

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment makes the following changes:

- 1) It adds “a foster parent with whom a child has resided for at least twelve months” to the group of individuals who may petition to intervene in court proceedings subject to the act, and
- 2) In Section 53 of the act, it removes amended language in Children’s Code, Section 32A-4-27 regarding persons permitted to intervene in abuse and neglect proceedings, exempting Indian children from the provisions of that section. Thus the section again applies to all children, including Indian children.

Synopsis of SIRC Amendment

The Senate Indian, Rural and Cultural Affairs Committee amendment makes changes throughout the body of the 74-section document, as indicated below (it also makes some cosmetic changes to correct typographical or stylistic miscues, but these are not detailed in this summary):

1. (Sec. 2) Adds permanent guardianship and kinship guardianship to the types of child custody proceedings in the definition.
2. (Sec. 3) Removes federal law as a determinant of eligibility of a child for tribal membership.
3. (Sec. 4) Adds team decision meetings to the list of services for which notification to Indian tribes is required.
4. (Sec. 4) Specifies that *every* department’s efforts to maintain or reunite the Indian child with his/her family is to be recorded by the court.
5. (Sec. 6) States that tribal membership is at the direction of the parent or tribe, and that the department (CYFD) does not determine tribal membership.
6. (Sec. 13) Adds a requirement that probable cause is the standard of proof for establishing legal custody in a court proceeding.
7. (Sec. 14) Adds a paragraph indicating that intervention by a family member, guardian, or Indian custodian should be allowed to occur unless it can be shown that a plan for reunification is in progress and would be impeded by the intervention.
8. (Sec. 17) Adds the requirement that a qualified expert witness be able to testify whether a child’s continued custody with a parent, guardian or Indian custodian would cause emotional or physical damage.
9. (Sec. 17) Reduces the allowable time after notice to a tribe to 15 days to allow an investigation to proceed.
10. (Sec. 17) Reduces the time from filing a petition to qualifying an expert witness to 30 days (from 60 days).
11. (Sec. 17) Eliminates paragraph H giving the qualified expert witness the duties of becoming acquainted with a case and then providing comments on it to the court.
12. (Sec. 18) The tribe is to be notified of its right to intervene, not the department’s right.
13. (Sec. 19) Moves a section dealing with mediation from Section 21 to this section.
14. (Section 20) Adds to the sections of this act which must be followed in order to avoid invalidation of a court action: now includes Sections 4, 5, 7, 9, 12, 13, 14, 17, 18, 19, 21, 28, 34 and 35. (Added sections italicized.)
15. (Sec. 35) Clarifies that when relationships between *adoptive* parents and Indian children are severed, that biological parents, guardians, or custodians may petition for custody.
16. (Sec. 36) Clarifies that courts shall allow testimony to all parties including the Indian tribe regarding the best interests of the child.

17. (Sec. 38) Clarifies that it is the “prospective adoptive parent” who must provide a decree of adoption or other information required by this act.
18. (Sec. 40) Removes the Kinship Guardianship Act as supplemental to the IFPA.
19. (Sec. 43) Adds two new sections regarding determination as to whether a child an Indian child:
 - a. CYFD must make active efforts to determine if a child taken into custody is an Indian child, and
 - b. At every Children’s Court proceeding, Courts must determine in writing if IFPA applies to the case.
20. (Sec. 43) Adds another reason why a court may determine that a child may be an Indian child: that a tribe states that the child may be eligible for membership, and states that *any* party to the action may inform the court that the child is an Indian child.
21. (Sec. 43) Removes a paragraph entitling a parent, guardian or Indian custodian right to court-appointed counsel if found to be indigent. It is replaced with a new section defining “Indian organization” as used in this act.
22. (Sec. 74) Establishes the effective date of all new sections except Section 22 as July 1, 2022, but Section 22 (which deals with training for all in the juvenile justice system on IFPA provisions) takes effect on July 1, 2023.

