
19. APPLICATION OF OTHER FEDERAL LAWS

Disclaimer: *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.



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19.1 What is Title IV-B of the Social Security Act?

Title IV-B, Subpart 1, 42 U.S.C. §§ 620 *et seq.* (2000), is a federally-funded grant program that provides money for child welfare services to states and tribes. Title IV-B, Subpart 2, 42 U.S.C. §§ 629 *et seq.* (2000), is a supplemental funding program that provides funding for family preservation, community-based family support, time limited family reunification and adoption promotion and support services for states and tribes.

19.2 Are Indian tribes eligible for direct federal funding under Title IV-B?

Indian tribes are eligible for funding under both Subparts. Under Subpart 1, tribes are eligible for funding in an amount to be set by the Secretary of the Interior. 42 U.S.C. § 628 (2000); 45 C.F.R. § 1357.40 (2007). In Fiscal Year 2004, tribes received \$5.2 million. Under Subpart 2, tribes receive a 3% set-aside. 42 U.S.C. §§ 629f(b)(3), 629g(b)(3) (2000). In Fiscal Year 2007, tribes received \$11.823 million. Tribes are also eligible for competitive grants that would address the impact of methamphetamine abuse upon the child welfare system.

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19.3 What must a state or tribe do to receive Title IV-B funding?

Both states and tribes must submit five year Child and Family Services Plans. Requirements for those Plans can be found in 45 C.F.R. § 1357.15 (2007).

19.4 Do Child and Family Service Plans address the Indian Child Welfare Act?

State plans must provide a description, developed in consultation with Indian tribes in the state, of the specific measures to be taken by the state to comply with the Indian Child Welfare Act (ICWA). 42 U.S.C. § 622(b)(11) (2000). Tribes are not required to address ICWA in their plans. It is also worth noting that state plans must provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed. 42 U.S.C. § 622(b)(9) (2000). Having an adequate number of Indian foster and adoptive homes is critical to a state's ability to comply with the placement preferences in the ICWA.

It is also worth noting that the Children's Bureau within the United States Department of Health and Human Services performs Child and Family Service Reviews (CFSR) of all state systems. The Children's Bureau considers tribes to be important "stakeholders" in this process and tribal representatives are encouraged to participate in the CFSR process through serving on Statement Assessment development teams, participating as consultant reviewers or in case-specific interviews, among other things. Involvement with the CFSR process may be a mechanism for tribes to determine whether states are complying with ICWA.

19.5 What is Title IV-E of the Social Security Act?

Title IV-E is an entitlement program for the states. 42 U.S.C. §§ 670 *et seq.* (2000). It reimburses states for payments to foster and adoptive families if the children in question come from a family below a certain income and the child meets other eligibility criteria. It also funds administrative and training costs associated with administering the foster care and adoptive assistance program for such children. Expenditures for the IV-E program ranged from \$6.4 billion to \$6.8 billion during Fiscal Years 2002-04.

19.6 Are tribes eligible for the Title IV-E program?

Not directly. Although some tribes have negotiated agreements with states pursuant to their inherent sovereign authority or pursuant to § 1919 which allow for the pass-through of federal funding to eligible tribal placements and activities. Although a few agreements are comprehensive, most provide only for payments to the foster parents themselves and do not provide tribes with money for training and administration.

An agreement under § 1919 is critical to the receipt of federal funding. In *Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), the court held that Alaska was not required to reimburse a Native village for payments to a child placed by the village from federal funding received under Title IV-E. The court found that three requirements needed to be met for funding, and the village lacked one of those. First, the home must be state licensed, and the court found that that requirement was met by § 1931(b), which provides that "[f]or purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State." Second, the removal was required to be the result of a judicial determination. The ICWA requirement of full faith and credit to the public acts, records and judicial proceedings of Indian tribes applicable to child custody proceedings was held to meet that requirement. Third, there needed to be an agreement between the tribe and the state, and in this case there was none. Section 1919 authorizes such agreements, but does not mandate them. *Native Village of Stevens*, 770 F.2d at 1489.

Practice Tip: Title IV-E requires that the governmental entity administering the program must provide a match for the federal contribution. The amount of the match is based upon the Federal Medical Assistance Percentage (FMAP) which varies by state as it is based upon the per capita income of the state. In some cases where tribes and states have IV-E agreements, the state has agreed to provide funding to cover the match requirement and has not required the tribe to come up with the match.

