



NCSL

Indian Child Welfare Act



NATIONAL CONFERENCE of STATE LEGISLATURES

Overview

The 1978 Indian Child Welfare Act 25 U.S.C. § 1901 (ICWA) is designed to protect the best interests of Indian children by setting minimum federal standards for states in the handling of the removal and placement of Indian children. In addition, the act aims to preserve tribal culture and ensure tribal jurisdiction.

The catalyst behind the development of ICWA in 1978 was the disproportionate number of Native American children and youth in the child welfare system. At the time, the adoption rate was 8 times higher among Indian children, while foster care placements were anywhere between 2.4 and 22.4 times more common among Indian children than their non-Indian counterparts. Further, 90 percent of these placements were in non-Indian homes.

Key Provisions of the Federal ICWA

Definition of a child subject to ICWA: Under the age of 18; and (1) member of an Indian tribe; or (2) eligible for Tribal membership and is the biological child of a tribal member. 25 U.S.C. § 1903 (a)(b)

Definition 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. 25 U.S. Code § 1903

Jurisdiction: 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 may petition to transfer the case back to the tribe. 25 U.S.C. § 1911

Notification and Intervention: A tribe, and the child's parent or Indian custodian 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 at any point during the proceeding in such cases; as well as cases in which a parent voluntarily relinquishes custody of an Indian child. 25 U.S.C. § 1912 (b)

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. 25 U.S.C. § 1912 (e)

Active Efforts: Before the placement of the Indian child in foster care or the termination of the Indian parent's parental rights, the state must show that they have made active efforts to provide remedial services and rehabilitative programs to the family in an effort to keep the family intact, and that these efforts have proved unsuccessful. 25 U.S.C. § 1912 (d)

Placement Preferences: An American Indian child placed in foster care or a pre-adoptive 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 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. 25 U.S.C. § 1915 (b)

Right to Counsel: The Indian child's parent or Indian custodian have a right to court appointed counsel, if he or she cannot afford one. The attorney will be provided

by the state court or through federal funds from the Secretary of the Interior if state law does not allow for court appointed counsel. The child may be appointed separate counsel if it is in their best interest. 25 U.S.C. § 1912 (b)

Evidentiary Standards and Qualified Expert Witnesses:

A foster care placement requires clear and convincing evidence that continued placement with the parent or custodian is likely to result in serious emotional or physical harm. The parental rights of an Indian parent or custodian may not be terminated without evidence beyond a reasonable doubt that continued placement with the parent or custodian is likely to result in serious emotional or physical harm. Both foster care placements and termination of parental rights determinations require testimony by a qualified expert witness. 25 U.S.C. § 1912 (e), 25 U.S.C. § 1912

Opportunity for Legislative Action

The safety, permanence and well-being of all children 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 American children who are involved in child welfare proceedings, such as:

- ❖ 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.
 - ❖ 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 Act of 2008.
 - ❖ Require education for 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.
 - ❖ Consider legislation such as California’s “Customary Adoption” which 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.
 - ❖ 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.
 - ❖ 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.

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