Synopsis of Bill

The House Health and Human Services Committee Substitute for House Bill 135 provides an addition to the Children’s Code entitled the “Indian Family Protection Act”. The act consists of 74 sections and consolidates provisions specific to child support proceedings involving Indian children within the act. The act also provides additional requirements governing child custody proceedings involving Indian children. The act is in general related to the federal Indian Child Welfare Act, establishing and in some cases strengthening the provisions of that 1978 law ((25 U.S.C. ch. 21 § 1901 et seq). It also addresses some of the terms specified in the 2019 *Kevin S Settlement*.

IAD points out that the proposed act would respond to the need to strengthen case and court procedures involving Indian children. HB135 would address the concern about “the high number of Indian children placed outside their family or their tribe. The removal of AI/AN children usually results in a disconnect from their extended families, their tribal communities, and their cultural identity.”

Section 1 provides the short title of the act.

Section 2 contains definitional sections for the act, including “child custody proceedings,” “cultural compact” (which includes making an agreement where a child’s indigenous heritage is respected, as agreed upon between the tribe and the non-tribal adopting parents or guardians), “fictive kin” (meaning a non-relative with which a child has a family-like relationship) and “extended family member” (according to the law or custom of the tribe, or, lacking that, a closely related person at least 18 years of age.

Section 3 provides that in a custody proceeding involving an Indian child, the state court must communicate with the relevant tribal court to determine and make an order of the domicile and residence of the child and whether the child is under the jurisdiction of a Tribal Court.

Section 4 requires CYFD to engage in certain mandatory “active efforts”, working with the family and tribe, to reunite an Indian child with their tribe and requires documentation of those efforts, which should include efforts to aid the family through a plan worked out with the family, using culturally appropriate services and keeping siblings together whenever possible. The section also prohibits the department from seeking findings of futility or aggravated circumstances, and the court from granting those findings. The court must ascertain that CYFD has made appropriate “active efforts.”

Section 5 requires notice to be given to the relevant Indian tribe of child custody proceedings when an Indian child is involved. The notice must be provided by certified mail, with the tribe to respond – if the tribe does not respond, the court case can continue.

Section 6 requires that when a child is taken into custody by the department, the department must take certain affirmative steps to determine whether the child is an Indian child, with determination of tribal membership according to criteria determined by the relevant tribe.

Section 7 provides for jurisdiction and transfer of jurisdiction in proceedings involving an Indian child. Children living on Indian land are under the jurisdiction of the tribe; if the child is not living on a reservation, the court should determine if the tribe wishes to assume jurisdiction, and if not, may proceed. The department must provide necessary information for an involved tribal court to proceed.

Section 8 discusses tribal-state agreements for the coordination of care and custody of Indian children and requires the department to make good faith efforts to enter into these agreements, with each tribe within the state, and with tribes beyond the state’s borders depending on where the tribe is located.

Section 9 requires the state to give full faith and credit to the public acts, records, and judicial proceedings within an Indian tribe’s jurisdiction.

Section 10 gives Indian children the same right to services as any other child in the state, with the expenses paid by the same mechanisms as for non-tribal children within the state.

Section 11 discusses the circumstances under which a court shall have temporary emergency jurisdiction over an Indian child and the necessity of communication with the tribal court in the interests and safety of the child.

Section 12 details what steps the department must take to coordinate with a tribe when conducting an investigation regarding an Indian child, including notifying the tribe within a specified interval after initiating the investigation as well as of the results of the investigation, and of attempts to place the child with relatives or fictive kin.

Section 13 details notice, evidentiary, and language access requirements (including providing an interpreter in the case of the family members being of limited English proficiency) of Court proceedings when an Indian child is involved. Again prohibits the use of findings of futility or of aggravated circumstances. Details the steps required to prove that an Indian family is unfit to keep a child, and that evidence must be given of likely emotional or physical danger if the child is left with his/her birth family. Family characteristics such as poverty or isolation are not to be used as basis for custody removal.

