



FACTSHEETS | APRIL 2021

The Indian Child Welfare Act: A Primer for Child Welfare Professionals

The Indian Child Welfare Act (ICWA) of 1978 is one of the key components to protecting the rights and culture of American Indian and Alaska Native (AI/AN) children and families. Unfortunately, not all child welfare caseworkers are aware of how to apply ICWA or the troubling history that prompted the law to be enacted. This factsheet provides caseworkers with an overview of current and historical issues affecting child welfare practice with AI/AN families, practice implications, and cultural considerations. As this factsheet is only an overview of the law and issues, we encourage caseworkers to review the additional resources provided and seek guidance from their agencies.

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BACKGROUND

Child welfare practice with AI/AN children and families has been shaped by the complicated history between the U.S. Government and Tribes, both within and outside the context of child welfare. This section briefly describes that history, other factors affecting Tribal-State relations, and relevant Federal legislation.

BRIEF HISTORY OF CHILD WELFARE PRACTICE WITH TRIBES

The child welfare system has had a particularly poignant impact on Tribal communities over the past century. From the 1870s through the 1930s, thousands of Indian children were removed from their homes, families, and Tribes and placed in boarding schools, often at a great distance from home, where a policy of assimilation left them without access to family and unable to speak their native language or participate in their native culture. They were frequently taken from their homes without any investigation of maltreatment or well-being and without notice being provided to their families or Tribes (Capacity Building Center [CBC] for States, 2017). Native customs and practices were destroyed, families were separated, and generations of AI/AN children grew to adulthood without the benefit of parenting or support from their families or Tribes.

Compounding the trauma associated with early child welfare practices is the overall treatment of native peoples by the U.S. Government, particularly from the 1820s through the 1960s. From the 1820s to the 1880s, the U.S. Government established practices of forced migration and placement

of native peoples on reservations (CBC for States, 2017). From that point onward, U.S. Government approaches to Tribal populations included seeking to assimilate Tribal members into mainstream American life; distributing reservation land to settlers, often without compensation to Tribes; and other policies that had serious and long-lasting negative consequences for Tribes. Although the U.S. Government's approach to working with Tribes has improved in recent decades, this distressing history has contributed to a great level of distrust, historical trauma, and unresolved grief that continues to affect AI/AN families and the ways in which Federal, State, and local governments and Tribes interact.

For a more detailed overview, refer to the article "[Government Law and Policy and the Indian Child Welfare Act.](#)"

FACTORS AFFECTING TRIBAL-STATE RELATIONS

Today, almost all Tribes operate some form of child protection services, and many have their own Tribal codes, court systems, and child welfare programs. A number of factors affect relationships between Tribes and States in the provision of child welfare services. These include, but are not limited to, the following:

- The [sovereignty](#) of Tribes (i.e., the right to govern themselves)
- The [Federal trust responsibility](#) between Tribes and the Federal Government, which refers to the Federal Government's obligation to protect Tribal self-governance, assets, resources, lands, and treaty rights (25 U.S.C. §§ 450; 450a)

- The influence of various Federal policies, including those that endorsed and allowed AI/AN lands to be taken from Tribes and AI/AN children to be removed for assimilation (ICWA Proceedings, 2016)
- The enactment of [Public Law 280](#) (P.L. 83-280) in 1953, which transferred Federal jurisdiction over Tribal affairs to six "mandatory" States and allowed other States to elect to assume full or partial State jurisdiction on Indian reservations without requiring Tribal consent¹
- Availability of funding for child welfare services, with Tribes—prior to the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351)—previously being required to access their title IV-E funding through agreements with the States
- Disproportionality of AI/AN children in the child welfare system, such that AI/AN children enter foster care at a rate that is double their proportion of the U.S. child population (Child Welfare Information Gateway, 2016)
- Possible lack of awareness of how to implement ICWA, the reasons it was necessary, or culturally responsive engagement (CBC for States, 2017; Lidot et al., 2012)

