

The Indian Child Welfare Act: The Gold Standard of Child Welfare Practice

BRIEF

FEB 2019
Washington state

By Partners for Our Children

SUMMARY:

The Indian Child Welfare Act (ICWA) has been attributed to a reduction in American Indian/Alaskan Native (AIAN) Children being placed in out of home care across the United States, however disparities still remain. To ensure we continue to improve well-being outcomes for AIAN children, it will require a full commitment to implement the ICWA.

THE INDIAN CHILD WELFARE ACT AND TRIBAL SOVEREIGNTY

With the enactment of the Indian Child Welfare Act (ICWA) of 1978, the Congress recognized Tribal jurisdiction over child-custody proceedings and set a minimum federal standard for the removal and placement of Indian children in state child welfare proceedings.¹ This was in response to, "An alarmingly high percentage of Indian families are torn apart by the often-unwarranted removal, of their children by non-tribal public and private agencies and an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."² Congress firmly placed the blame on states: "[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."^{3,4}

The high removal rate was one of the reasons Congress passed ICWA. Congress still has the authority⁵, the obligation⁶, and the interest⁷ in preventing the unwarranted removals⁸ and ensuring that states recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. Even if only one Indian child in the country was removed and placed with a non-Indian family, Tribal Sovereignty remains the justification for ICWA.

HISTORICAL BACKGROUND

Throughout the 19th century, the United States and Indian nations established funds for Indian education and for Indian orphans. However, the funds were then used to establish Indian boarding schools.⁹ From the early 1870s to the 1970s American Indian/Alaska Native children were placed in military style boarding schools run by the Federal Bureau of Indian Affairs (BIA), private churches or state agencies.¹⁰ For about 100 years, there was mandatory placement of Indian children in boarding schools where their hair was cut, they were not allowed to wear traditional clothing, and they were punished for speaking Native languages. Parents had no right to refuse to send their children to Indian boarding schools. The boarding school era began in the US in 1860 and became an effort to "kill the Indian, save the man" by 1879. In 1900 there were 20,000 children in Indian boarding schools and by 1925 there were 60,889. There were 357 boarding

schools operating in 30 states.^{11,12} Indian children were stripped of their tribal identity and forced to assimilate to Western culture. By the mid-twentieth century, these boarding schools closed because, "...the boarding schools had outlived their intended purpose, that they were expensive, and that Indian children would be better off in other settings."^{13,14} In 1958, the federal government attempted to solve these issues with the Indian Adoption Project (IAP). The IAP did not serve the best interests of Indian children, it was aimed at reducing costs for the federal and state governments, which resulting in an urban relocation program. Indian families were encouraged to leave the reservation behind and move to urban areas.¹⁵ By the 1960's hundreds of thousands of Indian children were removed from their homes and families and had been placed in boarding schools.

Nonetheless, the government did not stop the removal Indian children from their families, this time being placed into the state foster care system. Through the 1970s and 1980s, the federal Children's Bureau collected data on foster care and adoption from states on an annual and voluntary basis. In the absence of federal reporting requirements, the reliability and consistency of the data were questionable. To get data about removal of Indian children, the Association on American Indian Affairs surveyed child placing agencies, correctional institutions, and looked BIA statistics, AAIA found that between 1968 and 1969, 25 to 35 percent of Native children were removed from their families in 16 states with large Native¹⁶ populations. Eighty-five percent of those children were placed with non-Indian families.¹⁷

THE FORMATION OF THE INDIAN CHILD WELFARE ACT

By 1976, the removal rates were worse; approximately one in three Indian children were removed from their families and placed into a foster or adoptive home.¹⁸ Eight-five percent of those foster care placements and 90% of the adoptive placements were in non-Indian homes.¹⁹ In order to address these inequities, reinforce tribal sovereignty, and recognized the essential tribal relations of Indian people and the cultural and social standards prevailing Indian communities and families, Senator James Abourezk introduced to the Congress in 1976 the precursor to what would, in 1978, become the Indian Child Welfare Act.

With the enactment of the Indian Child Welfare Act of 1978, the Congress recognized Tribal jurisdiction over child-custody proceedings and set a minimum federal standard for the removal and placement of Indian children in state child welfare proceedings.²⁰ ICWA established the first national child welfare standards, such as requiring social workers to make active efforts to prevent the breakup of the Indian family before a child can be removed from their home in a non-emergency situation and before a parent’s rights could be terminated. Two years later, in 1980, Congress set similar standards for all children when it passed the Adoption Assistance and Child Welfare Act. ICWA also established best practices in placement of Indian child with family, tribe, and community members. Today, with 40 years of practice evidence national child welfare organizations recognize that ICWA both embodies and serves as the model for the child policies that are best practices generally.²¹ ICWA’s principals are critical to safeguarding the welfare of children and families.²²

The Congress recognized tribal sovereignty and the unique government-to-government relationship that exists among the federal government, states, and tribal nations through the establishment of ICWA:

- Congress has the Constitutional authority to enact the law;
- Congress has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
- Like states, tribes also have a responsibility to protect their children and support their families. The core government function is directly tied to ensuring that tribal communities can grow and prosper. In addition the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
- An alarmingly high percentage of Indian families are torn apart by the often-unwarranted removal, of their children by non-tribal public and private agencies and an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
- The States, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families when exercising their jurisdiction over Indian child custody proceedings through administrative and judicial bodies.²³

ICWA established:

- A definition of an Indian child that focuses on the child’s political relationship as a citizen of a tribal nation, for triggering ICWA’s application,²⁴
- A social worker standard of providing active efforts to prevent the breakup of Indian families,²⁵
- Requirements for states and private agencies that ensure due process is preserved,
- Placement preferences for foster care, guardianship, and adoption that prioritize the Indian child’s connection to their family (Indian or non-Indian) and tribe,
- Requirements regarding the termination of parental rights of an Indian child’s caregiver,
- Funding to support tribal operations of child welfare systems that support services within the tribal community and help tribes assist states when children are in state care
- Tribal Courts²⁶ inherent authority to take and maintain

jurisdiction over matters pertaining to Indian child welfare.²⁷

THE GOLD STANDARD IN CHILD WELFARE

The aim of the Indian Child Welfare Act (ICWA) is to keep AI/AN children connected to their families, cultural, and community. ICWA sets for the care and protection of Indian families, specifically because the law defines active efforts to prevent the removal and help rehabilitate families, and placement preference standards that prioritize the Indian’ child’s connection to their family, culture, and community. Federal evidentiary standards for the removal and for termination of parental rights.²⁸

Active efforts

ICWA requires states to make active efforts to prevent the breakup of Indian families.²⁹ Active efforts prevent the child from being removed from their home, when safe, in non-emergency situations. The Families First Prevention Act (2017) is legislation that gets close to the active efforts requirement.

Active Efforts	Reasonable Efforts
<ul style="list-style-type: none"> • Federal standards for Indian children • National definition in 2016 Regulations • Designed to prevent unnecessary removals and prevent further trauma to children and family • Services are remedial and rehabilitative for the family • Active efforts required in all cases • Active efforts considered higher standard than reasonable efforts 	<ul style="list-style-type: none"> • Federal evidentiary standards for all children • No national definition • No national standard of evidence for removal or termination of parental rights • Designed to prevent removal when possible and support rehabilitative services to family³⁰ • Reasonable efforts not required in some situations

Placement Preference Standards

ICWA was the first national legislation recognizing a preference for preserving families by placing children with relatives. ICWA then establishes addition placement preference guidelines as:

- A foster home licensed, approved, or specified by the Indian child’s tribe;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.³¹

Since the passage of ICWA, 48 states (all but New Hampshire and West Virginia) have language that prefers a relative when a child is being placed out of home.^{32 33} In 28 states, when a suitable relative cannot be determined, the law gives preference to “fictive kin” (or close family friends).^{34 35} Twenty-six states require social service agencies to exercise “due diligence,” requiring the state agency to find possible kin and fictive kin for the child.³⁶

Kinship

When children must be removed from their families to ensure their safety, the first goal is reunification with their families as soon as possible. ICWA was one of the first pieces of child welfare legislation to acknowledge relative/kinship placements and contains the strongest language in favor of family preservation as an important option for children in out-of-home care. Forty-eight states have statutes that give placement preference to relatives.³⁷ Twenty-eight states have laws that statutorily recognize the importance of family integrity and preference for avoiding removal of a child from the home.³⁸ In addition, Title IV-E of the Social Security Act, mandated that states applying to receive funds must give priority to relatives as caregivers: "the state shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all the relevant state child protection standards."³⁹

BENEFITS OF STRENGTHENING AI/AN COMMUNITIES

ICWA ensures that the essential tribal relations of Indian people are respected and decisions about Indian children in state dependency courts are made considering the prevailing cultural and social standards in Indian communities and families. AI/AN children stay connected to their tribe and culture. Connection to Native culture has a proven to be a protective factor for Native children.^{40 41 42 43}

- Cultural identity and ethnic pride result in greater school success, lower alcohol and drug use, and higher social functioning in Native children, adolescents, and young adults.⁴⁴
- Native children, adolescents, and young adults involved in their tribal communities and cultural activities have lower rates of depression, alcohol use, and antisocial behavior.⁴⁵
- Tribal language, ceremonies, and traditions are linked to a reduced risk of delinquent behavior for Native children, adolescents, and young adults.⁴⁶

Being connected to their families and tribal communities is in the best interest of Native children in the longer term.^{47 48}

- Research shows that there are important long-term benefits to being raised with a distinct cultural identity as a Native person.^{49 50}
- Identification with a specific cultural background and a secure sense of cultural identity are linked to higher self-esteem, higher educational attainment, and lower rates of mental health problems and substance abuse in adolescents and adults.⁵¹

