



Protecting the Future of Tribal Communities

Ensuring Compliance with the
Indian Child Welfare Act

by

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FIRST FOCUS

MAKING CHILDREN & FAMILIES THE PRIORITY

The Indian Child Welfare Act (“Act”), passed in 1978, was a response to the historical struggle of Native Americans against the governmental destruction of tribes, families, and culture.¹ At its core the Act was designed to remedy a long history of abuses, promote tribal sovereignty, strengthen tribes’ roles in child welfare, and protect the best interest of Native American children. The congressional findings at the beginning of the Act stating, “there is no resource that is more vital to the continued existence and integrity of Indian tribes” underscored the significant and unique nature of the legislation to the protection and promotion of child and family well-being.²

The congressional approach to remedying the vast problems of widespread dislocation of Native American children was multi-faceted. Acting under its plenary powers,³ Congress created various jurisdictional, procedural, and substantive protections governing child welfare in broadly defined child custody proceedings.⁴ Though there are inconsistencies in the application and implementation of the Act’s jurisdictional, procedural, and substantive protections, states such as California, Colorado and Nevada have passed specific legislation to allow for tribal perspectives to be heard in status offense proceedings.⁵

In states that have not adopted laws, court rules, or policies incorporating the Act’s protections in status offense proceedings involving Native Americans has led to increased contact of these children with the juvenile justice system, a failure to provide culturally competent services to Native American children and families, increased separation of Native American children from their families and tribes, and a lack of coordinated action by state courts, state child welfare agencies, advocates, and practitioners. Further, even in those Southwestern states which have passed laws or policies applying the Act in status offense proceedings, Native American status offenders continue to be removed from their homes and sent to residential facilities⁶ such as detention centers, shelters, reception/diagnostic centers, long-term secure facilities, ranch/wilderness camps, group homes, boot camps or other out-of-home facilities.⁷ This legal reality means much is at stake for a Native American child facing a status offense charge.

The Social and Economic Realities for Native American Children and Families in the Southwest

In the United States there are 566 federally recognized Native American tribes.⁸ In 2010, 647,321 Native American children resided in the United States.⁹ According to the most recent census data nearly one-third of Native American children (213,205) live in the Southwest (Arizona, California, Colorado, Nevada, New Mexico, Texas and Utah).¹⁰ Of these states, Arizona represents the second largest population of Native American children across the United States with a reported 82,219 children¹¹ and from 2000 to 2010 Texas was one of three states that had the largest increase in population of Native American children (1,411).¹²

The social reality for Native American children and families living on reservations, as well as those living off-reservation is one of persistent and entrenched socio-economic problems, despite the economic gains of recent years. Native American children and their families living on tribal land face high rates of poverty, unemployment, family violence, infant mortality, suicide, and alcoholism.¹³ Within the total population of people claiming Native American identity in 2000, almost two-thirds lived outside reservations, Alaska Native villages or other trust land.¹⁴ As the National Urban Indian Family Coalition reported, some of the largest urban Indian populations occur in cities across the Southwest.¹⁵ When comparing urban Native American populations to other populations, it has been consistently found that Native American populations have higher poverty and unemployment rates, are less likely to have a high school diploma, are three times more

likely to be homeless, and have significantly higher rates of alcohol-related deaths.¹⁶ In fact the overall poverty rate for urban Native Americans is higher than for any other population in the United States.¹⁷

When considering poverty in the context of children, Native American children are between six and nine times more likely than white children to live in these communities.¹⁸ Across the United States thirty-nine percent of Native American children under the age of five live in families below the poverty threshold, nearly twice as high as the percentage for the total United States population (21 percent).¹⁹ Although there are areas of concentrated poverty across the country, children in Southwestern states are most likely to live in these disadvantaged areas.²⁰ For example, New Mexico (20 percent), Texas (17 percent) and Arizona (16 percent) represent some of the highest rates of poverty across the United States.²¹ Children living in areas of concentrated poverty are also more likely to experience harmful levels of stress and severe behavioral and emotional problems. Consider that the suicide rate for Native American children is nearly twice that of any other ethnic group²² and fifty percent of fourth grade Native American children read below the basic level.²³

Native American children are also more likely to be the subjects of child abuse and neglect proceedings than the general population.²⁴ Studies show that Native American children are overrepresented in foster care at more than 1.6 times the expected level and in some states they account for more than half of all foster care youth.²⁵ Native American youth are also significantly overrepresented in the juvenile justice system.²⁶ For example, custody rates for Native American children were 2.6 percent higher than for white youth²⁷ and they were nearly 3.5 times more likely to have their cases result in confinement than white youth.²⁸ In 2008, it was documented that Native American children are approximately thirty percent more likely than white children to be referred to court,²⁹ ten percent more likely to be detained awaiting trial, and ten percent less likely to receive the comparatively lenient measure of diversion or the second chance of probation.³⁰ Further, Native American children are fifty percent more likely than white children to receive the most punitive measures, namely out-of-home placement after adjudication or waiver to the adult criminal justice system.³¹ Indeed, 130 adjudicated status offense cases involving Native American children resulted in out-of-home placement in 2008.³²

Native American children face significant challenges that stem from a unique set of circumstances that influence the social, economic, and legal realities they experience. In order to improve child well-being and break the cycles that push children into the foster care and juvenile justice systems, policymakers must be committed to ensuring that all Native American children, families, and tribes are afforded the full jurisdictional, procedural, and substantive protections of the Act. This legislation has been considered one of the boldest examples of federal policies favoring self-determination and sovereignty³³ and only through innovative reform and a clear commitment to continued improvement in implementation can states guarantee that both the intent and the language are met.

