitable home.¹²

Immediately prior to ICWA's passage, in some states the adoption rate of Indian children was 19 times that of non-Indian children, while foster placement of Indian children was 10 times that of non-Indian children.¹³ Many removals were the product of mainstream child welfare agency ignorance of AI/AN culture and child-rearing practices,¹⁴ a devaluing of extended AI/AN family networks,¹⁵ and

⁸ Homelessness and Poverty (Report Nos.105C). 2001 AM 105C

⁹ Commission on Youth at Risk (Report Nos. 107). 2008 AM 107

¹⁰ Charla Bear. *American Indian Boarding Schools Haunt Many*, NPR Report. May 2008. Available at <http://www.npr.org/templates/story/story.php?storyId=16516865>.

¹¹ *Id.*

¹² Wilkins, A. July 2008 State-Tribal Cooperation and the Indian Child Welfare Act. Pg. 1. Retrieved from: <http://www.ncsl.org/print/statetribe/ICWABrief08.pdf>

¹³ Brown, E.F., Limb, G.E., Munoz, R., & Clifford, C.A. (2001). Title IV-B Child and Family Service Plans: An Evaluation of specific measures taken by states to comply with the Indian Child Welfare Act. Seattle, WA: Casey Family Programs; Portland OR: National Indian Child Welfare Association. Pg. 9.

¹⁴ *ibid* citing Hollinger 1992; U.S., House Report, 1978.

mischaracterizing the poverty in Indian communities as neglect.¹⁶ Noting these findings, Congress “assumed the responsibility for the protection and preservation of Indian tribes and their resources” and recognized “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest in protecting Indian children.”¹⁷

ICWA recognizes the government-to-government relationship between the United States and Tribes, and affirms the political status of tribal members—ICWA is not based on either race or ethnicity.¹⁸ The stated purpose of the Act is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children...and placement of such children in ...homes which will reflect the unique values of Indian culture.”¹⁹ The long-standing clash between Indian tribal values and those of Anglo-American culture is the very problem ICWA was designed to address.²⁰

When appropriately applied, ICWA is designed to comprehensively address child custody proceedings related to Indian children and parents. The Tribal Law and Policy Institute notes²¹ that ICWA:

1. regulates States regarding the handling of child abuse and neglect and adoption cases involving Native children by state courts, state Child Protection agencies, and adoption agencies;
2. sets minimum standards for the handling of these cases;
3. affirms the jurisdiction of Tribal Courts over child abuse and neglect and adoption cases involving member children; and

establishes a preference for Tribal courts to adjudicate child abuse and neglect cases in situations of concurrent jurisdiction

ICWA applies to cases in State courts only (not Tribal courts) in child custody proceedings (including foster care placement, termination of parental rights, pre-adoptive and adoptive placements), involving an Indian child (any person under the age of 18 who is a member of an Indian tribe or the biological child of a member of an Indian tribe and eligible for membership in an Indian tribe),²² and²³

1. determines residency and jurisdiction for children and parents/custodians,
2. outlines placement preferences,
3. determines requirements for termination of parental rights, and
4. explains consequences for non-compliance, including invalidation of court orders and decisions.

In accordance with Title IV-B of the Social Security Act, the Administration for Children and Families (ACF) of the U.S. Department of Health and Human Services requires states to include “specific measures” for ICWA compliance in their Child and Family Service Plans. These specific measures include “the identification of Indian children, notification of such to the relevant Indian tribe, and preferential placement with Indian caregivers when determining out-of-home or permanent placements

¹⁵ *ibid*

¹⁶ *Id.* at 10

¹⁷ 25 U.S.C. §1901

¹⁸ *The Indian Child Welfare Act Summary*. Tribal Law and Policy Institute. Available at: <http://bit.ly/Z8FmyA>

¹⁹ *Id.* citing 25 U.S.C. § 1902

²⁰ Brown, E.F., et.al., at 12

²¹ Tribal Law and Policy Institute.

²² *Id.* citing 25 U.S.C. § 1903(1, 4)

²³ *Id.* citing 25 U.S.C. § 1911(a), 1912, 1915, 1912(f), and 1914

for Indian children, provided that the Indian caregivers meet all relevant child protection standards’,²⁴ With regard to these three specific measures, a study conducted by Limb and Brown reviewed 44 state Child and Family Services Plans (CFSPs).

Out of the 44 CFSP state plans that were reviewed, 15 plans (34.1%) indicated the development of specific measures for the identification of an Indian child; 12 plans (27.3%) indicated that states had developed specific measures regarding notification to the Indian child’s relevant tribe; and, 18 state plans (40.9%) revealed that the state had developed specific measures that gave preference to Indian caregivers when determining out-of-home or permanent placements for Indian children. Of those 18, only one (5.6%) state plan indicated that the state had procedures in place to ensure Indian caregivers meet all relevant child protection standards.²⁵ ICWA and the ACF state plan measures have not been without their detractors, due in part to a history of lack of awareness and appreciation of Indian culture, as well as challenges implementing and monitoring the act.

Two Supreme Court Cases that Have Highlighted these Issues

ICWA non-compliance does not just threaten tribal stability. The consequences of failing to follow ICWA include invalidation of state court proceedings through appeal by either the child or the parent, the possible disruption of a long-standing foster care placement, the voiding of an adoption order, and malpractice actions.

Adoptive Couple v. Baby Girl

This case was decided on June 25, 2013 by the U.S. Supreme Court (570 U.S. ____). Veronica is the daughter of a non-Indian mother and an American Indian father. The mother and father were not in contact during the months prior to Veronica’s birth. The father was not informed when she was born in Oklahoma, and was not aware that the mother intended to have the baby adopted by a non-Indian couple. Veronica was placed by her mother with a prospective adoptive couple shortly after her birth, the couple filed a notice to adopt, and they were permitted to move the child to South Carolina. The father was served four months later, and he immediately took legal steps to gain custody before he was deployed to Iraq. When he returned, Veronica had been with the couple for 27 months. The trial court found that ICWA applied to the proceeding, that the “Existing Indian Family Exception” (EIFE) was inapplicable, that the father did not voluntarily consent to adoption, and that his rights could not be involuntarily terminated due to the standards of ICWA. Thus, the adoption petition was denied and Veronica was placed with her father. The South Carolina Supreme Court affirmed.