Section 14 gives tribes the right to intervene in proceedings subject to the IFPA and gives direction to the court on how to determine, based on a child's best interests, whether to allow intervention, taking into account the "active efforts" that have been made by CYFD.

Section 15 requires child custody petitions, motions, and documents to include information concerning the Indian child's tribal affiliation and the department's active efforts to contact the tribe and to abide by the requirements of this act. This section prohibits the court from considering aggravated circumstances.

Section 16 requires the court to make a record of the Indian child's tribe(s), determining of which tribe the child has the closest ties in the case of mixed heritage, though other tribes of which the child could be a member can also intervene.

Section 17 requires qualified expert witnesses to be utilized by the court to determine a child's Indian status and the deadlines and timelines for when tribes need to be notified of the expert's identity and knowledge of tribal characteristics. Tribes are given the right to question the qualified expert witness and to name additional qualified expert witnesses in addition to the CYFD-nominated witness. CYFD employees would not qualify to be qualified expert witnesses.

Section 18 discusses requirements for voluntary termination of parental rights, consent, withdrawal and the processes for determining whether the parental consent stemmed from fraud, or duress. Parents must give informed consent in the case of voluntary out-of-home placement, and must give assent to children's participation in religious or other cultural practices while in temporary placement. Temporary placements cannot exceed 180 days in length, or total more than 365 days in any two-year period. Parents who have consented to voluntary placement will have visitation rights and the right to make important decisions regarding the child in such important matters as medical and legal decisions.

Section 19 applies to termination of parental rights of an Indian child, mandating notice to the tribe, which will be given the right to suggest an alternative permanency plan. Parents can dispute the termination action if they allege fraud or duress in the process.

Section 20 allows for parties to attempt to invalidate court action by a family member or by the child himself/herself if certain sections of the act are violated.

Section 21 discusses foster care, permanency, and adoption placement preferences and requirements, specifying placing a child in the least restrictive environment and most family-like environment, preferably close to the Indian child's home and family. If the foster arrangement does not fit the priorities described in this section, the court must reconsider the placement every six months, and must take into account the wishes of the Indian tribe.

Section 22 requires the Administrative Office of the Courts to work with the department to develop and deliver annual mandatory training regarding the provisions of the act and characteristics of the nearby tribes to all judges and attorneys involved in children's court proceedings, as well as to non-Native foster parents in certain circumstances.

Section 23 requires any household into which an Indian child is placed to enter into a cultural compact with the child's tribe, if the household does not include a parent who is a member of

the child's tribe. The contents of the compact have to do with maintenance of the tribe's cultural practices in the family that adopts or is serving as guardian for the child.

Section 24 requires transition services for Indian children aging out of foster care at age 17. CYFD is to be involved in the planning for services to be provided to the child when s/he reaches the age of 18.

Section 25 outlines the requirements for a discharge hearing when an Indian child is turning 18. The Court may maintain jurisdiction if it has found that the precepts of the Indian Family Protective Act have not been followed; otherwise it may dismiss the case.

Section 26 details requirements specific to the act for predispositional studies and reports, which would include compliance with the Indian Family Protection Act and attempts to keep family members together.

Section 27 outlines requirements for permanency hearings and permanency review hearings, with CYFD having to demonstrate compliance with the act and having followed the placement preferences of the tribe.

Section 28 has new requirements for findings a court must make at the conclusion of dispositional hearings regarding child custody determinations under the Family in Need of Court-Ordered Services Act or the Abuse and Neglect Act, that the child's cultural needs have been met and the involvement of the tribe in those determinations, and efforts that have been made to avoid the breakup of the Indian child's family.

Section 29 requires findings to be made to determine compliance with the act during periodic reviews, the first to take place within 60 days of disposition, and whether the procedures for placement preferences have been followed.

Section 30 details requirements for motions for permanent guardianship, including the tribal affiliations of the parents and attempts to comply with the placement preferences in the act.

Section 31 requires a person to meet CYFD standards prior to being certified to conduct pre-placement studies for Indian child adoptions.

