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. 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.

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, 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.

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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**

**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. 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.

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**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. ****

**2011 Data KIDS COUNT Data Center, [www.kidscoun.org/datacenter](http://www.kidscoun.org/datacenter).
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. 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.”\footnote{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.\footnote{x}

A 2001 study of ICWA compliance in Arizona revealed mixed results.\footnote{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. 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.*
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. 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. 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.

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?

1 AFCARS, 2011, Prepared by Data Advocacy, Casey Family Programs.
8 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.
10 Ibid., 3.