The History and Purpose of the Indian Child Welfare Act

For decades Native American families suffered from the federal and state child welfare practices that resulted in removals of Native American children at extremely high rates when compared to rates of removal for other children.³⁴ Collectively, such actions often led to the loss of individual tribal languages and customs, disruptions of Native American families, and serious challenges for children attempting to reintegrate into their tribal settings. Beginning in 1973, the U.S. Senate Select Committee on Indian Affairs began to receive reports that an alarmingly high percentage of Native American children were being removed from their natural parents, predominantly through the actions of state governments and private agencies.³⁵ In addition to

the disproportionately high number of Native American children being placed in foster or adoptive homes, the testimony established that Native American family breakups frequently occurred as a “result of conditions which [were] temporary or remedial and where the Indian people involved [did] not understand the nature of the legal actions involved.”³⁶

Following intensive investigation and reports, Congress held hearings on the topic of Native American child welfare from 1974 through 1978 to investigate the extent to which current child welfare policies undermined tribal survival through unwarranted removal of Native American children. These hearings heightened national sensitivity about Native American culture and its preservation through families and children. The 1974 congressional testimony of William Byler, executive director of the Association on Indian Affairs, concluded that, “[t]he wholesale removal of children from their homes, we believe, is perhaps the most tragic and destructive aspect of Indian life today.... It is clear then that the Indian child welfare crisis is of massive proportions and affecting the people at a more severe rate than non-Indian people.”³⁷

In 1978 Congress developed legislation to protect Native American children from unnecessary removals and to provide strict requirements for states when they removed these children from their homes. The Act is considered to be the most significant federal law governing Native American children, as it established protections for these youth and their tribes and ensured that “Congress through statutes, treaties, and the general course of dealings with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources.”³⁸ In the Act, Congress articulated a clear statement that preserving Native American families by ensuring that Native American children remain in homes reflective of their unique native cultures and values is in their best interest and the best interest of the tribe.

How the Indian Child Welfare Act Protects Native American Children, Families and Tribes

For Native American communities, no aspect of sovereignty is more important than protecting the well-being of children. Under the Act, self-determination includes the right to oversee how families experiencing problems are treated, and if necessary, to ensure the protection of Native American children. The jurisdictional provisions of the Act implement the congressional view that tribes must maintain the power to decide matters that involve the removal of Native American children from their homes. In placing limits on the power of state courts to maintain exclusive jurisdictional control over Native American children was recognition of the key role that courts historically, and arguably contemporaneously, play in removing Native American children from their homes. Under §1911(a) the Act provides for exclusive tribal jurisdiction over child welfare and adoption proceedings involving Native American children³⁹ domiciled or residing on their tribal reservation or who are wards of tribal court.⁴⁰ The exclusive jurisdiction provision is a clear statement of tribal authority.

Given that a majority of Native Americans no longer reside on reservation or trust lands, the Act’s provision for transfer and concurrent state jurisdiction in cases involving Native American children must be given significant attention. The concurrent tribal-state authority creates what has been termed “presumptive tribal jurisdiction.”⁴¹ Section 1911(b) requires state courts to transfer child custody proceedings to tribal court upon petition of a parent of the child’s tribe, unless either parent objects or the court finds good cause to the contrary.⁴² Despite this “presumptive” tribal jurisdiction, state courts continue to exercise jurisdiction in high numbers.⁴³ This is particularly true in cases involving status offenses or juvenile delinquency.

If a state court does not transfer jurisdiction to a tribal court, the Act places a heightened duty on the state to avoid removal of the child from the home by ensuring that active efforts⁴⁴ are made to reunify the family and that preference for out-of-home placements is given first to the extended family, then to tribal and other Native American homes.⁴⁵ The Act also establishes minimum federal standards of evidence, including testimony of expert witnesses with knowledge of tribal culture, before a state court may remove a Native American child from his or her home.⁴⁶ States must maintain records of each state court placement of a Native American child,⁴⁷ as well as evidence of efforts made to comply with the Act's placement preferences.⁴⁸

The Act also provides notice requirements for the parents and any person who has legal or temporary custody (1) if the court has reason to know the proceedings involve an Native American child,⁴⁹ and (2) if the tribe or Indian custodian has a right to intervene in such proceedings⁵⁰ or a right to court-appointed counsel.⁵¹ Indigent parents or custodians are entitled to court-appointed counsel⁵² and to rehabilitative services designed to preserve the family.⁵³ Congress also imposed heightened burdens of proof before state courts can order the removal of Native American children from their homes. For example, foster care placements must be based on "clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or custodian is likely to result in serious emotional or physical damage to the child."⁵⁴ For parental rights terminations, the Act requires the same showing of serious harm to the child, through a showing of proof beyond a reasonable doubt.⁵⁵

To ensure the well-being of Native American children, the Act should apply whenever Native American children are involved in state proceedings that place the child at risk of being removed from the home. As the legislative history of the Act explained, "[t]he definition of 'child placement' is intended to include proceedings against juveniles which may lead to foster care and proceedings against status offenders, i.e., juveniles who have not committed an act which would be criminal if they were adults, such as truancy."⁵⁶ In fact, one year after passage of the Act, the Bureau of Indian Affairs Guidelines stated, "[a]lthough most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in termination of the parental relationship."⁵⁷ Therefore, when considering the applicability of the Act to a status offense proceeding, whether classified as delinquency or dependency, the primary inquiry should simply be whether the proceeding may result in out-of-home placement, a foster care placement, guardianship placement, custody placement or termination of parental rights. If this question can be answered yes, then the jurisdictional and procedural protections of the Act should be applied.