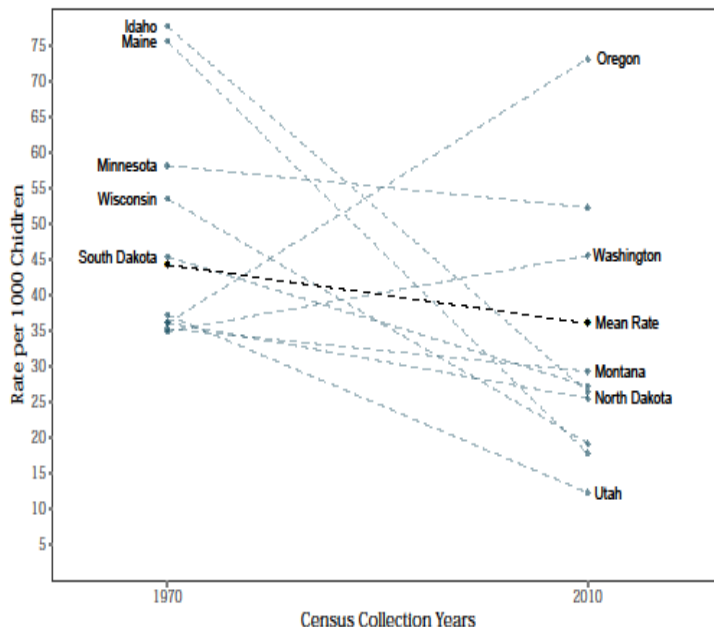
ICWA is regarded as a gold standard in child welfare policy and has influenced the creation other national child welfare policies, such as, The Fostering Connections to Success Act (2008), and the Families First Prevention Services Act (2017).

THE ICWA IS WORKING

Since the Association on American Indian Affairs 1969 report was released, the overall disproportion of AI/AN children in out-of-home care (Table 1) has decreased relative to non AI/AN population (Table 2) which has remained relatively the same.⁵² Despite the vast changes in policy, the overall placement in out-of-home care of non AI/AN children has not changed, however the overall out-of-home placement of AI/AN children has shown a downward trend. There are a number of explanations that could explain this data. For example, six states including Washington, Nebraska, Minnesota, Michigan, Iowa, and Oklahoma have state-specific ICWA guidelines in addition to the federal standards of ICWA, which include expansive definitions of an American

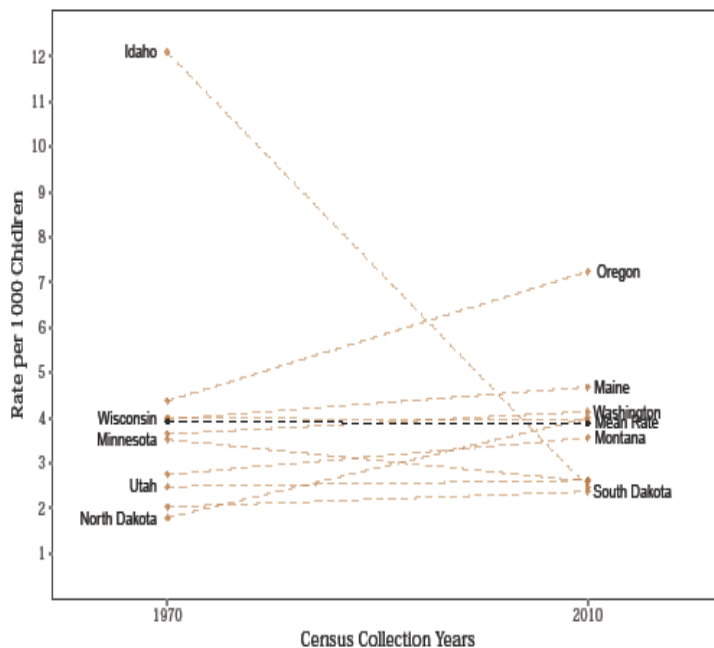
Indian/Alaska Native child⁵³ that could inflate the state's number of AI/AN children.

American Indian/Alaska Native in Out-of-Home Care 1970 and 2010



(Table 1) US Census Data collected in 1969 and in 2010

Non American Indian/Alaska Native in Out-of-Home Care 1970 and 2010



(Table 2) US Census Data collected in 1969 and in 2010

CONCLUSION

ICWA STILL NECESSARY FOR THE WELL-BEING OF AI/AN CHILDREN AND FAMILIES

Although, we have made great strides, AI/AN children are still disproportionately represented in the foster care system.⁵⁴ ICWA is working and when it is implemented accordingly, creates a positive impact in the lives of AI/AN children and families.

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- ⁷25 U.S. Code 1901(3)
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- ²³"25 U.S. Code § 1902 - Congressional declaration of policy | US Law" <https://www.law.cornell.edu/uscode/text/25/1902>. Accessed 26 Nov. 2018.
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- ²⁵25 U.S. Code § 1912 102 (d)
- ²⁶Under ICWA, "Tribal Court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (25 U.S. Code § 1903 12).
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