FEDERAL LEGISLATION AFFECTING CHILD WELFARE PRACTICE WITH TRIBES

The Federal Government has implemented various pieces of legislation to attempt to address some of the inequities of the past, with ICWA (P.L. 95-608) being the key guidance on child welfare practice with AI/

AN children and families. ICWA, which was passed in 1978, established Federal standards for the removal, placement, and termination of parental rights in order to protect the best interests of AI/AN children and keep them connected to their families and Tribes. ICWA also clarified the jurisdictions of State and Tribal governments in child welfare cases, authorized Tribal-State agreements, and provided funding for the development of Tribal programs. The Bureau of Indian Affairs (BIA) within the U.S. Department of the Interior (DOI) determined there is inconsistent implementation and interpretation of the law across States and localities (ICWA Proceedings, 2016). The following section, Practice Implications, addresses how ICWA affects your everyday practice with children who are or may be AI/AN.

The following are other Federal laws subsequent to ICWA that affect Tribal child welfare practice:

- The Indian Child Protection and Family Violence Prevention Act (P.L. 101-630), which was enacted in 1991, established Federal requirements for the reporting and investigation of child abuse and neglect on Tribal lands, required background checks on individuals who have contact with AI/AN children (including foster and adoptive families), and authorized funding for Tribal child abuse prevention and treatment programs. That act was amended in 2016 by the Native American Children's Safety Act (P.L. 114-165) to further ensure children's safety by requiring Tribes to conduct background checks before placing children in foster care.

¹ In 1968, Congress amended Public Law 280 to require that States obtain Tribal consent before assuming jurisdiction, but this amendment did not affect any transfers that had already occurred.

- The Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110–351) gives [federally recognized Tribes](#), Tribal organizations, and Tribal consortia the option to directly access title IV-E funds to operate foster care; adoption assistance; and, if elected, kinship guardianship assistance and prevention services programs. Previously, if a Tribe wanted to access title IV-E funds, the Tribe would enter into agreements with States to administer all or part of the State’s title IV-E program. This act also requires each State title IV-E agency to negotiate in good faith with any federally recognized Tribe that requests to develop an agreement with a State to administer all or part of the State’s title IV-E program.
- The Tribal Law and Order Act of 2010 (P.L. 111–211) addresses three Tribal justice issues: (1) lack of Federal Government accountability for investigating and prosecuting crimes in Indian country, (2) lack of Tribal government authority, and (3) longstanding lack of adequate and consistent funding for Tribal justice systems. For more information, visit the [Tribal Law & Order Act page](#) on the National Congress of American Indians website.
- The Family First Prevention Services Act, which was included in the Bipartisan Budget Act of 2018 (P.L. 115–123), allows State and Tribal title IV-E agencies to use title IV-E funding to prevent children from entering foster care.

PRACTICE IMPLICATIONS

The National Indian Child Welfare Association (NICWA) suggests that caseworkers should assume that ICWA applies to a case until they have enough information to determine the law is not applicable (NICWA, n.d.). The following provides a brief overview of some key provisions of ICWA. Many States have their own laws or Tribal-State agreements regarding Tribal child welfare that go beyond the requirements of ICWA; therefore, local requirements may differ from the practices discussed in this factsheet. Caseworkers should become familiar with their local policies regarding cases involving AI/AN families and consult with their supervisors or other agency leadership to determine how to apply ICWA in their practice.

Unless otherwise noted, the information provided in this section was taken from [ICWA](#) and [Part 23 of the Code of Federal Regulations](#).

DETERMINING IF ICWA APPLIES

ICWA applies when there is a "child custody proceeding" that involves an "Indian child," which is defined as an unmarried individual under the age of 18 who is either (1) a Tribal member or (2) eligible for Tribal membership and has a biological parent who is a Tribal member (25 U.S.C. § 1901 et seq.).² A child custody proceeding is any nonemergency proceeding that may result in a foster care placement, termination of parental rights, or a preadoptive or adoptive placement.