19.7 Does Congress attach conditions to the receipt of Title IV-B and IV-E funds?

Yes. Title IV-B and IV-E are the bases for many of the basic statutory requirements of the child welfare system. Although it is beyond the scope of this

Practical Guide to describe all of the requirements, some of the most important are requirements for individual case plans and administrative and legal case review systems with specific timelines, and the establishment of various legal standards, such as the requirements that reasonable efforts be made to keep children in their homes and that a child who is removed must be placed in the least restrictive setting in close proximity to the home of the child’s parents.

19.8 What is the Adoption and Safe Families Act (ASFA)?

The Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), was an amendment to Titles IV-B and IV-E of the Social Security Act, approved in 1997. Its goal was to make the health and safety of children the paramount concern in child welfare systems. It sought to expedite permanent placements for children by providing for adoption subsidies, encouraging concurrent planning, mandating the filing of termination of parental rights petitions when certain criteria are met, creating exceptions to the reasonable efforts requirement, and requiring quicker permanency hearings. It also requires background checks of prospective foster and adoptive parents.

19.9 Are ASFA and ICWA in conflict?

While the philosophical bases for ASFA and ICWA are somewhat different, their provisions are capable of being successfully integrated.

Practice Tip: ASFA provides that a termination of parental rights (TPR) petition must be filed when a child has been in foster care for fifteen of the last twenty-two months, the child has been abandoned or the parent has been convicted of certain violent crimes. There are exceptions to this requirement, however, when the child is being cared for by a relative, the state has a compelling interest for concluding that it would not be in the child’s best interests, or the state has not made adequate reunification services available to the family. Practitioners should be aware that Indian children frequently fall within one of the exceptions. Under the ICWA, extended family is a preferred placement which would place the child under the “relative” exception. Also, the ICWA legal standard is applicable to any TPR proceedings. If the state is unable to meet that standard, that would be a compelling reason not to file a petition. Finally, in evaluating the “failure to provide services” provision, necessary services to be provided to the family would be circumscribed by ICWA’s active efforts

requirement. Thus, failure to adequately utilize appropriate tribal, extended family and community resources could trigger this exception in ASFA.

Practice Tip: ASFA provides that an adoptive placement may not be delayed or denied when an approved family is available outside of the jurisdiction. However, searching for a family within a preferred ICWA category or a petition to transfer the case to tribal court should be considered legal prerequisites to the adoption of an Indian child and not the type of delay targeted by ASFA. It should also be noted that placements “outside of the jurisdiction of the state” would include placements within tribal jurisdiction and the state should not be permitted to delay or deny placement with a family that has been identified and approved by a tribe as an adoptive placement.

Practice Tip: While ASFA does not require reasonable efforts to reunify families in some circumstances, 42 U.S.C. § 471(15) (2000), it does not prohibit such efforts. Since the active efforts provision in ICWA, § 1912(d), would still apply to cases involving Indian children, services aimed at reunification should be provided in all ICWA cases.

For more information on the integration of ASFA and ICWA, see SIMMONS & TROPE, P.L. 105-89 ADOPTION AND SAFE FAMILIES ACT OF 1997: ISSUES FOR TRIBES AND STATES SERVING INDIAN CHILDREN (1999).

19.10 Does ASFA modify or supersede ICWA?

No. There is no provision in ASFA that indicates an intent to modify ICWA or any legislative history that identifies this intent and the preexisting ICWA compliance provision in Title IV-B was not changed by ASFA. The first state supreme court to rule on this issue has confirmed that ASFA does not implicitly modify ICWA. *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611.

19.11 What is the Multi-Ethnic Placement Act (MEPA) (also known as the Interethnic Adoption provision or IEPA)?

The Multi-Ethnic Placement Act (MEPA), 42 U.S.C. §§ 622, 1996b (2000), prohibits any person or government that is involved in adoption or foster care placements from delaying or denying the placement of a child on the basis of the race, color or national origin of the adoptive or foster parent or the child. 42

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U.S.C. §§ 1996b(c)(1), 674(d)(4) (2000). It also requires that state plans provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed. 42 U.S.C. § 622(b)(9) (2000). Having an adequate number of Indian foster and adoptive homes is critical to a state's ability to comply with the placement preferences in the ICWA.

19.12 Does MEPA modify or supersede ICWA?

No. MEPA provides a specific exclusion for placements made pursuant to ICWA. 42 U.S.C. §§ 1996b(c)(3), 674(d)(4) (2000).

19.13 What is the Indian Child Protection and Family Violence Prevention Act?

The Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201 *et seq.* (2000), is intended to strengthen procedures pertaining to and identifies requirements for the investigation and reporting of child abuse and neglect in Indian country. It also requires character investigations and criminal background checks of all federal employees and tribal employees who are employed by tribes that receive funding under Public Law 93-638 (the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f (2000)) that are employed in a position that involves regular contact with or control over Indian children. This provision has been interpreted to require criminal and character background checks for tribally-approved foster and adoptive homes.