A Failure to Protect Native American Status Offenders in the Southwest

Understanding the Act as protecting Native American children in state court proceedings is not a radical idea. The Act has achieved success on many levels, for example, by establishing respect for tribal authority and the expansion of tribal preservation policies and programs. While the overall rate of removal of Native American children from their homes in child welfare proceedings has decreased,⁵⁸ Native American children are still being removed from their homes in numbers disproportionately higher than non-Native American children. This is particularly true when 4,430 Native American children were involved with the juvenile justice system for status offenses in 2008.⁵⁹

The fact that the majority of Native American children and their families do not reside on tribal lands is of core significance when considering the history and purpose of the Act. While the state of crisis present in the 1970s leading to the passage of the Act is not present in today's court systems, there is serious concern regarding the impact of a lack of systemic adoption and enforcement of the Act's protections for status offenders. Native American children involved with the child welfare and juvenile justice systems are subject to a multi-jurisdictional framework complicated by where the activity occurs and the nature of activity, potentially subjecting them to state, federal, or tribal law.

Unfortunately, the critical legal protections provided by the Act are not equally applied across the states. Almost thirty years after enactment, the Act remains a source of controversy and confusion across the country. Fewer than half the states have passed laws that automatically trigger the Act's protections for status offenders, parents, and tribes.⁶⁰ In these states Native American status offenders find themselves in a jurisdictional gray area without clear guidance as to whether the Act's protections apply. In such instances, Native American status offenders are subject to potential ad hoc decision-making by judges, court officials, officers, lawyers, or state agencies, which places severe limits on compliance.⁶¹ Arizona is the only state in the country to specifically reject the inclusion of status offenses under the Act's protections.⁶² It is critical that future advocacy efforts in Arizona focus on revising state law and state court rules to include status offense proceedings under the Act, developing strategic partnerships with key stakeholders, and engaging with Native American service programs to strengthen access to culturally appropriate services.

While overall picture in the Southwest is similar to that in the rest of the country, states such as California, Colorado and Nevada have worked to ensure that Native American status offenders receive the full protections of the Act. In each of these states the legislature has passed statutes that strengthen the tribal role in status offense proceedings by incorporating the Act into status offense proceedings.⁶³ Additionally, state judicial branches have partnered with firms specializing in Indian law to develop judicial benchguides,⁶⁴ established Act-related rules of court,⁶⁵ and developed trainings for members of the court and law enforcement communities with roles in implementing the Act.

California represents a "model" state for protecting Native American status offenders. Not only does California law provide that the protections of the Act, such as notice requirements, heightened burdens of proof, or rehabilitative services, apply in status offense proceedings, but that the Act also applies in delinquency cases when a child is at risk of entering foster care or in foster care.⁶⁶ This comprehensive approach to the best interest of children is critical to strengthening Native American families. In addition to legal reform efforts, California has led the way in educational advocacy to ensure better compliance with the legal obligations under the Act. California courts have developed a comprehensive website with resources regarding the Act including curricula, in-person training, and distance learning tools.⁶⁷ California counties have developed culturally appropriate programs, policies, and collaborative partnerships to assist Native American families and children. In 2008, the California American Indian Enhancement Project⁶⁸ was established to improve outcomes for Native American families and children in the child welfare system. The work of the project has included strengthening relationships with Native American/Alaska Native youth service providers in an urban settings, collaborative trainings, support and technical assistance to local courts on tribal issues, and serving as a liaison to Native American communities in cases related to the Act.

Sometimes navigating the complicated rules in different proceedings and jurisdictions can lead to confusion by lawyers, parents, tribes, child welfare advocates, policymakers, intake officers, judges, and court officials even in states that have passed some laws protecting status offenders. For example, under New Mexico statute, Native American truant or runaway status offenders are protected under the Act.⁶⁹ Specifically, state statutes provide that in a case involving a family in need of court-ordered services, truant or runaway, the child's tribe shall be notified when the petition is filed. Unfortunately, New Mexico statute does not make it

clear if other status offenses, such as underage drinking or incorrigibility, fall under the protection of the Act. Furthermore, it is unclear if delinquency proceedings that lead to the removal of the child from the home or placement in foster care fall under the protections of the Act. To address this issue, the New Mexico Child Welfare Handbook 39.2.3 provides that, “Delinquency is not covered by ICWA. 25 U.S.C. §1903(1). If, however, the delinquency proceeding may or does lead to removal of a child from home to foster care, ICWA applies. There is no New Mexico case law on this provision (emphasis added).”⁷⁰ While the New Mexico Child Welfare Handbook is a helpful guide for practitioners, without a statute or courts interpreting the Act in this manner, the substantive, procedural and jurisdictional protections of the Act can be applied inconsistently in proceedings for non-truant or non-runaway Native American status offenders.

In states, such as Texas, which have not adopted specific statutes that apply the Act in status offense proceedings, it is important for the Department of Children and Family Services to clearly state a commitment to protecting the procedural rights of Native American children, families and tribes. For example, the Texas Department of Children and Family Services Appendix 1226-A⁷¹ not only provides that child custody proceedings include status offense proceedings under Texas Family Code Title III, but also that Texas follows the Bureau of Indian Affairs Guidelines in child custody proceedings involving Native American children.⁷² Furthermore, Texas courts have stated that any ambiguities between the Act and all regulations, guidelines, and state statutes pertaining thereto are to be resolved in favor of the result that is most consistent with the Act’s preferences of keeping Native American children with their families or other Native American families.⁷³