The U.S. Supreme Court reversed the decision of the South Carolina Supreme Court and remanded the case back to the state. In a five to four decision, the Court held that ICWA did not bar a state court from involuntarily terminating the father’s parental rights because he had not had “continued custody” or indeed any “custody” of Veronica prior to the trial court’s decision.

²⁴ Limb, G.E. & Brown, E. F. (2008). An examination of the Indian Child Welfare Act section of state Title IV-B Child and Family Services Plans. *Child & Adolescent Social Work Journal*, 25(2), 99-110. See also: 2005 report from the U.S. Government Accountability Office at: <http://www.gao.gov/new.items/d05290.pdf>

²⁵ *Id.*

As one of the five judges in the majority, Justice Breyer's concurring opinion expressed concern with the potential future broad consequences of the decision, noting that the Court's interpretation of ICWA might (in his view, wrongly) exclude from the Act's protections too many fathers (e.g., those with visitation rights, fathers who had met their child support obligations, fathers who were deceived about their child's existence, or fathers who were prevented from providing support to their child).

In her dissenting opinion, Justice Sotomayor expressed even deeper concern: When it excludes noncustodial biological fathers from [ICWA's] substantive protections, this textually backward reading misapprehends ICWA's structure and scope. Moreover, notwithstanding the majority's focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to all Indian parents who have never had custody of their children.

Because this was a private custody case, there are a number of reasons that it is very distinguishable from the more common state intervention child welfare cases that implicate ICWA. Under federal and state child welfare law, relatives, including non-custodial fathers, must receive prompt notice when a child is removed in a child welfare proceeding. In *Adoptive Couple v. Baby Girl*, the father did not apparently know about her placement with the adoptive couple until months later. Also, under federal and state child welfare law, states have an obligation to try to *engage both parents* in the development of a case plan, provision of parental visitation, and work towards a permanency goal, which is usually reunification with a parent. And in adoption cases, best practices generally require that the consent of both parents be obtained early on in the case and that both parents receive counseling and support prior to an upcoming adoption.

There is, in this decision, a stark split in the Court on interpretation of ICWA as it relates specifically to non-custodial fathers in private adoption proceedings. There is also the majority's arguably narrow holding based upon specific facts of one case. Therefore, it will be important for state judges to make sure that ICWA's provisions are immediately applied and made applicable to Indian father as well as mothers.

Mississippi Band of Choctaw Indians v. Holyfield

Twins whose parents were domiciled and residents of a reservation in Neshoba County, Mississippi were put up for adoption in a neighboring county where they were born after their parents consented to adoption.²⁶ They were adopted by non-Indian parents. The lower court found the twins were not domiciled and never lived on the reservation and as a result found that ICWA was not applicable. The U.S. Supreme Court, noting Congress's intent to preserve Indian families, found that Congress did not "enact a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme simply by giving birth and placing the child for adoption off the reservation."

The Center for Court Innovation noted that lack of training and education in child welfare was one of the barriers to effective implementation of ICWA, finding that:

federal court interpretation of ICWA is largely overlooked...the case of *Mississippi Band of Choctaw Indians v. Holyfield*, [at that time] the only instance in which the U.S. Supreme Court ruled upon ICWA, is taught with far less frequency than other landmark cases in the child law canon.

²⁶ 490 U.S. 30 (1989).

Other Challenges to Effective Implementation of ICWA

Overall, the National Indian Child Welfare Association (NICWA) reports that the application of the Indian Child Welfare Act has not resulted in poorer outcomes for Indian children. In three of the four states that have had more comprehensive data on ICWA cases, Indian children have done as well, if not better than, non-Indian children in state care in relation to the data [the Government Accountability Office] was looking at.²⁷ For instance, data from four states that could identify children subject to ICWA in their information systems showed no consistent differences when comparing the length of time they spent in foster care compared to Caucasian or other minority children who exited foster care in fiscal year 2003.²⁸

While the GAO study focuses on placement outcomes, a report submitted to Congress by the Crow Creek Sioux Nation and seven other tribes in the state of South Dakota highlights the violations of ICWA that have taken place when it comes to the placement of AI children. The report, which was written with the nonprofit Lakota People's Law Project, concludes that in some instances removal of AI children in South Dakota from tribal homes occurs under questionable circumstances.²⁹ According to the report, as of July 2011, there were 440 AI children in family run foster homes in South Dakota. Of these, 381 (87% or 9 out of 10) resided in non-Native family foster care, a claim that was supported by a National Public Radio series in 2012.³⁰ At the same time, there were 65 licensed Native American foster homes and, based on requests, 13-28 of these foster homes sat empty while the 381 AI children remained in non-Native family placements.³¹

Lack of awareness, oversight and compliance reporting

Since the Act was passed in 1978, its effective implementation and state compliance with its requirements have been unclear. Recent research has uncovered problems related to the states' success in applying the Act, but no nationwide, systematically collected data is available to determine the extent and exact nature of the problems that have surfaced.³² There are likely many reasons for non-compliance, including lack of education. The failure of many state courts and child welfare agencies to follow the mandates of ICWA is often due to simple lack of knowledge.³³ In many states, ICWA and laws regarding state-tribal court interaction are seen only as issues for tribal specialists, thus resulting in far too many child welfare caseworkers, supervisors, and attorneys being unfamiliar with ICWA's requirements.³⁴

²⁷ Simmons, D. (2005). Summary of the 2005 Government Accountability Office Study of the Indian Child Welfare Act. National Indian Child Welfare Association. Retrieved from: http://www.nicwa.org/Indian_Child_Welfare_Act/gao_study/

²⁸ U.S. Government Accountability Office (2005). Indian Child Welfare Act: Improving compliance through state-tribal coordination. Center for Court Innovation. New York, NY. Pg. 4. Retrieved at: <http://www.gao.gov/assets/250/245936.pdf>.

²⁹ "Reviewing the Facts: An Assessment of the Accuracy of NPR's "Native Foster Care: Lost Children, Shattered Families." Lakota People's Law Project, (2013) at 9. Retrieved from: <http://www.lakotalaw.org/wp-content/uploads/2013/01/Reviewing%20the%20Facts,%20An%20Assessment%20of%20the%20Accuracy%20of%20NPRs%20Native%20Foster%20Care,%20Lost%20Children,%20Shattered%20Families.pdf>

³⁰ Sullivan, Laura & Walters, Amy. *Native Foster Care: Lost Children, Shattered Families*. NPR Report. October 2011. Available at: <http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families>.

