

Setting the Record Straight: *The Indian Child Welfare Act*

Fact Sheet

10C
September 2015

A publication of the National Indian Child Welfare Association

In 1978, Congress worked closely with American Indian and Alaska Native (AI/AN) elected officials, child welfare experts, and families whose children had been unnecessarily removed from their homes, to pass the Indian Child Welfare Act of 1978 (ICWA). ICWA was carefully designed to protect AI/AN children and families from unscrupulous and biased child welfare practices and well-documented disregard for AI/AN families and culture held by some courts and attorneys.

The Need for ICWA

Child welfare and adoption systems are failing AI/AN children and families.

In 1978:

- **25%–35%** of all AI/AN children were removed from their homes by state child welfare and private adoption agencies.
- 85% of AI/AN children removed were placed outside of their families and communities—**even when fit and willing relatives were available.**

Today with widespread non-compliance:

- AI/AN children are **three times** more likely to be removed by state child welfare systems than non-Native children.
- 56% of adopted AI/AN children are placed outside their families and communities.

ICWA in Practice

ICWA empowers child welfare and adoption systems to follow best practices and treat AI/AN children fairly.

ICWA:

- Has been labeled the “**gold standard**” in child welfare practice by a coalition of 18 national child advocacy organizations.
- Lessens the trauma of removal by promoting placement with family and community.
- Mandates that families receive intensive services (“active efforts”) to prevent child abuse and neglect and keep children safely in their homes.
- Promotes the best interest of Indian children by keeping them connected to their culture, extended family, and community, which are **proven protective factors.**
- Brings to bear critical information and resources when emergencies arise.
- Promotes placement stability by **ensuring that voluntary adoptions are truly voluntary.** It disincentivizes adoption deals that fall outside accepted standards of practice.
- Encourages states to develop effective relationships and procedures with tribes to **carefully coordinate the care of AI/AN children** and families.

ICWA Implementation Concerns

Until ICWA is followed, AI/AN children and families will continue to face discrimination in the child welfare system, will continue to be removed at alarming rates, and will continue to be placed in risky adoptions.

Non-compliance is due to inadequate training, misinterpretations of the law, lack of data, and wilful ignorance. Common non-compliance with the key provisions of this federal law includes:

- Failure to identify ICWA-eligible children early on and ensure they are receiving the protections of the law.
- Providing inadequate—or no—notice of proceedings to key parties.
- Placing children outside their family and away from community **without good cause**, or placing children in a more restrictive setting than necessary.

Revised ICWA Guidelines and Proposed ICWA Regulations

To support effective ICWA implementation and address concerns, the Bureau of Indian Affairs (BIA) has revised the corresponding guidelines and proposed new regulations.

- In February 2015, the BIA issued revised ICWA guidelines. This is the first revision of the ICWA guidelines since their release in 1979. Guidelines are persuasive and not binding. In March 2015, the BIA proposed new substantive ICWA regulations. As of the date of this publication, these have not yet been promulgated.
- **These historic actions have been endorsed** by leading child advocacy organizations, the American Bar Association, family court judges, scholars, states, and AI/AN families who have faced the devastating consequences of ICWA non-compliance.
- The proposed regulations provide the clarity that was previously missing to support **consistent ICWA application nationwide** that can protect all of the parties who are involved in these proceedings.

“Because of ICWA, my son is growing up with his culture.”

—Chief Judge Allie Greenleaf Maldonado

“ICWA helped establish the values and practices that have become central to child welfare practice.”
—Casey Family Programs

“The ‘best interest of the child’ standard is applied in all cases under the act.”
—Former Senator Byron Dorgan

“[ICWA] has compelled greater efforts and more painstaking analysis by State and private adoption agencies and State courts before removing Indian children from their homes and communities.”
—Senator John McCain

“When you ask a child who has been in foster care how we can best improve the current foster care system, often the answer will be: You could have helped my mom so that I did not have to go into foster care in the first place.”
—Senator Orrin Hatch

“If AI/AN children today are to be provided with a reliable safety net, the letter and spirit of ICWA must be enforced.”
—Attorney General’s Advisory Committee on AI/AN Children Exposed to Violence