The Significance of Protecting Native American Status Offenders

Essential to understanding the significant potential harms of inconsistency in the application of the Act’s jurisdictional, procedural, and substantive protections is an understanding that at many stages of their lives, Native American children represent a disproportionately high population within states’ child welfare and juvenile justice systems. In 2010, Native Americans were overrepresented among the national population of youth in foster care by a factor of 2.1; however, rates were much higher in individual states such as Utah, where the factor was 3.5.⁷⁴ Furthermore, from fiscal year 1994 through 2001, Native American youth accounted for 10 percent of federal arrestees age 18 and younger, around 70 percent of all youth committed to the Federal Bureau of Prisons as delinquents and around 31 percent of those committed as adults.⁷⁵ These numbers must be contextualized in the representation of Native American youth in the overall juvenile population, 0.9 percent in 1994, 1.1 percent in 2000, and 1.4 percent in 2010.⁷⁶ Native American youth disproportionately account for cases at many different stages of the juvenile justice system, but overrepresentation is highest when involving the harshest sanctions, out-of-home placement after adjudication and waiver to the adult criminal justice system.⁷⁷

Status Offense Cases in 2008

	Total	Native American
Status offense cases per 1,000 juveniles age 10-upper age	5.1	10.1
Petitioned status offense cases	156,300	4,430
Detained status offenders	92,100	2,860
Percentage of petitioned status offenders that are detained	12,900	590
Total Capacity	8.25%	13.32%

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While this overrepresentation in the juvenile justice system is evident, disproportionality is more aggravated for status offenses. Native Americans had the highest case rate of petitioned status offenses among all racial groups in the United States between 1995 and 2008.⁷⁹ Their case rate at 10.1 is twice that of White children, four times that of Asian children and nearly double the overall national rate of 5.1 per 1,000 children. While this is true collectively for status offenses, Native American children have the highest representation in cases specifically regarding curfew, liquor law and truancy violations.⁸⁰ These three categories in particular realized increases of 28 percent, 32 percent, and 54 percent, respectively, between 1995 and 2008 in the number of petitioned cases.⁸¹ In this way, the disproportionate representation of Native American youth in status offense cases is compounded by the significant increase in the number of petitioned cases precisely for offenses most characteristic of this population.

While Native American youth are disproportionately represented among status offenders, this group bears further burdens given that status offenders are classified as criminal defendants in most states and are detained, adjudicated, and punished in the same manner as juvenile delinquents. Nationally, 12,900⁸² or 8.25 percent of the 156,300 petitioned status offense cases in 2008 involved detention for the offenders. However, the comparable statistic for cases involving Native American youth was 13.32 percent.⁸³ Of all youth incarcerated in both public and private residential facilities in 2010, 3,016 were status offenders and of these, most were classified as ungovernable (1,080), followed by truants (643), and runaways (535).⁸⁴ Furthermore, truancy, for instance, indicates a high propensity towards future delinquent acts or educational failure so incarceration without access to proper services for rehabilitation only perpetuates this disposition.⁸⁵ These numbers, however, do not represent the full extent to which status offenders are incarcerated. In 1980, Congress amended the JJDP A to allow juvenile courts to incarcerate children “charged with or who have committed a violation of a valid court order.”⁸⁶ This expanded authority means many of the 11,604 children incarcerated in secure facilities in 2010 for “technical violations” may be status offenders.⁸⁷ For example, in Utah at least 25 percent of offenders in custody were in custody for technical violations of probation, parole, or valid court orders.⁸⁸

Native American Status Offenders Are More Likely to be Removed from Their Homes

Adjudication of status offense cases that prescribe removal of a juvenile offender from the home may result in a wide variety of placement options. Of the 9,700 cases in 2007, only 3,410 were captured in the national Census of Juveniles in Residential Placement, an informative data set that includes facilities ranging from group homes and shelters to detention centers and long-term secure facilities.⁸⁹ Many of the status offenders surveyed are housed in living units and programs alongside juveniles convicted of murder and rape.⁹⁰

Similarly, of the juvenile population housed in secure detention facilities, it is estimated that one-third are cases involving status offenses or technical parole violations.⁹¹ It is noteworthy that the program and confinement conditions are unknown for status offenders placed outside the home but not ultimately represented in this census. In light of this reality, it is clear that a significant percentage of status offenders are housed outside of their homes, in secure confinement and other detention programs alongside violent juvenile offenders while for a large group of others, placement location and conditions remain unreported.

Native American Youth in Residential Placement in Southwest

	Status Offense	Technical Violation	
2007	21	66	
2010	6	60	92

In 2007, at least 21 Native American status offenders were incarcerated in the Southwest, housed in residential facilities away from their families, their communities and their cultures.⁹³ However, this number only represents a minimum of Native American children placed outside their homes, since the national Census of Juveniles in Residential Placement fails to capture the entire incarcerated population during a given year, only surveying children in residential facilities on the specific census date.⁹⁴ Furthermore, if the possibility that status offenders fall under the technical violation designation, then this lower threshold becomes even more significant. There is no information on whether the procedural, jurisdictional, and substantive protections for Native American youth enshrined in the Act were provided for these children or whether the residential facilities housing them are culturally competent. Moreover, given the purpose, intent and statutory obligations of the Act, there is little justification for this placement of Native American children outside the home in residential facilities, except in the most serious of circumstances.

Removal of Native American Children from Their Homes Harms Children, Families and Tribes

As testimony by David Simmons of the National Indian Child Welfare Association noted, “[B]ecause many of these state and federal detention facilities are long distances from tribal communities, both the tribe and family members may be at a disadvantage as they try to help their tribal youth.”⁹⁵ Similarly, in his testimony before the United States Senate Committee on Indian Affairs, Chairman Dan Eddy of the Colorado River Indian Tribes described how difficult it was for family members in his community to physically visit and maintain a helpful relationship with youth confined in state detention facilities, most of which are hundreds of miles from the reservation community.⁹⁶ He argued that without a regular presence, it can be very difficult for tribes and family members to have a current understanding of the issues that Native American youth in detention are experiencing and how best to address these.⁹⁷