³¹ Lakota at 11.

³² Wilkins at 2.

³³ Van Straaten, J. & Buchbinder, P.G. (2011). The Indian Child Welfare Act: Improving compliance through state-tribal coordination. Center for Court Innovation: New York, NY. Pg. 4.

³⁴ *Id.*

While ICWA does make it clear that non-compliance can result in vacating state court decisions, it is difficult to monitor ICWA's compliance because of lack of firm reporting requirements and because ICWA does not give any federal agency direct oversight responsibility of states' implementation of the law.³⁵ As a result, frequent barriers to successful implementation of ICWA have included:³⁶

1. difficulty in determining a child's Indian heritage and tribal membership eligibility;
2. lack of appropriate foster and adoptive homes;
3. lack of tribal access to federal child welfare funding sources;
4. lack of tribal institutional capacity;
5. incompatible state laws; and
6. undeveloped or poor state-tribal relationships.

One effort that should have helped address these challenges was a 1994 amendment to the Social Security Act, requiring states to complete Child and Family Service Plans (CFSRs) indicating the steps the state plans would take to comply with ICWA.³⁷ These plans are supposed to be completed in consultation with tribes and tribal organizations and report on how those consultations and collaborations will be carried out. However, while the Administration for Children and Families' (ACF) CFSRs have identified some ICWA concerns in states, the structure of this oversight tool was designed to review the overall performance of a state's child welfare system, rather than any particular law or program.³⁸ The lack of specificity means that, as a result, [the tool] does not ensure that ICWA concerns will be addressed or that identified problems will be included and monitored in states' program improvement plans.³⁹ The National Indian Child Welfare Association found that nearly 80% of CFSRs did not respond to the three required measures for ICWA compliance.⁴⁰

Measured federal action and attention is needed to overcome this major deficit in reporting and monitoring outcomes and services to tribal courts and AI/AN children and families. A lack of oversight and lack of funding for state and federal ICWA-related initiatives or to enhance tribal capacity to address these cases, significantly reduce the chances of effective implementation of ICWA. And unfortunately, in all areas of human services, tribal access to federal funding has been severely restricted by the inconsistent treatment of tribal governments by federal domestic assistance programs.⁴¹

Still, because federal Title IV-E foster care and adoption program funding was, until recently, statutorily reserved for state agencies, tribes were only able to gain access to and administer IV-E funds by entering into tribal-state agreements.⁴² In 2008, due to federal legislation, the *Fostering Connections to Success and Increasing Adoptions Act*, tribes became eligible, for the first time, to receive Title IV-E funds directly.⁴³ However, to date only a few tribes have qualified for such eligibility. The historic focus on federal funding only going to states and counties has had a major impact on the capacity of tribal child welfare services

³⁵ U.S. GAO (2005) at 4.

³⁶ Wilkins at 4.

³⁷ Program Instruction - ACYF-PI-CB-95-12. Retrieved from: <http://www.acf.hhs.gov/sites/default/files/cb/pi9512.pdf>

³⁸ U.S. GAO at 5.

³⁹ *Id.*

⁴⁰ Brown, E.F., et. al., at 7.

⁴¹ Brown, E., Scheuler-Whitaker, L., et. al., Tribal/State Title IV-E Intergovernmental Agreements: Facilitating Tribal Access to Federal Resources (Portland, OR: National Indian Child Welfare Association, 2000), pg. 22.

⁴² Brown, E.F. & Scheuler-Whitaker, L., et. al., at 7.

⁴³ Fostering Connections to Success and Increasing Adoptions Act of 2008 P.L. 110-351

The Existing Indian Family Exception (EIFE) Doctrine and other child welfare law conflicts

Incompatible laws or state court decisions have also presented challenges to effective ICWA implementation. For example, some state courts have used an “Existing Indian Family Exception” to avoid the application of ICWA when the mother from whom a child is removed is not a Native American (but where the non-custodial father is). Although the majority of states that have considered the EIFE doctrine have rejected it, finding it inconsistent with ICWA’s core purpose, it has been used by a few states.⁴⁴ Courts in states that have explicitly rejected the doctrine have reasoned that such an exception was not included in the language of ICWA and that it undermines ICWA’s purpose by allowing state courts *to impose their own subjective values* in determining what constitutes American Indian culture and who is an American Indian.⁴⁵

Additionally, some laws that should theoretically support the goals of all child welfare systems have also made ICWA implementation more challenging. For instance, the *Adoption and Safe Families Act of 1997* (ASFA) was enacted to minimize the problem of “foster care drift”: children spending their entire childhoods drifting from one temporary placement to another.⁴⁶ In practice, ASFA and ICWA were enacted for very different purposes and their differing goals have led to potential conflicts.⁴⁷

1. In many ways, ASFA moves away from the ICWA ideal of reunifying children with their parents unless all other options are exhausted; and
2. Since ICWA heightens the standard of “reasonable efforts” (under ASFA) to reunify families to “active efforts” (ICWA’s own standard - which must include the testimony of a qualified expert witness and enhanced efforts to preserve families), it would stand to reason that any mention of “reasonable efforts” to reunify families in subsequent federal legislation absent language to the contrary should be construed as indicating “active efforts” as it relates to ICWA cases.

Unfortunately case law has provided limited guidance regarding conflicts between ICWA and ASFA, and although ICWA and ASFA should work harmoniously together, in practice too often they do not.⁴⁸

Recommendations to Enhance and Fully Implement ICWA

There are several means for encouraging and supporting full implementation of ICWA. These include state and tribal court collaboration, better training for guardians ad litem, parent’s attorneys, and state court judges, and increased financial support to Tribes and tribal courts from federal agencies.

State-Tribal Collaborations

The State Court Improvement Program (CIP) was created as part of the *Omnibus Budget Reconciliation Act* (OBRA) of 1993, Public Law 103-66, which among other things, provides federal funds to state child welfare agencies and Tribes for preventive services and services to families at risk or in crisis.⁴⁹ The National Center for State Courts notes that state CIP committees are essential to fostering better

⁴⁴ *In the Matter of A.J.S., A Minor Child*, 204 P.3d 543 (Kan. 2009). In this decision, the court abandoned the doctrine which had earlier been applied in the case it overruled, *Baby Boy L.*, 643 P.2d 168.

