Child Welfare

With regard to child welfare, the Commission received evidence about the importance of resource equity with states (and how increased funding can strengthen Tribes' and Tribal organizations' capacity to address child welfare issues), as well as about the importance of Federal measures to ensure state compliance with the Indian Child Welfare Act.

1 Enhance the capacity of Tribal social services and Tribal courts

The Federal government shall provide sufficient funds and design appropriate processes for distributing those funds so that all Tribal social services and Tribal courts are funded adequately to address child welfare. Tribes should receive full financial support from all relevant Federal sources from which states receive financial support, at levels that are proportionate to their populations and community needs and that create equity with state funding. Thus, Congress, the Bureau of Indian Affairs, the Department of Justice, and the Department of Health and Human Services shall fund, pursue, and implement:

- **An amended process for Tribal access to Social Security Act Title IV-E funds and Family First Prevention Services Act funds, including:**
  - » Streamlined Tribal IV-E applications and reporting requirements, as distinguished from those required for states, appropriate to Tribes' child welfare systems and smaller populations
  - » Provision for Title IV-E agreements with states that allow Tribes discretion to decide which Title IV-E program components to be funded to operate
  - » Waivers for Tribes and Tribal organizations of requirements in state Title IV-E plans that exceed minimum Federal requirements
- Changes in legislation related to state foster care and other supportive funding, if required, so that Tribes and Tribal organizations are able to bill states for maintenance, services, and administrative case management costs when a Native child's case is transferred from state to Tribal court, including but not limited to provisions that:
  - » Allow Title IV-E funding provided by states for foster care, kinship guardianship, or Adoption Assistance services for a Native child under state jurisdiction to follow the child if their case is transferred from state to Tribal jurisdiction.
  - » Provide funding for special education and other social services/behavioral health resources that a Native child in care may require
  - » Include funding for Extended Foster Care for youth aging out of foster care at 18 if the state includes Extended Foster Care in its child welfare program
- Legislative or regulatory changes if necessary to allow for Title IV-E and other Federal child welfare programs to be combined into P.L. 102-477 plans, P.L. 93-638 Self-Determination contracts, and Self-Governance compacts so that Tribes and Tribal organizations are able to use resources in the most flexible, effective, and cost efficient ways possible
- Legislative changes to create a Tribal set-aside and a formula-driven, noncompetitive distribution of funds to Tribes from the Social Services Block Grant (SSBG) and a Tribal-specific, and larger, set-aside for monies distributed to Tribes under the Child Abuse Prevention and Treatment Act (CAPTA) Community-Based Child Abuse Prevention grant program. The overall funding for CAPTA also should be increased to ensure that all Tribes have the capacity to operate a basic child abuse prevention program as states currently have with these funds
- Fully funded Tribal courts, including in P.L. 83-280 states, at documented need, which is annually reported by the Department of the Interior to Congress pursuant to the Tribal Law and Order Act, and expanded funding and scope for Tribal Court Improvement Program funds under Title IV-B
- Appropriations for the creation of appeals processes for Tribal court decisions regarding child welfare in Tribal courts
- Passage of the Tribal Family Fairness Act, which has been introduced in two Congresses—first in the 117th Congress in 2021 and again in the 118th Congress in 2023 as HR 2762

“nəsá?c’əŋ cxʷ means ‘you are my every breath.’ This S’Klallam phrase is specifically meant to be said to children. They are the breath of our future.”

LONI GRENINGER
Jamestown S’Klallam Tribe
Vice Chairwoman, Tribal Council, and Director Social & Community Services
Northwest and Rocky Mountain Regional Hearing, Commission on Native Children

Although Tribal social services and Tribal courts have the authority and desire to manage child welfare cases for Tribal children and families, they do not have access to the same Federal funding as do state and local courts to support either their systems or their Tribal families and children in need. This is true with regard to funding for judges, guardians ad litem, attorneys, and social service case workers and is particularly true with regard to the provision of services for children in foster care, where resources are needed for education support, foster care payments, and intensive services such as therapeutic foster care. In addition, Tribes also need resources for family strengthening that prevent out-of-home placements and for alternative permanent placements when children cannot be returned home to their parents or relatives. As a result, many Tribes are forced to decline jurisdiction to ensure that Tribal children have access to necessary services. The Commission’s recommendation addresses this inequity so that Tribes have access to the same resources to support their children and families as do states and local courts and child welfare systems.