In a study being conducted by the National Indian Child Welfare Association, Prevent Child Abuse of America, and Purdue University, where the link between youth victimization and delinquency are being examined, preliminary results have indicated that practicing and participating in tribal culture, such as speaking tribal language, is key to having a reduced risk of becoming involved in the juvenile justice system.⁹⁸ Public and private residential facilities are simply not equipped to regularly provide this level of support to incarcerated Native American youth and would be hard pressed to, even with a significant increase in resources. As decades of research and best practices in the field have shown, punitive programs that remove youth from their homes and their tribal communities make it harder to address the problems that led to the out-of-home placement in the first place.⁹⁹

It is clear that Native American youth face significant challenges. They are overrepresented in the child welfare and juvenile justice systems, more likely to commit status offenses and more likely to be detained, removed from their homes and placed in residential facilities for their actions. These status offenders pose no threat to society at large, but nevertheless experience high incarceration rates and are housed in facilities alongside serious juvenile delinquents. Given the disproportionate removal and contact of Native American children with the juvenile justice system, there must be consistent statewide compliance with the Act combined with comprehensive and culturally sensitive services.

How States Can Protect Native American Status Offenders

Native American tribes cannot solve this issue alone. The issue of child well-being for Native American status offenders, in the context of multiple legal and non-legal frameworks, requires working across systems. This necessitates collaboration between tribes, policymakers, lawyers, judges, child welfare and juvenile justice advocates, and private and public agencies to develop and promote solutions aimed at ensuring protections of one of the most vulnerable populations of children, Native American status offenders.

Given the diversity of the Southwest, such solutions should be considered on a state-by-state and community-by-community basis to promote culturally appropriate, coordinated services and programs. For example, one solution to fulfilling the Congressional mandates and intent of the Act would be the automatic transfer of all status offense cases to tribal courts, under the presumptive tribal jurisdiction provision, to ensure compliance with the legal requirements and to provide comprehensive and culturally sensitive services. Without the transformation of multiple systems through the implementation of innovative legislation, funding, policies, and programs to ensure compliance with the Act in status offense proceedings, critical tribal perspectives on the best interest of Native American children will not be heard. Such silencing of tribal voices undermines the dual purpose of the Act: to prevent removal of Native American children from their homes, and to promote the stability of tribes. Simply put, this places greater numbers of Native American children at risk.

Revising State Statutes, Rules and Policies

In states that do not have clear statutory requirements for application of the Act in status offense proceedings, there must be revisions to statute, state code, state court rules, and departmental policies. Ensuring that the critical protections for Native American children, families, and tribes are provided in all proceedings, which place a child at risk of being removed from the home, begins with basic compliance with the Act. As the examples discussed above illustrate, adopting clear laws, policies, and protocols is the first step in addressing a lack of systemic adoption and enforcement of the Act's protections for status offenders. The second and more challenging step will be a comprehensive evaluation of compliance with the Act, and state-wide education so that individuals and agencies can more effectively deliver services to Native American children and families.

Comprehensive Data Collection

Comprehensive data collection, analysis, and synthesis are crucial to identifying, understanding, and targeting areas for improvement as well as protecting Native American children, families, and tribes. As evidenced by the statistics above, there is a significant lack of data and evaluation available at the state level addressing compliance with the Act. States are not currently monitoring or accurately tracking the number of Native

American status offenders in the dependency and/or delinquency systems or collecting data regarding case status and adjudication in status offense cases. For example due to the methodology of the Census of Juveniles in Residential Placement, the confinement conditions are unknown for more than half of all status offenders held outside the home in a given year. To ensure compliance with the Act and to protect Native American children, states must develop tools for data collection, including but not limited to, case processing, case status, case disposition, placement status, confinement conditions, and compliance with cultural practices.

Monitoring, Compliance and Accountability

Consistent with the recommendations of the Government Office of Accountability, states must develop and implement monitoring protocols for compliance with the Act. These protocols must pay particular attention to issues of disproportionate representation of Native American children in the child welfare and juvenile delinquency systems. Based on data collected by these monitoring protocols, states must file comprehensive reports documenting compliance efforts with the Administration for Children and Families, Bureau of Indian Affairs, and local tribal communities. These reports should include, but not be limited to, a discussion of annual progress, review compliance with prior compliance and implementation issues, and development of continued program improvement plans.

Education and Training

States must invest in curricula, in-person training, distance learning tools, local education strategies, and state-wide training institutes for all practitioners that come in contact with status offenders on the requirements and protections of the Act. Trainings should be developed collaboratively with tribal communities and publically available, not only addressing the legal protections of the Act and the importance of compliance with the Act, but also providing individuals and agencies with strategies to adopt stronger protocols and policies to more effectively advocate for Native American children in status offense proceedings.

Tribal Community Engagement

Cultural experts believe that for institutions, policies, and programs to improve the lives of Native American children and families, they must have legitimacy, and in order to have legitimacy, they must reflect the individual cultural practices of Native American communities. Therefore, successful programs are those conceived of, implemented by, and generally, in part, funded by tribal communities.¹⁰⁰ Successful tribal youth programs have been implemented across the United States focusing on a diverse range of issues impacting youth with the underlying goals of supporting youth and developing tribal wellness. Such programs must be based on coordinating resources through partnerships, sustained funding, and an engagement with native traditions. By implementing, evaluating, and funding such programs, tribes can better support children and families at risk for coming in contact with the child welfare and delinquency systems. Such preventative strategies must be focused on long-term outcomes.

Conclusion

The passage of the Act was only a beginning step toward the goals of promoting tribal survival and protecting the interests of Native American children. Three decades after its enactment, Congress has still failed to devote adequate resources to address the needs of Native American families and children. At the same time, the perplexing problems faced by state courts in adjudicating cases involving Native American children

demand attention. The ultimate success of the Act will require increased state compliance, consistent monitoring and evaluation, education and outreach, creation of tribal-state partnerships, and dramatic increases in funding for tribal child welfare programs, tribal foster homes, and social services.

