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A Research and Practice Brief:
Measuring Compliance with the Indian Child Welfare Act¹

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INDIAN CHILD WELFARE ACT
MEASURING COMPLIANCE

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Note: America's indigenous people refer to themselves in many different ways. We use the term American Indian to refer to American Indians and Alaska Natives. The Indian Child Welfare Act uses the term Indian to refer to American Indians and Alaska Natives. Thus, this document uses both terms interchangeably.

Introduction

Enacted in 1978, the Indian Child Welfare Act (ICWA) is an important and comprehensive piece of federal legislation, designed to protect Indian children, families, and tribes from child displacement. ICWA establishes minimum federal standards for the removal and displacement of Indian children from their homes or tribes and requires that, when removal is unavoidable, Indian children be placed in foster or adoptive homes that reflect the unique values of Indian culture (25 U.S.C § 1901(2), (3), (4)).

History of Abusive Indian Child Welfare Practices

The need for legislation to protect Indian children, families, and tribes evolved from a number of federal and state actions and policies in the 19th century that forced the displacement of Indian children away from their homes, tribes, and culture. Despite the strenuous objections of their parents, hundreds of Indian children were forced to enroll in militaristic boarding schools, designed to promote mainstream assimilation and acculturation. In these boarding schools, children were stripped of their Indian culture and tribal associations and were often subjected to deprivation and abuse.²

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In the mid-1930s, with the passage of the Indian Reorganization Act and subsequent closing of Indian boarding schools, the Bureau of Indian Affairs (BIA) became concerned that Indian children would be returned to impoverished communities of origin if alternative homes were not found. The BIA hired social workers to place Indian children in non-Indian homes, and in 1957, it contracted with the Child Welfare League of America to establish the Indian Adoption Project, which advanced the mission of interstate placement of Indian children into non-Indian homes.^{3,4}

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Although the Indian Adoption Project ended in 1967, it was succeeded by the Adoption Resource Exchange of North America, which continued to promote the adoption of Indian children into non-Indian families until the enactment of ICWA in 1978.⁵ During this time, approximately 25 percent to 35 percent of all Indian children were separated from their families, tribes, and culture and were placed in non-Indian foster homes, adoptive homes, or institutions.^{6,7,8} In 1974, the Senate Select Committee on Indian Affairs heard testimony documenting the long-term detrimental impact of these policies and practices on Indian children's and families' well-being.^{9,10,11}

The Indian Child Welfare Act of 1978 (25 U.S.C. 1901(2)(3)(4))

Based upon compelling testimony, Congress advanced stringent federal and state guidelines to increase protections for Indian children, parents, and tribes from unnecessary removal. ICWA outlines federal procedures that direct state courts as to when they must defer to Indian tribal authority or allow for Indian tribal participation in court proceedings.^{12,13,14} ICWA affirms tribal jurisdiction in relevant matters involving all Indian children and establishes minimum safeguards to prevent unnecessary disruption of Indian families and promote reunification of Indian families and tribes.^{15,16,17}

State courts and agencies must actively identify Indian children in order to apply ICWA protections. Best practice guidelines advise that judges ask about Indian heritage—out loud and on the record—at every hearing if heritage has not been previously established.¹⁸ ICWA defines an Indian child as a minor who “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)). At the time of this publication, new BIA proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings elaborate on these requirements.

Minimum ICWA requirements include:

- affirmed status of tribal interests on par with parental rights (e.g., states must notify the tribe if an Indian child is taken into foster care, even if the child lives off the reservation, and the tribe maintains the right to intervene and request that the case be transferred to tribal court)¹⁹
- increased standards of active efforts by social service agencies to keep the Indian family intact
- qualified expert witness testimony before making out-of-home placements or terminating parental rights
- preferred child placement into homes and families that preserve tribal heritage or with extended family members.^{20,21}

For more details on each of these key provisions, visit the National Indian Child Welfare Association website (www.nicwa.org) and BIA proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings (www.federalregister.gov/articles/2015/03/20/2015-06371/regulations-for-state-courts-and-agencies-in-indian-child-custody-proceedings).