One of the major barriers is the difficulty Tribes encounter in operating direct IV-E programs. While Tribes should be accountable to the U.S. government for IV-E funds, the current administrative and fiscal requirements are more appropriate for the larger populations and programs in states. Therefore, as IV-E is a primary source of funding for state and local governments in supporting child welfare programs, a streamlined process for Tribes and Tribal organizations to access IV-E funding would increase their resources to effectively implement their own child welfare programs.

Additionally, most of the Federal child welfare program funding available to Tribes is limited and discretionary (requiring annual appropriations from Congress that may change from year to year), and at times, Tribes must compete with states or other entities to receive it. Improving Tribal access to funding under the CAPTA grants and SSBG and other Federal sources available to states for child welfare programming, so that they also receive direct noncompetitive formula funding, would narrow the funding gap. Finally, fully funding the interdisciplinary services offered through the Bureau of Indian Affair’s Tiwahe program would also greatly enhance Tribes’ capacities by making it possible for any Tribe that wished to operate its programs in a more coordinated and administratively reasonable manner to do so.

CASE STUDY

PORT GAMBLE S'KLALLAM TRIBE CHILD WELFARE PROGRAM

In 2012, the Port Gamble S'Klallam Tribe (PGST) became the first Tribe in the U.S. to enter into a direct agreement with the Department of Health and Human Services to operate its own Social Security Act Title IV-E program governing guardianship assistance, foster care, and adoption assistance. While significant for Tribes across the U.S. and important to the capacity of the PGST to serve its citizens, this administrative and financial agreement also should be understood as the next logical step in PGST's progress toward full self-determination over child welfare and family services.

In the 1980s, PGST initiated a concerted effort to reassert sovereignty over the future of S'Klallam children by developing its own Tribal Child Welfare Program. Then, in 2003, it worked with the State of Washington to broaden the definition of "family" for emergency and foster care placements to include "Tribe." PGST also Indigenized its own child welfare laws and regulations:

- The Tribal code requires that child custody determinations consider how children "will maintain significant contact with parents, siblings, grandparents, other extended family members and the Port Gamble S'Klallam community" and notes that children should be given "an opportunity to learn about and participate in the S'Klallam way." Guardianship provisions clearly state that "the care of children is both a family and Tribal responsibility."

- The PGST code governing the termination of parental rights is much more stringent than state rules and does not impose timelines for permanency. Fostering and guardianship agreements offer stability for children without excluding parents, who are expected to "keep working toward being a good parent and offering whatever they can to benefit their children."

Administratively, PGST deliberately placed its Child Welfare Program within its integrated Children and Family Services Department (CFS), which manages a wide array of connected and complementary programs: youth services (including prevention activities, after school programming, Independent Living Services, Education and Training Vouchers, and parent/child retreats); elder activities (including congregate meal service, elder trips and social events, and chair volleyball); child support; vulnerable adult case management; protective payee support; Adult Protective Services investigations; special needs case management; Temporary Aid to Needy Families; SNAP Pilot Project; Maternal Home Visiting Program; WIC; and a Kinship Navigator who works as part of the child welfare team. Within this broader, supportive setting, the Child Welfare Program is made up of a child welfare manager, investigator, and family care coordinators; as the touch points closest to families, the family care coordinators are able to offer services via a holistic and preventive approach rather than in a piecemeal, program-by-program fashion.

By focusing on prevention and establishing a trusting relationship with the Tribal community, the PGST child welfare team has been able to reduce dependency caseloads to an all-time low of 6 active dependencies (down from 60 in 2012) and 21 guardianships. PGST recently became the first Tribe in Washington state and the fourth in the nation to have an approved Family First Prevention Services Plan, allowing them to bill for prevention services.

The exercise of self-determination and sovereignty over child welfare has had a transformative impact on PGST families and children. Parents are never punished for admitting they cannot care for their children and are encouraged to seek services. The Tribe has been able to increase the number of foster homes and halt the steady rise in the number of S'Klallam children placed in court-ordered care. As a result of all of its efforts, the number of Tribal dependency cases fell from 60 in 2012 to six in 2023.