19.14 What is the Interstate Compact for the Placement of Children (ICPC) and does it apply to ICWA proceedings?

The Interstate Compact for the Placement of Children (ICPC) is a law adopted by all fifty states, the District of Columbia and the United States Virgin Islands that provides for uniform legal and administrative procedures governing the interstate placement of children. *See, e.g.,* ALASKA STAT. §§ 47.70.010-.080 (2004); CAL. FAMILY CODE §§ 7900-12 (2005); COLO. REV. STAT. §§ 24-60-1801 to -1803 (2001); N.M. STAT. §§ 32A-11-1 to -7 (2005); OKLA. STAT. tit. 10, §§ 10-571 to -576 (2000). The purpose of ICPC is to ensure that children placed out of their home state receive the same protections and services that would be provided if they remained in their home state. Normally, in the case of transfers from one state system to another, the court order from the sending state cannot legally be supervised in the receiving state without obtaining approval through the compact. The ICPC applies to interstate

placements under ICWA when the intent is to have the receiving state supervise the placement. However, tribes are not part of the ICPC and thus if a child is to be placed into tribal custody, the ICPC would not come into play.

Practice Tip: The ICPC is not required in order for a child to be transferred across state lines into tribal jurisdiction. However, if the tribe would like the sending state to continue making payments to the foster family located within tribal jurisdiction, it may contact the state within which it is located and request them to utilize the ICPC for the transfer.

19.15 Can a tribe designate a tribal placement in a state separate from tribal headquarters or the child's state of residency?

Yes.

19.16 When is an Indian child eligible for medical assistance under Title XIX of the Social Security Act?

In a child-only case, if the family from which the child is removed is eligible for Temporary Assistance for Needy Families (TANF) benefits or Title IV-E foster care assistance, the Indian child is eligible for medical assistance under Title XIX. If the family is intact, the children would be eligible if household is income-eligible or meets the Children's Health Insurance Program's eligibility according to each state's criteria.

19.17 How does foster placement of a child outside of the jurisdiction where he or she resides or is domiciled affect the child's eligibility for Indian Health Services contract care funds?

The child should have access to care as long as the Indian child's pre-removal address is within the "on-reservation" or "near-reservation" Indian Health Services contract health service area, the courts have awarded the foster family custody, and the child is a member or eligible for membership with an Indian tribe or has proof of descendant status. If the child is transferred back to the jurisdiction of the tribal court from an area outside the contract health service area the court needs to make the Indian child a ward of the tribal court and declare the child's residence to be on reservation to render the child eligible. The child is always eligible to receive direct services through any Public Health Service facility if Indian status is demonstrated.

19.18 Can funds from the Temporary Assistance for Needy Families Act (TANF) be used to pay for foster care placements?

If the foster care placement is a relative placement, the child and caretaker are eligible for Temporary Assistance for Needy Families Act (TANF) benefits either from the state or the tribe, if the tribe operates the TANF program and the family meets certain financial requirements.

19.19 What other funding may be available for Indian children placed by tribes into foster homes?

If a family is not TANF eligible, the placement may be funded by the Bureau of Indian Affairs (BIA) general assistance monies or tribal funds. Title IV-E or state funds may also be available if there is an agreement between the tribe and a state providing for the use of these funding sources.



**** Access to the full-text of opinions and additional materials is at www.narf.org/icwa ****

The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.

FEDERAL CASES

Circuit Courts of Appeal

Doe v. Mann (Mann II), 415 F.3d 1038 (9th Cir. 2005)

Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985)

Native Village of Venetie I.R.A. Council v. Alaska, 155 F.3d 1150 (9th Cir. 1998)

District Courts

Navajo Nation v. Hodel, 645 F. Supp. 825 (D. Ariz. 1986)

STATE CASES

Alaska

J.S. v. State, 50 P.3d 388 (Alaska 2002)

State v. M.L.L., 61 P.3d 438 (Alaska 2002)

Arizona

Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. 2000)

California

In re M.A., 40 Cal. Rptr. 3d 439 (Ct. App. 2006)

Michigan

In re Miller, 451 N.W.2d 576 (Mich. Ct. App. 1990)

Minnesota

In re T.T.B. (T.T.B. II), 724 N.W.2d 300 (Minn. 2006)

Montana

In re Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1

South Dakota

In re D.B., 2003 SD 13, 670 N.W.2d 67

In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611

Utah

Searle v. Searle, 2001 UT App 367, 38 P.3d 307