State Compliance with ICWA

At present, no federal agency is tasked with ensuring state compliance with the protections mandated by ICWA. Without federal oversight, state legislatures, public child welfare authorities and courts are left to interpret ICWA provisions and definitions of “active efforts.”²² ²³ Despite overall decreases in rates of out-of-home placements, Indian children remain disproportionately represented in the foster care system, at more than twice the rate of the general population,²⁴ though this varies among states.²⁵

Available research, though limited, indicates inconsistent and varying degrees of state compliance with ICWA requirements and sanctions. Some variance is likely due to lack of enforcement, differences in definitions and methods used to measure compliance, and lack of information and understanding. For instance, in Utah and Oklahoma, active efforts require more than reasonable efforts, whereas in California and Maryland, active and reasonable efforts are equated.²⁶ Therefore, any attempt to measure compliance with the active efforts provision of ICWA must account for state-specific interpretation.



Barriers to Compliance

In 1994, the Office of the Inspector General of the federal Department of Health and Human Services conducted a study responding to concerns raised by federal, state, and tribal child welfare administrators and experts about serious gaps in the provision of child welfare services to protect Indian children, including the lack of federal oversight for enforcement of the law.²⁷ Other commonly cited barriers to ICWA compliance include a lack of knowledge about ICWA requirements, challenges in identifying children who may be eligible for ICWA protections, and lack of education and training for social workers, attorneys, and judges.^{28,29,30,31} Further, the intensity and speed with which some state courts focus on the perceived best interests of the child may cause them to overlook potential tribal interests.^{32,33}

Measuring ICWA Compliance

Abdication of federal oversight has left ICWA stakeholders concerned about the implementation of and adherence to ICWA sanctions; the need for measuring compliance with the law is high. Although cross-jurisdictional and collaborative efforts are emerging, compliance measurement remains characterized by relatively small, idiosyncratic efforts. Empirical study results are scattered, inconsistent, and highly specific to the state or jurisdiction being examined.

Although what we know about compliance is limited, a summary of findings of compliance studies and other reports on compliance efforts are highlighted, by topical area, in Table 1. Aside from the Government Accountability Office (GAO) report, all studies were conducted within a single state and with a relatively small number of cases. Given the small scale of these efforts, the temporal nature of the data, the limited scope of the studies, and the variation in hearing types, these findings can hardly be generalized as a summary of overall nationwide ICWA compliance.

Available research, though limited, **indicates inconsistent and varying degrees of state compliance** with ICWA requirements and sanctions.

While limited in scope, several compliance measurement approaches are used in the field, including observational methods, judicial case record review, focus groups, structured interviews, and surveys. Selection of a measurement methodology and tool is driven by the intended purpose or research question. For example, is the compliance study aimed at gathering information on strengths and weaknesses in implementing the law, monitoring progress toward implementation, or documenting an intervention designed to improve compliance? Table 2 outlines current methods and tools for gathering compliance information, from quantitative, court-focused measures to perception-oriented methods involving key participants.

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Table 1: Current Compliance Findings

| Area of Compliance | Study Findings* |
|--------------------------------------|--|
| Identifying American Indian children | <ul style="list-style-type: none"> • One study by the Government Accountability Office in 2003 found that only five states could identify ICWA-eligible children in their State Automated Child Welfare Information System.³⁴ • In one study that reviewed case records, 15% of the records found no documentation regarding how the court or child protection agency determined the child was American Indian.³⁵ |
| Active efforts | <ul style="list-style-type: none"> • Two studies found a large majority of ICWA cases included judicial assessment that active efforts were taken to prevent child removal or termination of parental rights in ICWA cases.^{36,37} • One study found case record documentation of active efforts undertaken, in addition to the judicial assessment, in 66% of cases examined.³⁸ • One study using case record review methods found that cases documenting active efforts on the record varied by type of hearing, from 21% for disposition hearings to 67% for pretrial or adjudication hearings.³⁹ • One observational study found verbal findings of active efforts were more likely to occur at adjudication review and permanency hearings but were highly unlikely at the initial hearing.⁴⁰ |
| Qualified expert witnesses (QEW) | <ul style="list-style-type: none"> • One study of judicial case records found that a qualified expert witness was used in 71% of cases involving foster care placement.⁴¹ • One observational study found that testimony from qualified expert witnesses was present in 38% of adjudication hearings but in none of the three other types of hearings sampled.⁴² |
| Placement preferences | <ul style="list-style-type: none"> • One study found that 83% of out-of-home placements of the American Indian children in the study followed ICWA placement guidelines.⁴³ • A forthcoming brief documents the placement patterns of American Indian children in a nationally representative sample; this study finds that Indian children are more likely than children of other races to receive services at home 18 months after an investigation.⁴⁴ |

*Note: Unless otherwise mentioned, study findings are from a single state or jurisdiction, and are not representative of ICWA compliance nationally or in other jurisdictions.