² For ICWA to apply, the Tribe must be federally recognized.

An emergency proceeding is one that is intended to prevent imminent physical harm to the child in situations in which the child is not located on the reservation in which the child's Tribe has jurisdiction. In those cases, caseworkers should still attempt to comply with ICWA when possible and cease emergency custody once the child is safe.

NICWA (n.d.) suggests that caseworkers determine if ICWA may apply to a child by asking the family at intake and other key case points if they identify as AI/AN or have AI/AN ancestry. If the parents are unavailable or are unable to provide a reliable answer, the caseworkers can review other documentation or contact extended family. If there is no reason to believe the child is AI/AN or has AI/AN ancestry, it is recommended that the caseworker document this and proceed as is normally required for a non-ICWA case.

If there is reason to know the child is AI/AN, caseworkers need to contact the appropriate Tribe or Tribes to verify that the child is a Tribal member or is eligible for membership (25 U.S.C. § 1901 et seq.). If a Tribe verifies this, the caseworker should apply all ICWA provisions to the case; if the child is not a Tribal member nor eligible for membership, the caseworker does not need to apply ICWA (NICWA, n.d.). To view Tribal contact information, view BIA's [Tribal Leaders Directory](#) or its [ICWA Designated Agents Listing](#).

³ An Indian custodian is "any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child" (25 C.F.R. § 23.2).

NOTIFYING THE APPROPRIATE PARTIES

If a child is determined to be AI/AN, the caseworker must notify the child's parents; each applicable Tribe; and, if applicable, the child's Indian custodian³ by registered mail (return receipt requested) of the upcoming child custody proceeding. BIA recommends that agencies also provide notice to those parties of each individual hearing, any change in placement, any change to the child's permanency or concurrent plan, or any transfer of jurisdiction (BIA, 2016).

TRANSFERRING JURISDICTION TO THE TRIBE

The child's parents, Tribe, or Indian custodian may request a transfer of the case to the child's Tribe at any time during the case. The State court must grant the transfer unless either parent objects, the Tribal court declines jurisdiction, or the State court finds good cause to deny it.

PROVIDING SERVICES

ICWA requires that agencies make "active efforts" to maintain or reunite AI/AN children with their families. Active efforts are those that proactively connect families with substantive services rather than just identify the services available. Active efforts must be made before ordering an involuntary foster care placement or termination of parental rights. NICWA (n.d.) recommends that caseworkers also ensure active efforts are taken after the investigation and after removal to promote reunification. Services should be provided in a way that reflects the Tribe's social and cultural standards.

REMOVING THE CHILD FROM THE HOME AND TERMINATING PARENTAL RIGHTS

For an AI/AN child to be removed from the home or for a termination of parental rights to be granted, the public agency must prove (1) a causal relationship between the conditions in the home and serious emotional or physical harm to the child and (2) that the agency has made active efforts to support the family. Additionally, both actions must be supported by the testimony of a "qualified expert witness."⁴ NICWA (n.d.) notes that the evidence levels for both actions when ICWA is applicable tend to be higher than the levels of proof required in most States for non-ICWA cases.

PLACING A CHILD

When placing an AI/AN child in out-of-home care, the child should be placed in the least restrictive setting that is like a family, allows for the child's special needs (if any) to be met, and is within a reasonable proximity of the child's family. The following are the placement preferences for the child:

1. Extended family member
2. Foster home that is licensed, approved, or specified by the child's Tribe
3. Indian foster home that is licensed or approved by an authorized non-Indian licensing authority
4. Institution for children approved by a Tribe or operated by an Indian organization that has a program suitable to meet the child's needs

The preceding order should be followed unless there is good cause to do otherwise or if the Tribe has a different order preference.