⁴⁵ U.S. GAO at 20.

⁴⁶ Van Straaten, J. & Buchbinder, P.G. See also: <http://www.nicwa.org/law/asfa/asfa-issues.pdf>.

⁴⁷ *Id* at 5-6.

⁴⁸ *Id* at 8.

⁴⁹ Children’s Bureau (2012). *Court Improvement Program*. May 2012. Retrieved from: <http://www.acf.hhs.gov/programs/cb/resource/court-improvement-program>

understanding among justice systems to enhance proper ICWA enforcement.⁵⁰ Examples of successful State-Tribal Court engagement include:⁵¹

1. North Carolina CIP participation as ad hoc member of a Commission on Indian Affairs' Standing Committee on Indian Child Welfare
2. Colorado CIP and state counterparts met with leaders of several tribes to learn about historical trauma, creation of reservations, and the removal of Indian children to be placed in boarding schools, as well as the Navajo Nation Peacemaker Court (a renowned restorative justice program).

The Child Welfare Information Gateway prepared an issue brief in August 2012 which, among other things, highlighted the components of successful Tribal-State Relations. They include mutual understanding of government structures, cooperation and respect, and ongoing communication.⁵² The brief highlighted promising practices in Tribal-State relations including:⁵³

1. California's Indian Child and Family Services was adopting evidence-based practice models to Native culture like the SPIRIT Parenting Program. That program incorporates a historical motivational interview that places families' issues within a historical context and a culturally embedded evidence-based practice (for instance, the Incredible Years Parenting Training Program).
2. The Indian Country Child Trauma Center at the University of Oklahoma Health Sciences Center adapted existing evidence-based treatments to incorporate traditional healing practices, teachings, and concepts relevant in Indian Country.
3. Tribal Court Appointed Special Advocates (CASA) Program trained community volunteers to serve as advocates to speak on behalf of the best interests of AI/AN children involved in abuse and neglect cases.

State support of judicial mechanisms that facilitate State-Tribal cooperation, such as the Court Appointed Special Advocates (CASA) programs, is another tool for improving ICWA implementation in the state system.⁵⁴

The National Council of Juvenile and Family Court Judges has noted that developing meaningful and respectful relationships with tribal partners is critical to improving a state court's ICWA compliance because it is the first step to understanding the significance of keeping Native children connected with their community.⁵⁵ In sum, these practices demonstrate that a meaningful effort will result in Tribal-State collaboration at the state and federal levels in culturally sensitive, evidence-based ways that provide significant advocacy and information exchange. Therefore, this resolution supports the increased use of such agreements, and related memoranda of understanding, to ensure compliance with ICWA and successful Tribal-State relations.

⁵⁰ Davis, A.K. & Jackson, G., Meaningful and Ongoing Engagement of Tribes and State Courts in Child Protection (2012). National Center for State Courts. Pg. 62.

⁵¹ *Id.*

⁵² Child Welfare Information Gateway (CWIG). "Tribal-State relations" (2012). Retrieved from: https://www.childwelfare.gov/pubs/issue_briefs/tribal_state/tribal_state.pdf.

⁵³ *Id.* at 8-10.

⁵⁴ Wilkins at 9.

⁵⁵ Blomquist, M. & Hall M. A. (2012). "Improving Compliance with the Indian Child Welfare Act: A Guide for Juvenile and Family Courts."

Title IV-E Cooperative Agreements

Since the passage of ICWA, Tribes have had the opportunity to run their own child welfare systems, but they were unable, until recently, to directly receive federal Title IV-E funds except through their States.⁵⁶ The purpose of these programs is to provide federal matching funds for foster care and adoption services for economically disadvantaged children and children with special needs.⁵⁷ Nationwide, there are 13 states and 71 American Indian tribal governments that currently are involved in Title IV-E agreements.⁵⁸

The passage of the *Fostering Connections to Success and Increasing Adoptions Act* (FCA) in October 2008 also increased Tribes' access to federal funding for child welfare programs. The FCA gives Tribes, among other things, the option to *directly* access Title IV-E funds to operate foster care, adoption assistance, and, if elected, kinship guardianship assistance programs. The FCA also requires each state Title IV-E agency to negotiate in good faith with any Tribe that request to develop an agreement with a state to administer all or part of the Title IV-E program.⁵⁹

Enhancing Tribes and Tribal Court Legal Services and Case Management

In order for Tribes to successfully accept and carry out jurisdiction over Indian child welfare cases, they must have the means and ability to do so. If the child's tribe does not have the capacity to process the case, or to provide needed social or legal services, this inhibits the ability of Tribes to play meaningful roles in these cases. In addition, it is imperative that states provide appropriate services to AI/AN children. Providing state officials with proper training on applying ICWA, and requiring state court and state agency oversight, are tools that can help assure that a state is abiding by the goals of the Act.⁶⁰

One way to increase Tribal-State collaborations as well as tribal capacity to perform child welfare functions is to increase oversight of ICWA compliance and include Tribes in the review and monitoring process. The scarcity of data on outcomes for children subject to the law, along with variations in how individual states, courts, social workers, and tribes interpret and implement ICWA, make it difficult to generalize about how the law is being implemented or its effect on American Indian children.⁶¹

One successful example of promising collaboration comes out of Arizona. The Pima County Juvenile Court in Arizona integrates tribal social workers from the Tohono O'odham Nation and the Pascua Yaqui Tribe, the two largest tribal communities in southern Arizona, into the juvenile court intake process and subsequent court hearings. Tribal social workers participate regularly in hearings and are given the same access to the Pima County Juvenile Court as other child welfare stakeholders.⁶² Alaska's Tribal State Collaborative Groups (TSCG) is another example. The TSCG is a partnership of state and Tribal organizations—Tribal members and leaders, representatives from Alaska's Office of

⁵⁶ CWIG at 2.

⁵⁷ Brown, E., Scheuler-Whitaker, L. at 13.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 3.

⁶⁰ Wilkins at 5.

⁶¹ GAO at 58.

⁶² Van Straaten at 10.