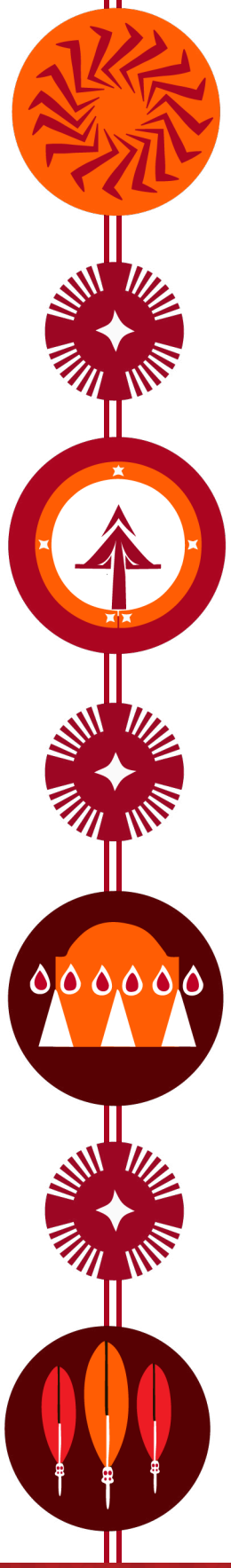
2 Ensure compliance with the Indian Child Welfare Act

Federal and state government agencies shall be required to adopt and implement policies and procedures that promote greater state compliance with the Indian Child Welfare Act (ICWA), long considered the gold standard for child welfare practice, to better ensure Indian child and family wellbeing and limited removal of children from their families and/or communities. Such policies and procedures shall include:

- Efforts to support the inherent authority of Tribal courts to make decisions about their children, such as removing barriers to transfer to Tribal court
- Training and technical assistance on ICWA requirements and best practices for state child welfare agencies and courts, developed and delivered by Native professionals with appropriate content area and local community expertise
- A requirement that the U.S. Department of Health and Human Services (HHS) collect data from the states on their implementation of ICWA, utilizing, without exclusion, the Adoption and Foster Care Analysis and Reporting System (AFCARS) and Child and Family Services Review as vehicles for new data collection. The data collected should be used to measure state ICWA compliance, performance improvement plans, and demonstrate progress on improvement, including, but not limited to, diligent inquiry, notice, Tribal intervention, active efforts, placements, transfer of jurisdiction, and permanency
- A requirement that HHS assess states' progress in ICWA compliance improvements and make achieving benchmarks in improvement plans either a condition of receiving IV-E or other Federal child welfare funding or a condition of receiving additional funds as an incentive for improved compliance
- A requirement that in cases where a Native child is adopted by a non-Native family, state court orders shall include an enforceable provision (for example, a Post-Adoption Contact Agreement and Culture Plan), to preserve connection to the child's Native community
- A requirement for diligent and documented inquiry before a court makes a finding that a child is not eligible for membership and therefore ICWA does not apply based on current information
- Implementation of Administration for Children and Families (ACF) Policy Manual Question 31, which ensures that states may subaward IV-E funds to Tribes to pay for attorneys to represent Tribes in state child welfare cases
- Funding and resources to create specialized ICWA courts and to lower attorney and social worker caseloads in those jurisdictions with higher Native caseloads
- Funding and resources to create Tribal-state joint jurisdiction wellness and child welfare courts
- Technical and financial support so that Tribes and Tribal organizations have stable infrastructure and capacity to identify and maintain access to ICWA compliant homes, thus providing an incentive to states to use such homes for out-of-home care
- Adherence to the provisions of ICWA related to parents' wishes

In order to achieve the goals of ICWA, the Bureau of Indian Affairs must work closely with relevant Federal agencies such as ACF to focus on child and family *wellbeing* planning with birth parents and relatives and ensure recruitment and engagement of culturally competent state and Federal staff (through, for example, ICWA Specialist certification training for state and local child welfare workers). HHS also should use its power to hold states accountable for compliance with ICWA through AFCARS, auditing, and other monitoring mechanisms including, without limitation, state IV-B plans, Annual Progress and Services Reviews, and Child and Family Services Reviews. Further, the Commission recommends specialized ICWA courts, which are state or county courts that handle ICWA cases in one docket and in collaborative ways by engaging with Tribal partners and other stakeholders. These courts have designated staff, designated locations, and often, designated days of the week and robust remote appearance capabilities to best accommodate Tribal participation.