Section 32 has new requirements for termination proceedings in independent adoptions, including the specification of the attempts made to satisfy the placement preferences and to meet the requirements of the act.

Section 33 requires consent from the Indian child involved or his/her parent or guardian in independent adoption and relinquishment proceedings.

Section 34 discusses adoptions of Indian children, criteria for adoption, and notice requirements. Parents must be involved, and can petition the court for reversal if the consent was obtained through coercion or deceit. Parents may also withdraw their consent for voluntary adoption at any time prior to the final decree.

Section 35 allows for a presumption of the return of an Indian child who has been adopted to their biological parent, guardian, or prior Indian custodian if it is in the best interests of the

child.

Section 36 lists factors to be used to make a determination of an Indian child’s best interests, including preventing unnecessary out-of-home placements, maintaining the child’s cultural ties and the well-being of the child.

Section 37 gives an Indian tribe access to an Indian child’s post-decree adoption records. If the adoption occurred before the federal ICWA was passed and signed, then the person wishing the information may apply to the secretary for access to that information.

Section 38 requires attorneys and court clerks to provide specified Indian child adoption information to the CYFD secretary.

Section 39 keeps records and information in Indian child proceedings confidential and closed to the public but leaves them open to specified persons including the Indian child’s guardian ad litem and the Indian child’s tribe, provides for penalties for disclosure, and requires the department to promulgate rules to implement the section. Parents in particular are to be allowed access to any of the records, with the reporting party’s identity hidden.

Section 40 discusses conflict of laws issues, especially with the federal Indian Child Welfare Act (25 U.S.C. ch. 21 § 1901 et seq), ceding precedence to the federal law.

Section 41 creates an office of tribal affairs within CYFD.

Section 42 directs the department to work with Indian nations, tribes and pueblos to promulgate rules to implement the act.

Section 43 requires courts to inquire and document as to a child’s being an Indian child, with efforts to be made by the department to determine if the child is indeed an Indian child, if there is any question. Specifies methods to be used by the court to ascertain tribal membership.

Sections 44 through 69 revise sections of the Children’s Code to ensure that the act coincides with the provisions of the code:

Section of HB135	Section of law amended	Provisions
44	32A-1-4	Definitions, including of “active efforts”, “extended family members”, “Indian”, “Indian tribe,” member” (as being determined by the tribe)
45	32A-1-8	Adds specifics to require Courts to apply the precepts of the Indian Family Protection Act, which will take precedence over other portions of the Children’s Code
46	32A-1-11	Requires petitions to include reference to compliance with the Act.
47	32A-3B-16	Dispositional judgements: in this section, references to Indian children are removed as redundant.
48	32A-4-6	When a child is taken into custody, active efforts must be made to identify Indian children.