¹ Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2006).

² 25 U.S.C. § 1901 (3) (Congressional Findings).

³ 25 U.S.C. § 1901 (1).

⁴ 25 U.S.C. § 1903 (1). There is significant interpretation of what child custody proceedings across the United States, which has caused inconsistency in application of the Act, non-compliance with the Act, and issues with implementation with the Act. For example, see ARIZ. REV. STAT. ANN. § 8-201(10) (2007); ARIZ. REV. STAT. ANN. § 8-201(18) (2007); Ariz. Juv. Ct. R.P. 8(A) (2007); CAL. WELF. & INST. CODE §§ 224.3, 601 (2011); COLO. REV. STAT. § 19-1-126 (2011); NEV. REV. STAT. § 62D.210 (LexisNexis 2011); New Mexico, NMSA 1978 § 32A-1-8 (2009), NMSA 1978 § 32A-1-14 (2005), and NMSA 1978 § 32A-5-4 (1993); In re Interest of J.J.C., 302 S.W.3d 896 (Tex. App. 2009).

⁵ Status offenses are acts, which if committed by an adult, would not be criminal. See González, Thalia, “Reclaiming the promise of the Indian Child Welfare Act: A study of state incorporation and adoption of legal protections for Indian status offenders,” New Mexico Law Review (forthcoming June 2012), Appendix A; Costello, Jan C., and Nancy L. Worthington, “Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act,” Harvard Civil Rights-Civil Liberties Law Review 16 (1981): 41-81; Matthews, Howard T., Jr., “Status Offenders: Our Children’s Constitutional Rights Versus What’s Right for Them,” Comment, Southern University Law Review 27 (2000): 201-213; Steinhart, David J., “Status Offenses,” The Future of Children 6.3 (1996): 86-99.

⁶ Sickmund, M., et al., “Easy Access to the Census of Juveniles in Residential Placement 1997-2010, US & State Profiles” (United States Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2011), <<http://www.ojjdp.gov/ojstatbb/ezacjrp/>>.

⁷ Sickmund, et al., see “Facility self-classification” in the glossary.

⁸ United States, Department of the Interior, “What We Do,” <<http://www.bia.gov/WhatWeDo/index.htm>>.

⁹ O’Hare, William, “The Changing Child Population of the United States: Analysis of Data from the 2010 Census” (Baltimore, MD: The Annie E. Casey Foundation, Population Reference Bureau, Nov. 2011), <<http://www.aecf.org/~media/Pubs/Initiatives/KIDS%20COUNT/T/TheChangingChildPopulationoftheUnitedStates/AECFChangingChildPopulationv8web.pdf>>.

¹⁰ O’Hare.

¹¹ O’Hare.

¹² O’Hare.

¹³ Atwood, Barbara Ann, Children, Tribes, and States: Adoption in Custody Conflicts over American Indian Children (Durham, NC: Carolina Academic Press, 2010); National Urban Indian Family Coalition, “Urban Indian America: The Status of American Indian and Alaska Native Children and Families Today” (Baltimore, MD: The Annie E. Casey Foundation, 2008) <<http://www.aecf.org/~media/Pubs/Topics/Special%20Interest%20Areas/SW%20border%20and%20American%20Indian%20Families/UrbanIndianAmericaTheStatusofAmericanIndianandUrban%20Indian%20America.pdf>>.

¹⁴ Atwood.

¹⁵ National Urban Indian Family Coalition.

¹⁶ Atwood.

¹⁷ National Urban Indian Family Coalition 11 states, “The poverty rate of urban Indians is 20.3 percent compared to 12.7 percent for the general urban population.”

¹⁸ “Data Snapshot on High-Poverty Communities,” *Kids Count Data Snapshot* (Baltimore, MD: The Annie E. Casey Foundation, Feb. 2012), <http://www.aecf.org/~media/Pubs/Initiatives/KIDS%20COUNT/D/DataSnapshotonHighPovertyCommunities/KIDSCOUNTDataSnapshot_HighPovertyCommunities.pdf>.

¹⁹ “Data Snapshot on High-Poverty Communities.”

²⁰ “Data Snapshot on High-Poverty Communities.”

²¹ “Data Snapshot on High-Poverty Communities.”

²² Snyder, Howard N., and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* (Washington, DC: United States Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention and National Center for Juvenile Justice, March 2006), <<http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>>.

²³ O'Hare.

²⁴ Atwood 23.

²⁵ Kids Are Waiting: Fix Foster Care Now and National Indian Child Welfare Association, "Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children" (Philadelphia, PA: The Pew Charitable Trusts, 2007), <http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/NICWARReport.pdf>.

²⁶ Snyder and Sickmund.

²⁷ Hartney, Christopher, and Fabiana Silva, "And Justice for Some, Differential Treatment of Youth of Color in the Justice System" (Oakland, CA: National Council on Crime and Delinquency, Jan. 2007), <http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf>.

²⁸ Draper, Lindsey, et al. *Disproportionate Minority Contact, An Assessment of Disparity in the Wisconsin Juvenile Justice System 2003–2007* (Madison, WI: Wisconsin Office of Justice Assistance, Jan. 2009), <<http://oja.state.wi.us/docview.asp?docid=16877&locid=97>>.

²⁹ Hartney, Christopher, "Native American Youth and the Juvenile Justice System," Focus (Oakland, CA: National Council on Crime and Delinquency, March 2008), <http://www.nccdglobal.org/sites/default/files/publication_pdf/focus-native-american-youth.pdf>.

³⁰ Hartney.

³¹ Hartney.