An important component to ensuring that children maintain connection with their Tribal community can be achieved through a Post Adoption Contact Agreement (PACA, see California Family Code §8616.5) or similar mechanism, by which a state court order requires that non-Native adoptive parents continue the child's relationship with the Tribe. PACAs are focused on connectivity beyond family such as contact with cultural learning and experience, receipt of benefits in the event of birth parent death (heirship), and guidance on sensitive topics like name changes and haircutting. These arrangements address at least one negative impact on Native children resulting from "adopting out"—undermining positive Native identity development—which in turn may mitigate suicidality and other destructive behaviors that can arise as Native youth age in non-Native foster/adoptive homes.



3 Strengthen advocacy for Native children in child welfare cases

Because children in child welfare cases are the only parties not appointed counsel at public expense, Congress shall fund and state and Tribal governments shall improve the advocacy resources available to Native children and youth by appointing advocates, which shall be a guardian ad litem (GAL) and a separate attorney for every American Indian, Alaska Native, and Native Hawaiian child involved in a state or Tribal welfare system. To be effective, these advocates must have knowledge of and receive specialized training in cultural intelligence, the Indian Child Welfare Act (ICWA), Native family connections and relationships, and be familiar with the customs and traditions of the Tribe where the child is enrolled/enrollable and/or of the Native community where the child lives.

- **In all child welfare cases under state jurisdiction that involve an American Indian, Alaska Native, or Native Hawaiian child, judges shall appoint 1) a GAL for the child, who will serve at public expense and whose responsibility is to recommend to the court what is in the best interest of the child; and 2) an attorney for the child, who will serve at public expense and whose responsibility is to convey the child's wishes to the court, including where the child would like to live and other vital matters. Compliance with this mandate shall be a condition of the receipt of ongoing state Title IV-E funding.**
- **In all child welfare cases under Tribal jurisdiction, Tribal court judges shall appoint and Congress shall appropriate funds for 1) a GAL for each child, who will serve at public expense and whose responsibility is to recommend what is in the best interest of the child; and 2) an attorney for the child, who will serve at public expense and whose responsibility is to convey the child's wishes to the court, including where the child would like to live. Congress shall appropriate sufficient funding to cover the costs of attorney and non-attorney Tribal GALs and separate attorneys for children and youth as part of Title IV-E or provide a noncompetitive grant program for Tribes to cover these costs, if such representation is appropriate in the context of the child's case and the Tribe's chosen method of addressing such cases.**

Although states are required to provide a GAL in child welfare cases, not all do so consistently. The Commission believes that it is important for a GAL to be appointed in each case involving a Native child, but it is equally important for that GAL to have a deep understanding of ICWA and of the emotional, social, and cultural circumstances of the Native child, including that child's Tribal connections. The Commission also recommends that GALs be appointed in Tribal cases but recognizes that Tribes do not have the same resources for establishing GAL programs as states do. For example, Title IV-E funds, even if available to the Tribes, may only be used to remunerate attorney GALs—a requirement that can pose a problem in some Native communities and should be removed. The Commission also notes that where Tribes use alternative dispute resolution venues such as peacemaking courts, GALs may not be necessary; an alternative more suitable to the Tribal court may be an appropriate substitute.

The Commission further recognizes that states and Tribes vary with regard to their provision of counsel to children and youth involved in state child welfare systems. However, the National Council of Juvenile and Family Court Judges and the National Association of Children's Counsel has found that access to counsel whose role is to express a child's wishes to the court strengthens that child's sense of agency in decisions concerning placement and contributes to more successful outcomes when such children age out of foster care.

Without adequate resources, Tribes will not have the ability to provide GALs or attorneys for children. Thus, such funding should be provided either as part of an expanded and simplified IV-E program for Tribes (see Recommendation 1) or as a noncompetitive grant program.