⁴ A qualified expert witness is an individual who can testify about whether the child's continued custody by the parents is likely to cause serious emotional or physical harm and about the prevailing social and cultural standards of the child's Tribe.

NICWA advises child welfare professionals to consult with representatives from applicable Tribes to determine if this order is acceptable or which homes are licensed, approved, or specified for a particular child (NICWA, n.d.).

CULTURAL CONSIDERATIONS

When working with AI/AN children and families, caseworkers should keep in mind the following (Substance Abuse and Mental Health Services Administration, 2009):

- AI/AN individuals and communities are affected by varying levels of trauma, both directly and through intergenerational transmission.
- AI/AN individuals can be found in all areas of the country (rural, suburban, and urban).
- AI/AN ancestry cannot be determined just by "look" or family name.
- Each Tribe has its own history and culture, and customs vary by region and Tribe.
- It is appropriate to ask questions about cultural issues, but this should be done respectfully.
- Communication styles, the role of elders, etiquette, and other cultural components of Tribes may differ from those of non-Tribal communities.

For additional information, refer to [American Indian and Native American Culture Card: A Guide to Build Cultural Awareness](#), which was developed by the Substance Abuse and Mental Health Services Administration. For general information about cultural humility, visit Information Gateway's [Cultural Responsiveness](#) page or review [Standards and Indicators for Cultural Competence in Social Work Practice](#) by the National Association of Social Workers.

Public agency caseworkers can also use this information as they partner with Tribal child welfare staff and other Tribal members. In particular, public agency caseworkers should recognize that, in addition to maintaining child safety and well-being, Tribal caseworkers may also view their practice as including cultural preservation (i.e., preventing the loss of the Tribe's children and maintaining children's connection to their culture) (Lucero & Leake, 2016). When communicating with Tribal staff, caseworkers should remember that they are dealing with representatives of a sovereign nation (Tribal STAR, 2015).

As when working with any culture different than their own, caseworkers should be self-reflective and examine their own biases to help ensure their practice is always conducted in the best interests of the child and family.

ADDITIONAL RESOURCES

- [A Guide to Compliance With the Indian Child Welfare Act](#) (NICWA)
- [Guidelines for Implementing the Indian Child Welfare Act](#) (U.S. Department of the Interior [DOI], BIA)
- [A Practical Guide to the Indian Child Welfare Act](#) (Native American Rights Fund)
- [Working With American Indian Children and Families](#) (Child Welfare Information Gateway) [webpage]
- [CBC for Tribes](#) [webpage]
- CapLEARN (Child Welfare Capacity Building Collaborative) [free registration required]:
 - ["Indian Child Welfare Act"](#) (CBC for Courts) [online course]
 - ["State-Tribal Partnerships: Coaching to ICWA Compliance"](#) (CBC for States) [online course]

- [Indian Child Welfare Act \(ICWA\)](#) (DOI, BIA) [webpage]
- [NICWA](#) [webpage]
- [Détente and Decorum for Child Welfare Leaders: Strategic Teaming and Engagement With Tribes and Native American Communities](#) (Tribal STAR)

If you are working with judges or other court personnel who may require additional information about applying ICWA in court settings, you can refer them to the [Indian Child Welfare Act Judicial Benchbook](#), which was developed by the National Council of Juvenile and Family Court Judges.

CONCLUSION

ICWA's enactment in 1978 was a significant moment in child welfare history, but the mere presence of a law is not enough to protect and support children and families. It is critical for child welfare professionals to know how to apply the law, recognize the events that preceded it, and appreciate the importance of culturally competent practice with AI/AN children and families. Additionally, collaboration between Tribal and State child welfare systems can promote improvements in child welfare practice as well as child, family, and community outcomes (Lidot et al., 2017). This factsheet touches briefly on these concepts, but now it is up to you to further explore and reflect on these issues in order to improve your practice and ensure the protection and continuity of AI/AN children, families, and Tribes.

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