“I knew Barry Goldwater—he was my friend and often came to me for advice on most tribal matters. I wish he were alive to see this travesty because he would *never* approve of [the current attacks on ICWA] and you can quote me on that and make sure you emphasize the word ‘never.’”
—Former Senator James Abourezk

Setting the Record Straight: *The Indian Child Welfare Act* Fact Sheet

A publication of the National Indian Child Welfare Association

September 2015

The Truth about ICWA

Recently, some well-funded anti-ICWA groups have been promoting a campaign of misinformation rooted in the most egregious negative stereotypes about AI/AN families. With the support of a coalition of national Native nonprofit organizations, NICWA sets the record straight.

ICWA raises the bar of child welfare practice to ensure Native children are well protected and treated fairly.

ICWA rights the wrongs of the past and addresses the current injustices that AI/AN children and families still face. ICWA provides high standards and requires accountability in today's complex and highly-fractured child welfare system. For example, ICWA asks social workers and courts to examine whether the use of intensive in-home services would be just as, or more, effective in protecting a child's safety and best interest, rather than simply resorting to a de facto removal of the child as the first option. ICWA also encourages the use of culturally specific services that are more likely to successfully strengthen AI/AN families and help AI/AN children stay safely at home. ICWA helps states secure tribal assistance and ensure that experts are present in the courtroom when important decisions about the child are made.

ICWA protects children's and parents' constitutional rights. ICWA provides *additional* procedural and substantive safeguards that recognize parents' constitutional right to care for their child and the child's corresponding right to family integrity.

Children fare better when placed with family, in community, and connected to culture. Recent studies show that *all* children fare better when placed with kin. This is also true for AI/AN children. ICWA promotes connection to culture, elders, and community thus promoting resiliency and well-being.

ICWA promotes the best interest of AI/AN children. ICWA delicately balances the need for flexibility and individualized case-based decisions with the need to ensure a fair process that protects the basic rights of children and families. For example, ICWA provides state court judges with discretion to deviate from the requirements of ICWA when there is "good cause." At the same time, it provides important provisions that remind the court that placing a child with family and maintaining a child's cultural connection *is* in the child's best interest, and not to be disregarded as was the norm in the pre-ICWA era.

ICWA is not based on race. ICWA applies to children who are citizens (referred to as "members" in ICWA) of a federally-recognized tribe. The U.S. Supreme Court has repeatedly found federal laws that specifically govern tribal citizens constitutional. Citizenship requirements vary from tribe to tribe, just as citizenship requirements vary from country to country. ICWA does not apply to individuals who merely self-identify as American Indian or Alaska Native.

Tribes care deeply about the safety and well-being of their children and families. Like state governments, tribal governments have a deep concern for the—and responsibility to—care for their citizens. Incendiary statements that claim otherwise are offensive and simply untrue. Making inflammatory and false statements about tribal communities does not advance the tireless efforts of concerned people that are working on these issues every day. Besides the work that tribes are doing to improve services and protections for their children and families, ICWA is supported by other non-Native experts in the field, including leading national child welfare organizations and legal experts and professional associations. To build a better future for Native children, the experience, insight, and wisdom of these significant populations *must* be respected and included.

Congress has unique authority over this issue. Tribes are nation states within the larger United States. The Constitution, federal law, and centuries of treaties have set a precedent: matters regarding tribes and tribal members are within the purview of the federal—not state—government. It is under this authority that ICWA has been legislated.

The regulations are Congressionally authorized. The revised guidelines released from the BIA are non-binding suggested best practices, no federal law requires a notice and comment period for guidance that is not binding. Further, the proposed regulations will be promulgated based on the authority granted by Congress which states: "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter."

For More Information

Please contact NICWA Government Affairs Director David Simmons at desimmons@nicwa.org.



NICWA

National Indian Child Welfare Association
Protecting Our Children • Preserving Our Culture

The National Indian Child Welfare Association works to support the safety, health, and spiritual strength of Native children along the broad continuum of their lives. We promote building tribal capacity to prevent child abuse and neglect through positive systems change at the state, federal, and tribal levels. To learn more, visit www.nicwa.org.