4 Follow local community standards for Native foster and kinship placements

State government licensing agencies shall ensure that local American Indian, Alaska Native, and Native Hawaiian community standards are used in the licensing of Native foster or kinship homes by, for example, incorporating local community standards in licensing rules and regulations and making liberal use of waivers.

In order to ensure that states and local agencies do not inadvertently apply standards that create barriers to Native foster or kinship placements, it is important to utilize the standards of the communities in which the children and families live. The Fostering Connections to Success and Promoting Adoptions Act of 2008 (P.L. 110-151) expresses a limited version of this idea by allowing states and Tribes to waive non-safety standards used in licensing relative placements. The idea is further developed in Federal regulations approved in September 2023 that allow states and Tribes to establish separate licensing standards for relative and kinship foster homes. The Commission's intent is to ensure that local Native community standards are used in licensing all Native foster homes, aligning with the more expansive understanding of relatives and kin that exists in many Native communities.

5 Promote family dependency treatment courts

Congress shall appropriate sufficient funds to state and Tribal courts on a noncompetitive basis through the Departments of Justice, Interior, and Health and Human Services for the ongoing and expanded use of family dependency treatment courts (also sometimes called family drug courts, healing to wellness courts, peacemaking circles, or other similar names) or other courts to address child welfare as the Tribes so choose for American Indian, Alaska Native, and Native Hawaiian communities.

Over the past several decades, research has shown that treatment courts, which provide more intensive judicial intervention and greater access to substance abuse treatment, produce higher rates of success in child welfare cases. These types of courts, which include healing to wellness, circle peacemaking, and family drug courts, also often are more consistent with holistic Native approaches to wellbeing that involve the community. However, these courts generally are supported with competitive short-term grant funding, which limits the sustainability of these important options. Noncompetitive, long-term operating funds are essential for transforming the child welfare system at both state and Tribal levels.

CASE STUDY

THE YUROK TRIBE'S JOINT JURISDICTION COURTS

In an effort to promote and elevate holistic, culturally appropriate approaches to family healing, the Yurok Tribe has joined with the California state judicial system to create joint jurisdiction courts. These partnerships provide a framework for Tribal and state court judges to adjudicate certain juvenile justice and child welfare cases in a collaborative manner. They also establish an avenue for Tribal citizens to receive much-needed supportive services from both the Tribe and the county, resulting in a multifaceted approach to achieving better outcomes for children, youth, and families.

Youth Diversion is a collaboration among the Yurok Tribal Court, Del Norte County Superior Court, and Del Norte School District to address truancy. If a Yurok youth is determined to be at high risk of entering the juvenile justice system due to truancy, high absenteeism, and/or an inability to obtain or successfully complete an Individual Education Plan, the program provides the individual and their family with access to legal and other supportive services.

The *Joint Family Wellness Court* is the product of a joint powers Memoranda of Agreement among

Del Norte Superior Court, Yurok Tribal Court, and the Yurok Human Services Department intended to better respond to the opioid crisis by creating an alternative to the state child dependency court. (Note: The Yurok Reservation is in two counties, and the Yurok Tribe also has an agreement with Humboldt County that mirrors the Del Norte County agreement.) The court's mission is to empower families to make healthy decisions and break the cycles of addiction and of child abuse and neglect. It is presided over by both a Tribal court judge and a state court judge; operates under California state law, Federal law, and Yurok Tribal law; is informed by Yurok traditions and culture; and through its combination of justice system supervision with rehabilitation services, embraces aspects of Tribal healing to wellness and collaborative justice. Key components include:

- A coordinated team approach
- Comprehensive, culturally competent services
- Frequent monitoring
- Creation of support systems for family recovery and child wellbeing

Through the Youth Diversion and Joint Family Wellness Court initiatives, Yurok children, youth, and families experience holistic, intervention-based, and prevention-oriented care, thus promoting wellness and resilience for the entire Yurok community and strengthening the next generation.

“Tribal courts face chronic underfunding, which is a significant challenge. When looking at the challenges in family court, it becomes evident that, both economically and morally, it’s better to invest upfront in prevention than to spend resources on a cure. The focus is on preventing children from entering the child protection stream.”

ERIC MENHERT

Chief Judge, Penobscot Nation Tribal Court

Eastern Regional Hearing, Commission on Native Children