³² Puzanchera, Charles, Benjamin Adams, and Melissa Sickmund, "Juvenile Court Statistics 2008" (Pittsburg, PA: National Center for Juvenile Justice, July 2011), <<http://www.ncjj.org/pdf/jcsreports/jcs2008.pdf>>. This represents the most current publication of Juvenile Court Statistics.

³³ Atwood.

³⁴ The House Report noted, "[t]he wholesale separation of Indian children from their families [sic] is perhaps the most tragic and destructive aspect of American Indian life today." H.R. REP. NO. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531. The House Report also noted, "Indian child welfare crisis is of massive proportions" H.R. REP. NO. 95-1386, at 9 (1978).

³⁵ S. REP. NO. 95-597, at 11 (1977).

³⁶ S. REP. NO. 95-597, at 11 (1977).

³⁷ United States Senate, Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, *Indian Child Welfare Program, Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction*, Hearing, 8 April 1974, 93rd Cong., 1st sess. (Washington, DC) 3-4, see statement of William Byler, Executive Director, Association on American Indian Affairs.

³⁸ 25 U.S.C. § 1901 (2006).

³⁹ The Act defines "Indian child" as "any unmarried person who is eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2006).

⁴⁰ 25 U.S.C. § 1911(a) (2006).

⁴¹ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

⁴² 25 U.S.C. § 1911(b) (2006).

⁴³ Atwood, Barbara Ann, "Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance," *Emory Law Journal* 51 (2002): 587-676; Graham, Lorie M., " 'The Past Never Vanishes': A Contextual Critique of the Existing Indian Family Doctrine," *American Indian Law Review* 23 (1998–99): 1- 54.

⁴⁴ 25 U.S.C. § 1912(d) (2006).

⁴⁵ 25 U.S.C. § 1915.

⁴⁶ 25 U.S.C. § 1912(e).

⁴⁷ 25 U.S.C. § 1915(e).

⁴⁸ 25 U.S.C. § 1915.

⁴⁹ 25 U.S.C. § 1912(a). One of the purposes of the notice requirement is to enable an Indian tribe to participate in determining whether the child involved in the proceeding is an "Indian child." See *In re Jeffrey A.*, 127

Cal.Rptr.2d 314, 317 (2002). A tribe cannot participate in determining tribal membership unless the tribe is aware of the proceeding. Further, the notice requirement recognizes that Indian tribes have an interest in Indian child welfare proceedings apart from the parties and that the information supplied by the parties regarding the “Indian child” status of the child may be incomplete. See *In re M.C.P.*, 571 A.2d 627, 633 (1989).

⁵⁰ 25 U.S.C. §1911(c).

⁵¹ 25 U.S.C. §1912(b).

⁵² 25 U.S.C. §1912(b).

⁵³ 25 U.S.C. § 1912(d).

⁵⁴ 25 U.S.C. §1912(e)

⁵⁵ 25 U.S.C. § 1912(f)

⁵⁶ S. REP. NO. 95-597, at 16 (1977).

⁵⁷ Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979). The BIA Guidelines were intended to be the Department of the Interior’s interpretation of the provisions of the Indian Child Welfare Act.

⁵⁸ Atwood; Limb, Gordon E., Toni Chance, and Eddie Brown, “An Empirical Examination of the Indian Child Welfare Act and Its Impacts on Cultural and Familial Preservation for American Indian Children,” *Child Abuse & Neglect* 28 (2004): 1279-89.

⁵⁹ Puzzanchera, Adams, and Sickmund.

⁶⁰ González.

⁶¹ Consider the specific example of intake officers. Intake officers are generally charged with a duty to investigate status offense complaints. As part of their investigation, intake officers are charged with a duty to use discretion in weighing whether to recommend a formal petition, to divert the case to another agency, or dismiss the case. While some jurisdictions are very specific about the required extent of the intake officer’s investigation, others do not specify the investigative requirements. Thus, intake officers exercise significant discretion in their gate-keeping function in juvenile court. Although one cannot assume that intake officers will make errors in their investigation, it can be assumed that not all intake officers will contemplate the applicability and requirements of the Act when investigating status offense complaints. This is most likely to occur in states, which have not adopted specific statutes, court rules, or administration guidelines that address the applicability of Act to status offense proceedings.

⁶² ARIZ. REV. STAT. ANN. § 8-201(10) (2007); ARIZ. REV. STAT. ANN. § 8-201(18) (2007); Ariz. Juv. Ct. R.P. 8(A) (2007). While Arizona is the only state to affirmatively state that the ICWA does not apply in status offense cases, when read in totality, the Rhode Island and New Hampshire’s statutes have also removed ICWA from applying in status offense proceedings. For example, Rhode Island specifically defines a “delinquent juvenile” to include a wayward child. R.I. GEN. LAWS § 14-6.1-10 (2003). Under § 14-1-3 (9)(i)-(iv) the definition of “wayward child” includes runaways, truants, and a child who is habitually disobedient to the reasonable and lawful commands of his or her parent or parents, guardian, or other lawful custodian. See R.I. GEN. LAWS § 14-1-3 (9)(i)-(iv) (1995). Thus, when these statutes are read in conjunction, Rhode Island has placed certain status offenses within definition of juvenile delinquency. Such a designation removes the protections of the Act without a court acting outside the text of the Act and applying the non-binding BIA guidelines.

⁶³ California, CAL. WELF. & INST. CODE §§ 224.3 and 601 (Deering 2011); Colorado, COLO. REV. STAT. § 19-1-126 (2011); Nevada, NEV. REV. STAT. § 62D.210 (LexisNexis 2011).

⁶⁴ California Indian Legal Services, “California Judges Benchguide, The Indian Child Welfare Act,” (Escondido, CA: California Indian Legal Services, June 2012), <<http://www.calindian.org/home/113>>.