Children's Services, and other representatives. It meets three times a year to discuss issues affecting AI/AN families involved in the child welfare system and to improve ICWA compliance.⁶³

Conclusion

The Indian Child Welfare Act remains an important effort to preserve and protect American Indian/Alaska Native families. ICWA works when it is applied in a timely, appropriate manner. Increased efforts to support training and education (to states and tribes), technical assistance, funding, Tribal-State Collaborations, and Tribal capacity-building are critical to ensuring that the Act aids tribes and state governments in meaningfully carrying out its intentions and edicts. Additionally, systematic and comprehensive state reporting requirements on compliance with ICWA will also help to assure ICWA's mandates are incorporated at all levels of state assessment, review and handling of foster care, adoption and custody proceedings.

⁶³ CWIG at 8.



Indian Child Welfare

Overview

Lawmakers in Michigan, concerned about the safety, permanency and well-being of American Indian children and families, enacted Senate Bill 1232, “The Michigan Indian Family Preservation Act,” which became effective on Jan. 2, 2013. The goal of the act is to protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families. The legislation requires that courts and agencies responsible for child welfare cooperate fully with Indian Tribes to ensure that the federal Indian Child Welfare Act (ICWA) is enforced in Michigan.

ICWA establishes minimum federal standards for removal of Indian children from their families and requires placement of these children in foster or adoptive homes “which will reflect the unique values of Indian culture.” Although ICWA was passed in 1978, American Indian children remain disproportionately represented in the child welfare system. While American Indian children comprise approximately 1 percent of the general population under age 18, they represented 4.3 percent of all children in foster care in 2011.ⁱ Several states have much higher rates of overrepresentation. The U.S. Government Accountability Office (GAO) found that no national data are available about children who are subject to ICWA, and concerns exist about state ICWA implementation.ⁱⁱ

In recent years, legislatures in several states have enacted laws similar to Michigan’s. Legislators responsible for the oversight and funding of state child welfare systems have worked with child welfare administrators, judicial representatives and other partners to address high foster care caseloads; overrepresentation of children of color, including Native American children, in child welfare systems; and issues related to compliance with ICWA requirements.

This special extended edition newsletter provides a brief overview of ICWA, presents statistics on Indian children involved in child welfare systems, examines state legislative enactments intended to codify or come into compliance with ICWA, and discusses the role of state legislatures in considering policy for children in Indian Country.

The Indian Child Welfare Act (ICWA) of 1978

Historical Background

Since the late 1800s, a number of policies have affected American Indian families, including that of removing Indian children from their families and placing them in boarding schools to help them assimilate into mainstream American society. Based on nationwide studies conducted between 1969 and 1974,ⁱⁱⁱ it was discovered that 25 percent to 35 percent of Indian children were removed from their homes and placed in non-Indian foster or adoptive homes. Testimony in 1974 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs (93d Cong., 2d Sess.,) indicated the negative effects of such adoptions on the children, their parents and the Tribes.^{iv}



In response to the disproportionately high number of Indian children removed from their homes and placed in non-Indian foster care or adoptive homes, Congress passed the Indian Child Welfare Act (ICWA) in 1978. ICWA was designed to protect the best interests of Indian children and to promote the stability and security of Indian Tribes and Native families. The act affirmed Tribal jurisdiction in child custody matters involving Indian children who live on reservations. In addition, the act required state courts to transfer child custody cases to Tribal courts upon the request of the child's Tribe, parent or Indian custodian, except in cases where the parent objects or there is good cause for keeping the matter in state court.

ICWA established a minimum federal standard for state removal of a child from his or her home. To meet this standard, the state must produce clear and convincing evidence demonstrating that "active efforts" (a stronger mandate than "reasonable efforts") have been made to prevent breakup of the family. ICWA also set requirements for placement in foster or adoptive homes. If active efforts to prevent breakup of the family are unsuccessful, out-of-home placement is possible only if a court finds that the child is likely to suffer serious emotional or physical harm if he or she remains in parental or guardian custody.



If out-of-home placement is necessary, ICWA created a preference system designed to keep Indian children in an Indian family whenever possible. The intent of this

preference system, which applies to both foster and adoptive homes, is to preserve Native American communities and culture and to respect Tribal sovereignty. The following information provides a brief overview of major provisions of the Indian Child Welfare Act of 1978.

Key Provisions of the Indian Child Welfare Act

Source: Pub. L. No. 95-608 and U.S. Government Accountability Office, 2005.^v

Definitions of a child subject to ICWA

ICWA defines a child as Indian if he or she is a member of a federally recognized Tribe or if he or she is eligible for Tribal membership and is the biological child of a Tribal member.

Definitions of child custody proceedings

ICWA applies to the following child custody proceedings: 1) involuntary foster care placements; 2) petitions to terminate parental rights; 3) pre-adoptive placements; and 4) adoptive placements. ICWA does not apply to custody arrangements arising from divorce proceedings or placements by the juvenile justice system when a child commits an act that would be deemed a crime if committed by an adult.

Jurisdiction

American Indian Tribes have exclusive jurisdiction over child welfare proceedings for American Indian children who reside or live on a Tribal reservation.

If a case concerning an Indian child is brought in a state court, the Indian parent, Indian custodian or the Tribe has the right to petition to transfer the case. If a Tribe or parent requests that a child custody proceeding be transferred to the jurisdiction of the Tribe, the proceeding should be transferred to Tribal jurisdiction unless either parent objects to the transfer or good cause exists to not transfer the case. The Tribal court has the right to decline any transfer request.

Notification and intervention

A Tribe must be notified in writing about any involuntary child welfare proceeding in state courts involving a child subject to ICWA and has the right to intervene in such cases.

A Tribe also has the right to intervene in cases in which a parent voluntarily relinquishes custody of an Indian child. The Tribe may intervene at any point during the proceedings.

Placement in foster care

A child subject to ICWA cannot be placed in foster care unless clear and convincing evidence exists that

continued custody by the parent is likely to result in serious damage to the child.

Placement preferences

An American Indian child placed in foster care or a preadoptive placement must be placed in the least restrictive, most family-like setting in which the child's special needs, if any, may be met. The child must be placed within reasonable proximity to his or her home and preference must be given, absent good cause to the contrary, to a placement with:

1. A member of the child's extended family;
2. A foster home, licensed, approved or specified by the Tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. An institution approved by a Tribe or operated by an American Indian organization that has a program suitable to meet the child's needs.