49	32A-4-18	Regarding custody hearings, reference to the federal Indian Child Welfare Act is removed.
50	32A-4-21	Regarding neglect and abuse predispositional hearings, reference to the federal Indian Child Welfare Act is removed.
51	32A-4-22	Regarding disposition hearings in cases of abuse or neglect, reference to the federal Indian Child Welfare Act is removed.
52	32A-4-25	Regarding periodic review of dispositional judgements, reference to the federal Indian Child Welfare Act is removed.
53	32A-4-27	Permission to intervene in abuse or neglect proceedings exempts from Indian children from the list of allowed interveners.
54	32A-4-28	In terminating parents' rights, CYFD may not base a motion on the fact that the child is an Indian child and reference to the federal Indian Child Welfare Act is removed.
55	32A-4-29	Regarding termination proceedings, removes language referring to the federal ICWA, substituting the provisions of the Indian Family Protection Act.
56	32A-4-32	Regarding permanent guardianship, removes language referring to the federal ICWA, substituting the provisions of the Indian Family Protection Act.
57	32A-4-33	Regarding confidentiality, removes language referring to the federal ICWA.
58	32A-5-7	Regarding the duties of the clerk of the Court, removes language referring to the federal ICWA.
59	32A-5-13	Regarding independent adoptions, removes language referring to the federal ICWA, substituting the provisions of the Indian Family Protection Act.
60	32A-5-15	Regarding termination of parental rights, removes language referring to the federal ICWA.
61	32A-5-16	Regarding termination procedures, removes language referring to the federal ICWA.
62	32A-5-17	Regarding persons whose consents or relinquishments are required, removes language referring to the federal ICWA.
63	32A-5-21	Regarding form of consent or relinquishment, removes language referring to the federal ICWA
64	32A-5-26	Regarding petitions, removes language referring to the federal ICWA.
65	32A-5-27	Regarding notice of petitions, removes language referring to the federal ICWA.
66	32A-5-28	Regarding responses to petitions, removes language referring to the federal ICWA.
67	32A-5-36	Regarding adjudication and decrees of adoption, removes language referring to the federal ICWA.
68	32A-5-40	Regarding access to records after adoption decrees, removes specific language referring to Indian children.
69	40-10B-5	Regarding who may file petitions, removes language referring to the federal ICWA, substituting the provisions of the Indian Family Protection Act.
70	40-10B-6	Regarding services of petition, removes language referring to the federal ICWA, substituting the provisions of the Children's Code.
71	32A-1-14 and 32A-3B-6.1	Repealed: 32A-1-14 deals with "notice to Indian tribes" and 32A-3B-6.1 with preferences for Indian child placement, both of which become redundant with passage of this bill.

Section 72 establishes severability of this act.

Section 73 applies Section 8 of the act to all tribal-state agreements occurring after July 1,

2022.

Section 74 provides for an effective date of July 1, 2022.

FISCAL IMPLICATIONS

There is no appropriation in House Bill 135. It is likely that both CYFD and AOC will incur costs related to the promulgation of these regulations and the necessity for enhanced procedures relative to Indian children, but because they are already following the precepts of the federal Indian Child Welfare Act, these costs are likely to be small.

AOC indicates an uncertain cost of implementing the IFPA: “HB 135 does not provide an appropriation, however many of the sections may require significant resources by the Judiciary, CYFD and potentially the Public Defender Department. Most, if not all, court hearings would become testimonial and include mandatory expert testimony. HB135 creates new mandatory steps to be taken by CYFD and the courts which will necessitate longer or additional court settings, forms, and compliance and it contains mandatory training provisions and may expand rights to court-appointed counsel and those provisions are likely to have impact on the operating budgets of the affected state agencies. New requirements are included for permanent guardian proceedings as well as independent adoptions and creates both a cause of action for invalidating adoptions (Section 34) and restoring parental rights (Section 35).

HB 135 also establishes a requirement on the court to attempt to locate historical cases and specific adoption data, upon request for cases predating ICWA enactment. There are also requirements for additional monitoring as well as collaboration between AOC and CYFD with the Indian nations, tribes, and pueblos of the state with no provision for funding the additional FTE positions to support such endeavors. This is in addition to the undefined cost associated with creating an Office of Tribal Affairs.”

CYFD states that “With regard to the training requirements of the bill, CYFD already requires staff training on the requirements of ICWA. Any additional training necessitated by this bill will be incorporated into existing training for CYFD staff.” However, CYFD also indicates that “There is no appropriation in this bill. It is anticipated that additional FTE (approximately 2 to 3) will be needed in the Office of the Secretary (OTS) to fulfill the bill’s requirements,” and estimates that each additional position would cost \$65 to \$75 thousand.

SIGNIFICANT ISSUES

According to the National Indian Child Welfare Association, the federal Indian Child Welfare Act was passed in 1978 “in response to a crisis affecting American Indian and Alaska Native children, families, and tribes. Studies revealed that large numbers of Native children were being separated from their parents, extended families, and communities by state child welfare and private adoption agencies. In fact, research found that 25percent to 35 percent of all Native children were being removed; of these, 85 percent were placed outside of their families and communities—even when fit and willing relatives were available.