⁶⁵ See the various rules listed under “ICWA-related California Rules of Court,” of California Courts, “ICWA Laws, Regulations & Rules,” (San Francisco, CA: Judicial Council of California, 2012), <<http://www.courts.ca.gov/8709.htm>>.

⁶⁶ CAL. WELF. & INST. CODE § 224.3 (West 2006).

⁶⁷ California Courts, “Indian Child Welfare Act (ICWA),” (San Francisco, CA: Judicial Council of California, 2012), <<http://www.courts.ca.gov/3067.htm>>.

⁶⁸ California American Indian Enhancement Team, “Implementation Toolkit for the American Indian Enhancement Project,” (Berkeley, CA: American Indian Enhancement Project),

<http://calswec.berkeley.edu/CalSWEC/AIE/AIE_home.html>. “The American Indian Enhancement Team is an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC) resourced through the Annie E. Casey Foundation, the California Department of Social Services, Casey Family Programs, and the Stuart Foundation, in collaboration with the Administrative Office of the Courts, the Child and Family Policy Institute of California, the California Child Welfare Co-Investment Partnership, the California Social Work Education Center, and Tribal STAR. Participating Counties include Fresno, Orange, Riverside, San Diego, and San Bernardino.”

⁶⁹ NMSA 1978, § 32A-3A-2(A) (2005); NMSA 1978, § 32A-3B-2 (2009)

⁷⁰ Corinne Wolfe Children’s Law Center, “New Mexico Child Welfare Handbook” (Albuquerque, NM: Institute of Public Law, University of New Mexico School of Law, 2011) section 39.2.3,

<<http://childlaw.unm.edu/docs/2011%20Child%20Welfare%20Handbook%20-%20August%202011-2.pdf>>.

⁷¹ Texas, Department of Family and Protective Services, *Child Protective Services Handbook, Appendix 1226-A: Child-Placing Requirements of the Indian Child Welfare Act and Related Guidelines and Regulations* (Austin, TX: Department of Family and Protective Services, 2012), <http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_px_1226a.jsp>.

⁷² Texas, Department of Family and Protective Services.

⁷³ *In re J.J.C.*, 302 S.W.3d 896, 900 (2009)

⁷⁴ Summers, Alicia, Steve Wood, and Jesse Russell, “Disproportionality Rates for Children of Color in Foster Care,” (Reno, NV: National Council of Juvenile and Family Court Judges, Permanency Planning for Children Department, University of Nevada, May 2012),

<<http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%202010.pdf>>.

⁷⁵ Snyder and Sickmund.

⁷⁶ Puzzanchera, C., A. Sladky, and W. Kang, “Easy Access to Juvenile Populations: 1990-2010, Population Profiles,” (United States Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2011), <<http://www.ojjdp.gov/ojstatbb/ezacjrp/>>.

⁷⁷ Hartney.

⁷⁸ Data represented in the table is from Puzzanchera, Adams, and Sickmund.

⁷⁹ Puzzanchera, Adams, and Sickmund.

⁸⁰ Puzzanchera, Adams, and Sickmund.

⁸¹ Puzzanchera, Adams, and Sickmund.

⁸² Puzzanchera, Adams, and Sickmund.

⁸³ Puzzanchera, Adams, and Sickmund.

⁸⁴ Sickmund, et al.

⁸⁵ The Act 4 Juvenile Justice Working Group, “The Juvenile Justice and Delinquency Prevention Act: A Fact Book” (Washington, DC: The Act 4 Juvenile Justice care of Coalition for Juvenile Justice, 2007),

<http://www.act4jj.org/media/factsheets/factsheet_27.pdf>.

⁸⁶ 42 U.S.C. § 5633(a)(11)(A)(ii) (2006).

⁸⁷ Sickmund, et al.

⁸⁸ Snyder and Sickmund.

⁸⁹ Sickmund, et al., see “Facility self-classification” in the glossary.

⁹⁰ Sedlak, Andrea J., and Karla S. McPherson, “Conditions of Confinement: Findings from the Survey of Youth in Residential Placement” (Washington, DC: United States Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2010), <<https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>>.

⁹¹ Arthur, Patricia J., and Regina Waugh, “Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule,” *Seattle Journal for Social Justice* 7.2 (2009): 555-576.

⁹² Sickmund, et al.

⁹³ Sickmund, et al.

⁹⁴ Sickmund, et al., see “Data collection methods” under methods.

⁹⁵ United States Indian Law and Order Commission, *Testimony of David Simmons, Government Affairs Director for the National Indian Child Welfare Association*, Field Hearing, 7 September 2011 (Tulalip, WA) 2,

<<http://www.indianlawandordercommission.com/resources/documents/DavidSimmonsTestimony.pdf>>.

⁹⁶ United States Senate, Committee on Indian Affairs, Law and Order in Indian Country, Field Hearing, 17 March 2008, 110th Cong., 2nd sess. (Washington, DC: Government Printing Office, 2008),

<<http://www.gpo.gov/fdsys/pkg/CHRG-110shrg41590/html/CHRG-110shrg41590.htm>>, see statement of Daniel Eddy, Jr., Tribal Chairman, Colorado River Indian Tribes.

⁹⁷ United States Senate, Committee on Indian Affairs.

⁹⁸ United States Indian Law and Order Commission.

⁹⁹ Holman, Barry, and Jason Ziedenberg, “The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities” (Washington, DC: Justice Policy Institute, 28 Nov. 2006),

<http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf>.

¹⁰⁰ The Harvard Project on American Indian Economic Development, “The Context and Meaning of Family Strengthening in Indian America” (Baltimore, MD: The Annie E. Casey Foundation, Aug. 2004),

<http://www.aecf.org/upload/PublicationFiles/fs_indian_america.pdf>.