When placing an American Indian child for adoption, preference must be given, absent good cause to the contrary, to a placement with:

1. A member of the child's extended family;
2. Other members of the child's Tribe; or
3. Other American Indian families.

Indian Children and Child Welfare Today

Over-Representation of Indian Children in Child Welfare System

Despite enactment of ICWA, American Indian children remain over-represented in the child welfare system, and Native children continue to be removed from their homes at a high rate.^{vi} According to the most recent data from the Adoption and Foster Care Analysis System (AFCARS), while Indian children make up 1 percent of the total U.S. child population, they represent 2 percent of the foster care population (see sidebar). Other data indicate even higher rates of over-representation. In 2011, the U.S. Department of Health and Human Services reported that these rates often are even higher in states that have larger numbers of Native American children. For example, while Native American children represent 2 percent of children in the nation's foster care system, 10.5 percent of Native children in Hawaii are in foster care. In Minnesota, they represent 8.2

percent of children in foster care and 7.9 percent in South Dakota.^{vii}

Current National Numbers

- 5.1 million American Indians and Alaska Natives live in the United States.*
- 644,642 American Indian and Alaska Native children live in the United States, representing 1 percent of the nation's child population.**
- 8,020 American Indian children are in foster care, representing 2 percent of the nation's foster care population. This means that American Indian children are in foster care at a rate twice that of non-minority children.***
- 7,149 American Indian children were confirmed by child protective services to be victims of maltreatment.****
- American Indian children experience a maltreatment victimization rate of 11.4 per 1,000 children, the second highest rate in the nation.****

*U.S. Census Bureau, American Indian and Alaska Native Heritage Month: November 2012,

http://www.census.gov/newsroom/releases/pdf/cb12ff-22_aian.pdf.

**2011 Data KIDS COUNT Data Center, www.kidscount.org/datacenter.

***The AFCARS Report No. 19, Preliminary FY 2011 Estimates as of July 2012, <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>. The number of AI/AN children in foster care counts only the number reported by states and does not include children affected by ICWA.

****Children's Bureau; Child Maltreatment 2011, <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment>.

Furthermore, various studies have found that Native American children are disproportionately represented in the nation's child welfare system at the major stages of child welfare involvement.^{viii} Investigation and substantiation of alleged maltreatment is twice as likely for Native American children. Once maltreatment is substantiated, Native American children are three times more likely to be placed in foster care. In some states, these numbers are even higher.

Experts cite varying causes for both the disproportionate over-representation of children of color in child welfare systems and the disparate or unequal results these children experience. Among the factors experts identify as possible causes of disproportionality are poverty, racism, lack of resources and a need for culturally relevant training for workers who make decisions about which children enter care and what subsequently happens to them.

ICWA Implementation Issues

As state policymakers, families and child welfare system stakeholders raise concerns about the continued disproportionate representation of Native American children in foster care, lawmakers have begun to examine state implementation of the federal ICWA, which was intended to keep Native families intact and prevent entry into foster care. While states are not required to enact Indian child welfare acts, they must implement provisions of the federal act

According to the 2005 U.S. Government Accountability Office report, *"Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States,"* the federal Administration on Children and Families "... does not administer ICWA and is not authorized to take any enforcement actions for failure to comply with the act, although they encourage states to comply with ICWA."^{ix} In addition to a lack of enforcement authority on the part of the federal Administration on Children and Families, the report cites the following barriers to fulfilling the intent of ICWA:

- No requirement to report on implementation;
- Difficulty in determining a child's Indian heritage and Tribal eligibility;
- Lack of Indian foster and adoptive homes;

- Tribal access to federal child welfare funding sources;
- Lack of Tribal institutional capacity;
- Incompatible state laws; and,
- Undeveloped or poor state-Tribal relationships.^x

A 2001 study of ICWA compliance in Arizona revealed mixed results.^{xi} While Arizona provided ICWA training for caseworkers upon hiring, ongoing training was sparse. State efforts to maintain regular contact with the child's Tribe appeared to be consistent, but state and Tribal officials reported that the time frame required by state law did not allow time for state and Tribal officials to collaborate. State and Tribal officials reported that, in many cases, transferring the case to Tribal court would be preferable, but Tribes often lacked the resources to meet the needs of the child and family. Finally, the study found that Arizona's attempt to comply with the preference system established by ICWA for out-of-home placement was good, although no agreement exists between the state and Tribes to define "active efforts" to prevent the breakup of the family initially. Thus, caseworkers had no clear guidelines for developing case plans to help these families.



State Legislative Activity

State lawmakers—working to craft legislation to meet ICWA requirements amid concerns about the safety and well-being of Indian children and families—have been

engaged in various legislative activities. These include crafting state versions of the federal ICWA, requiring legislative reviews of state ICWA compliance, authorizing specific provisions in state statute that address state implementation issues, requiring an examination of disproportionality and/or disparity in treatment for Native American children entering foster care, and establishing study commissions on Indian child welfare. A brief review follows of state legislative activity from 2001 through 2012. The review, although

not exhaustive, highlights major trends in state legislative response to ICWA requirements. A more comprehensive chart of state legislation can be viewed [here](#).



State Indian Child Welfare Laws.

Lawmakers in several states have attempted to address issues related to ICWA compliance by codifying many provisions of the federal law in state statute. The National Conference of State Legislatures

(NCSL) has identified at least six states (Iowa, Michigan, Minnesota, Nebraska, Oklahoma and Washington) that have created state ICWA laws intended to guide compliance with the federal law. In 2003, the Iowa legislature adopted the “Iowa Child Welfare Act” to clarify state policies and procedures regarding ICWA implementation. The legislation stated that, “The state is committed to protecting the essential Tribal relations and best interest of an Indian child by promoting practices, in accordance with the federal Indian Child Welfare Act and other applicable law, designed to prevent the child’s voluntary or involuntary out-of-home placement and, whenever such placement is necessary or ordered, by placing the child, whenever possible, in a foster home, adoptive home, or other type of custodial placement that reflects the unique values of the child’s Tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child’s Tribe and Tribal community.” Iowa included provisions on the law’s purpose, definitions, determination of Indian status, jurisdiction, notice, emergency removal and voluntary termination procedures. The statute also required that state compliance with ICWA be monitored and that a database of records of Indian children be established. Michigan, Nebraska and Washington lawmakers also included many of federal provisions in their laws, such as jurisdiction, transfer of jurisdiction,

placement preferences and procedural elements of child custody.