“Congressional testimony documented the devastating impact this was having upon Native children, families, and tribes. The intent of Congress under ICWA was to “protect the best

interests of Indian children and to promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902).”

Many states have passed comprehensive state versions of ICWA: California, Iowa, Michigan, Minnesota, and Oklahoma are among them. It is thought that state versions may be especially important during a time of uncertainty regarding upcoming adjudication of the case *Brackeen v. Haaland*, which alleges that provisions of ICWA unconstitutionally discriminate against non-Indian parents. If the federal law is fully or partially invalidated, passage of a state version, such as the Indian Family Protection Act, would preserve the protections for Indian children and families.

CYFD comments on IFPA’s augmentation of some of the provisions of the federal ICWA: “In addition to incorporating ICWA’s requirements into NM law, the IFPA will surpass the federal requirements by imposing additional, more protective requirements, including for example, early notification to Nations, Tribes, and Pueblos that the family of an Indian child is being investigated; early identification of Qualified Expert Witnesses; ongoing mandatory monitoring of non-preferred placements; mandatory training; cultural compacts when an Indian child is to be adopted by a non-Indian family; and expanded opportunities for intervention by the child’s extended family or Nation, Pueblo, or Tribe. The IFPA also clarifies that CYFD must provide active efforts (1) to prevent the break-up of the Indian family, (2) to reunify children with their families, (3) to provide early notification to the Pueblos, Nations, and Tribes of cases involving an Indian child, (4) to place Indian children in preferred settings set forth by the tribes and the ICWA, and (5) to ensure that culturally appropriate interventions and services are provided.”

RELATIONSHIP

Relates to 2021 HB209, being similar in many but not all respects.

TECHNICAL ISSUES

“Department” in the document probably means CYFD, but it is not defined as such in Section 2. And “secretary”, as mentioned in Sections 37 and 38, is probably the secretary of CYFD, but is not specified either there or in Section 2.

AOC raises the following concerns:

- Court-appointed counsel is mandated in child custody proceedings, but that no funds are appropriated for this purpose or for the bill’s requirement for annual trainings that AOC is to provide regarding this act and its application to proceedings having to do with Indian children.
- Section 36 of the bill, placing the best interests of an Indian child last in the list of criteria for the child’s protection may be detrimental to Indian children.
- In Section 20, it is not specified whether violation of the Indian Family Protection Act (IFPA) must occur after the effective date of the act, or can be applied retroactively.
- AOC and NMAG both point to the possibility of the state IFPA, the federal ICWA, and Bureau of Indian Affairs procedures being in conflict on some provisions, and that the federal law may in those instances invalidate state provisions.
- Looking at the prohibition of use of “aggravated circumstances” in the cases of children being adjudicated, giving the examples of child sexual abuse or murder of one parent of the other as possible instances where aggravated circumstances may be important.

- Removal of futility findings mandated by the bill would seem to require the continuation of futile efforts, for example, to keep a family together.
- “Active efforts” to remediate family problems are defined differently in ICWA and IFPA.
- CYFD currently has the ability to pursue membership in a tribe; the IFPA would appear to remove that capability.
- Requirements for qualified expert witnesses to testify regarding alleged abuse or neglect appear to be at variance with other state law, both as to qualifications and as to timelines.
- Both AOC and NMAG point out that IFPA requirements may come under the same challenge as occurred in the California case, *In re Santos Y*” which ruled that the provisions of the ICWA appeared to have “no purpose which is sufficiently compelling to overcome the child’s fundamental right to remain in the home where he is... loved and well cared for...”
- The act’s becoming effective on July 1, 2022 gives inadequate time to make the required changes to procedures.

In the amendment, Section 43 D is stricken and replaced with a Section F (amendment item 59). This should probably be a “D”.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If the federal Indian Child Welfare Act were partially or completely invalidated by the courts, Indian children might again be subjected to the much higher rates of removal from their homes and from their cultures that prevailed before the 1978 law was passed.

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