Oklahoma’s Indian Child Welfare Act applied the law to all custody proceedings involving Indian children, addressed the court requirement to seek determination of a child’s Indian status, and required placement preferences (for placing an Indian child with an Indian family member or Tribal member) to apply to pre-adjudicatory, pre-adoptive, adoptive and foster care placements. The legislation required the child welfare agency to use the services of the child’s Indian Tribe to secure a placement consistent with the Oklahoma ICWA.

Codification of Specific ICWA Provisions. Several states enacted legislation to address implementation challenges within the state. In 2002, Colorado created an Indian Child Welfare Law and amended relevant sections of the Children’s Code to ensure compliance with the federal act. The law included provisions related to transference of jurisdiction to Tribal courts, Tribal notification, and determination of whether the child is an Indian child.

Although the California Legislature did not create a California Indian child welfare act, in 2006 it codified federal ICWA provisions, including those regarding Tribal jurisdiction, notice of and intervention in child custody proceedings, right of indigent parents or custodians to court-appointed counsel, active efforts, evidentiary standards and placement preferences.

In 2009, Wisconsin lawmakers incorporated jurisdictional provisions of ICWA and its minimum standards for child custody proceedings into the state’s Children’s Code. In 2010, the Legislature addressed the burden of proof in dependency matters affecting Native American children by prohibiting courts from placing Native American children in foster care unless the court finds, by clear and convincing evidence, that the continued custody of the child by the parent would cause serious emotional or physical damage. In 2011, Wisconsin adopted additional provisions of the federal ICWA, including that related to delegation of parental powers.

The Oregon legislature addressed placement of Indian children by crafting a statute that “implemented federal policy of protecting Indian cultures by ensuring the

placement of Indian children within Indian families or communities.” The law established that anyone who provides a foster home to an American Indian child is eligible for payments, regardless of the person’s relationship by blood or marriage to the child where the child’s placement in the foster home is pursuant to the Indian Child Welfare Act.

A 2005 South Dakota law required that, in any proceeding in which ICWA applies, the state’s attorney must notify the parent or Indian custodian and Indian child’s Tribe of pending proceedings and their right of intervention. In 2006, South Dakota lawmakers enacted legislation allowing notice of child custody proceedings subject to ICWA to be given to the designated Tribal agent for Indian children taken into temporary custody.

A 2011 North Dakota law allowed that Title IV-E funding to be made available to Native American group foster care homes or facilities located on a recognized Indian reservation or are owned by the Tribe or a Tribal member and located on a recognized Indian reservation in North Dakota that is not subject to state licensing requirements.

Statutes in several states specify that Indian children are subject to the federal ICWA. Kansas law states that child custody proceedings involving Indian children are governed by the federal ICWA. In Montana, certain proceedings involving Indian children as defined in ICWA are subject to that act.

In 2006, Florida legislators required the Department of Children and Families to adopt rules to ensure that ICWA provisions are enforced in the state.

Study Commissions. At least two states—Maine and South Dakota—have legislatively mandated study commissions. In 2005, Maine established a committee to study and recommend ways to improve state compliance with ICWA. According to the committee’s January 2006 final report, Maine’s compliance with ICWA had greatly improved. Recommendations for further improvement included providing ICWA training for child welfare caseworkers, developing agreements between the state and Tribes, improving recruitment of Indian foster families and placement options, and developing culturally appropriate materials for non-Native foster and adoptive families raising Native

children.^{xii} In 2011, the Wabanaki people of Maine created a Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission. The Wabanaki people, their governments, the state of Maine and the Maine Indian Tribal-State Commission are collaborating to improve child welfare practice for Wabanaki children and to recognize the effects of Wabanaki child welfare system experiences between passage of the 1978 ICWA and 2011 on individuals, families, communities, cultures and state child welfare services. The state also has a Tribal State ICWA Workgroup that addresses Indian child welfare issues.



In 2004, South Dakota established a Governor’s Commission on the Indian Child Welfare Act and required the governor to appoint an independent reviewer to analyze ICWA compliance. The commission held a series of public hearings on the reservations and in Sioux Falls and

Rapid City and helped the National Center for State Courts conduct an in-depth assessment of ICWA compliance. Some recommendations the State Department of Social Services implemented were: hiring an ICWA program specialist to facilitate relations and communication between the state and Tribes, hiring placement investigators to search for relatives, improving recruitment and retention of American Indian foster homes, and revising the state kinship care policy. Additional enacted state legislation was related to notification requirements for custody and placement of Indian children and relative preference when seeking to place abused and neglected children.^{xiii}

Direct Access to Title IV-E Funding for Tribes - Tribal Foster Care Provision in the Fostering Connections to Success and Increasing Adoptions Act of 2008

Before passage of the Fostering Connections to Success and Increasing Adoptions Act of 2008, Tribes did not have direct access to funds provided through Title IV-E of the Foster Care and Adoption Assistance Programs that provide funding for children in foster care, for special needs children in adoptive placements, and for associated administrative and training costs. The requirement that Tribes enter into agreements with state governments sometimes served as a barrier to effectively providing services to children. The Fostering Connections Act now allows Indian Tribes direct access to Title IV-E funds, including services to support foster care, adoption and independent living. The law also provided new funding for technical assistance to Tribes that sought to operate Title IV-E programs and one-time start up grants of up to \$300,000 each year for a maximum of two years (from the enactment of Fostering Connections).

In April 2012, the Port Gamble S’Klallam Tribe became the first Native American community, through the Fostering Connections Act, to receive Title IV-E funding directly and to operate its own guardianship assistance, foster care and adoption assistance program. In addition, several states—including California, Indiana and Minnesota—enacted laws in 2009 related to the Fostering Connections Act. California’s Assembly Bill 770, Chapter 124, maximized the opportunities for Indian Tribes to operate foster care programs for Indian children pursuant to the Fostering Connections Act and required the Department of Social Services to modify the state foster care plan to that end. Indiana’s Senate Bill 365, Public Law 131, required the Family and Social Services Administration to negotiate with any Indian Tribe, Tribal organization or Tribal consortium in the state that requests to develop an agreement with the state to administer all or part of Title IV-E on behalf of Indian children who are under the authority of the Tribe, Tribal organization or Tribal consortium. Minnesota’s House Bill 1298, Chapter 88, increased program aid for use by a county to the governing body of the Red Lake Band of Chippewa Indians for the cost of implementing the Fostering Connections Act.

Tribal Customary Adoption

In the 2009 legislative session, California lawmakers enacted Assembly Bill 1325, Chapter 287, to implement “Tribal Customary Adoption,” an additional permanent placement option that allows dependent Indian children who are unable to reunify with their parents to be eligible for adoption by and through the laws, traditions and customs of the child’s Tribe without requiring termination of the parental rights of the child’s biological parents.^{xiv} This is the first law of its kind to be enacted by a state legislature. Before passage of the law, Indian children who were unable to reunify with their parents were limited to adoption, legal guardianship or placement with a relative. Tribal Customary Adoption was intended to provide another, more culturally appropriate permanency option for Indian children.^{xv} A December 2012 Judicial Branch Report to the Legislature on implementation of the program identified 15 finalized Tribal Customary Adoptions involving 18 children who otherwise would have remained in less permanent plans for long-term foster care or legal guardianship. Key findings in the report include difficulty in tracking cases, confusion and delay around in case implementation due to a lack of understanding of the process, discomfort on the part of some Tribes that may object to any form of adoption, and concern about compatibility of the process with other parts of child welfare and adoption law and practice. Overall, the report noted most stakeholders interviewed about implementation viewed the program as beneficial and positive.^{xvi}

Opportunity for Legislative Action

The safety, permanence and well-being of all children—Native and non-Native—are of concern to state legislators. Several options are available to lawmakers to increase state compliance with the federal act and to improve results for Native children who are involved in child welfare proceedings. State policymakers may want to consider the following policy options.

- Require a legislative review of state ICWA compliance, agreements and related laws, and/or a study of American Indian children in the state child welfare system. The study of American Indian children in care can include an examination of the number of Indian children in care; how long children remain in care; with whom Indian children are placed; availability of ICWA-required preferred placements; and other issues facing Indian children and families.
- Ensure provisions of the federal Indian Child Welfare Act are incorporated into state child welfare policy and operations and encourage state-Tribal cooperation.
- Help states provide support to Tribes that are interested in direct Title IV-E funding as provided through the Fostering Connections to Success Act of 2008.
- Require education for state and Tribal child welfare caseworkers and administrators, judges and other judicial and court representatives, and other child welfare stakeholders about the Indian Child Welfare Act and provide funding for on-going training.
- Encourage or require that the state provide culturally competent child welfare services.
- Require “active efforts” to provide remedial services and rehabilitative programs to prevent the breakup of Indian families.
- Create and support state-Tribal liaison positions or ICWA compliance workers to help child welfare workers, Tribes and court officials identify more ICWA-eligible children and to more effectively communicate and collaborate.
- Support Tribal Court-Appointed Special Advocate (CASA) programs to train volunteers to navigate the state and Tribal court systems while representing children involved in child welfare proceedings.
- Make it easier to obtain Tribal affiliation, including obtaining original birth certificates.

- Encourage collaboration to improve notification to Tribes and Indian children’s parents and Indian custodians when children are taken into state custody
- Examine state policies for Indian children in the relevant legislative policy committees, which can include those dedicated to state-Tribal relations or child welfare.
- Visit Tribes and families to discuss child welfare concerns and issues in Indian communities.
- Authorize working groups to examine state-Tribal relations and Indian child welfare policies.
- Facilitate information-sharing with other states that have significant populations of Indian children and/or experience with implementation of ICWA to discuss challenges and successes.

Conclusion

Recent focus on the safety, permanency and well-being of American Indian children has provided state lawmakers a unique opportunity to closely examine important issues facing the state Indian child welfare populations. State legislators—in collaboration with Tribes; state child welfare agencies; families; and representatives from other systems, such as judicial, educational, domestic violence, health, juvenile and criminal justice—can work to overcome barriers that might exist to effectively meeting the needs of Indian children and families while respecting the sovereignty of Tribes.



NCSL Quick Links

[State Statutes Related to Indian Child Welfare](#)

[Educating Children in Foster Care: State Legislation 2008 - 2012](#)

[What's New in Child Welfare?](#)

ⁱ AFCARS, 2011, Prepared by Data Advocacy, Casey Family Programs.

ⁱⁱ U.S. Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States* (Washington, D.C.: U.S. GAO, April 2005), i,5.

ⁱⁱⁱ Steven Unger, ed., *The Destruction of American Indian Families* (New York: Association on American Indian Affairs, 1977), 1.

^{iv} U.S. Supreme Court, *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (1989).

^v U.S. Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States* (Washington, D.C.: U.S. GAO, 2005), 7.

^{vi} Robin Leake, *Denver Indian Family Resource Center Research Report*, Rocky Mountain Improvement Center (Washington, D.C.: U.S. Department of Health and Human Services, 2007), 5.

^{vii} Child Welfare Information Gateway, *Addressing Racial Disproportionality in Child Welfare* (Washington, D.C.: U.S. Department of Health and Human Services, Children's Bureau, 2011).

^{viii} Robert B. Hill, *An Analysis Of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels* (Seattle, Wash.: Casey Family Programs, 2007), 9, 10.

^{ix} U.S. Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, 53.

^x *Ibid.*, 3.

^{xi} Eddie F. Brown, Gordon E. Limb, Toni Chance, and Ric Munoz, *The Indian Child Welfare Act: An Examination of State Compliance in Arizona* (St. Louis: Washington University of St. Louis, 2001), 7.

^{xii} *Final Report of the Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978* (Augusta: Maine Legislature, January 2006), www.maine.gov/legis/opla/ICWAReport.pdf.

^{xiii} Governor's Commission on the Indian Child Welfare Act 2005, *Report to the Governor* (Pierre, S.D.: GCICWA, 2005), <http://sdTribalrelations.com/icwa/icwa05recoml.pdf>.

^{xiv} Andrea Wilkins, *State-Tribal Cooperation and the Indian Child Welfare Act* (Denver, Colo.: National Conference of State Legislatures, 2008), 9 – 10.

^{xv} Judicial Branch Report to the Legislature, *Tribal Customary Adoption – A Report to the California Legislature* (Sacramento: Judicial Council of California, Administrative Office of the Courts, January 2013), www.courts.ca.gov/documents/lr-Tribal-Customary-Adoption-Report_123112.pdf.

^{xvi} *Ibid.*