Table 2: Current Approaches to Measurement of ICWA Compliance⁴⁵

| | Method | Tools | Strengths | Weaknesses |
|-----------------------|---|---|---|--|
| Court-focused methods | Observation (in-person or via audio or video recording) | Structured forms with checklists and limited text fields, e.g. QUICWA Performance Checklist | <ul style="list-style-type: none"> • Specific information: information easily obtained by a trained observer • Data collection: tools focus on consistency of data collection and reliability of results; both quantitative and qualitative data may be collected • Research presence: the process of being observed can result in behavior changes • Utility: sample compliance within a case or follow a case over time | <ul style="list-style-type: none"> • Variance: consistency and depth of information varies by jurisdiction and court • Observer training: technical language of cases and speed and complexity of court proceedings can impede observation and require extensive training • Missing data: nonverbal cues or silent presence of key players may be missed • Resource intensive: training and observation can be expensive and time consuming • Complex tools: complexity of observation forms may interfere with observer accuracy |

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| | Method | Tools | Strengths | Weaknesses |
|-------------------------------|---|--|---|---|
| Court-focused methods (cont.) | Judicial case record review | Structured case record review form | <ul style="list-style-type: none"> Amount of data: large amounts of court physical and digital data are available, providing a cumulative snapshot of key indicators of ICWA compliance at any selected time Relative objectivity: impartial coders Clarity: easy to follow variance in compliance rates over time Pacing: data may be collected at a coder's own pace Depth: judicial case records may present more detail (e.g., on active efforts) than court proceedings | <ul style="list-style-type: none"> Courtroom behaviors: case review does not allow researcher to see what is happening in the courtroom (extent of tribal presence or involvement may not be included) Variance: consistency and depth of information varies by jurisdiction, court and clerk Missing information: court transcripts are typically not included Multiple sources: information moves through multiple filters, including child welfare staff, judges, court clerks, etc.; knowledge of local jurisdictional practice is essential to the design of research questions and case record review forms |
| Perception-based methods | <p>Focus groups</p> <p>Structured interviews</p> <p>Surveys</p> | <p>Paper or web surveys</p> <p>Structured interview guides</p> | <ul style="list-style-type: none"> Ease of data collection: surveys allow researchers to collect large amounts of data relatively easily and inexpensively Qualitative data: provides additional context and information, including perceptions of multiple stakeholders, practitioners and constituents | <ul style="list-style-type: none"> Subjective data: participants may experience response bias or express only "socially desirable" opinion Representation: smaller samples from some qualitative data collection efforts may not be fully representative of all stakeholders and participants |

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Recommendations to Support Best Practices for ICWA Compliance and Measurement

Three recommendations to support improved monitoring of compliance with ICWA mandates are:

- I. Allocate funds and resources for effective child welfare services to support active efforts and placement preferences.
- II. Develop training mechanisms and opportunities to include initial and continuing education for Child Protective Services (CPS) and judicial staff; incorporate ICWA history, importance, and compliance measurement into existing training programs.
- III. Develop a standardized national compliance measure for certain provisions of ICWA and differentiate standards that can be measured across sites from jurisdiction-specific measurements.

Recommendation I

ICWA's active efforts provisions promote efforts to preserve and reunify families beyond the normal scope of child welfare work and, therefore, logically require additional financial and human resources. Child welfare funding, however, is not appropriated relative to the disproportionate representation of Indian children in care or at risk of going into care present in some jurisdictions. Augmenting the cultural competence of the workforce and increasing collaboration among state, county, and tribal welfare agencies may enhance efficiency and help meet increased demands for ICWA regulations.⁴⁶ Organizations such as the National Council of Juvenile and Family Court Judges, National Indian Child Welfare Association, and National American Indian Court Judges Association are dedicating resources to improve state collaborations and ICWA-related practices.

Recommendation II

Variance in extant evidence of state compliance with ICWA emphasizes the importance of training all professionals involved with child welfare on the federal law.⁴⁷ Social workers, attorneys, and judges have existing training mechanisms that can be adapted or expanded to improve the understanding of and adherence to ICWA sanctions. ICWA training could be integrated more fully into existing initial or continuing education funded by Title IV-E and other sources. ICWA educational efforts should be open to guardians ad litem and court-appointed special advocates. Collaborative data collection efforts between practitioners and researchers should be employed and included in the training. Results from these efforts should be shared widely and used to engage all professional and community stakeholders around the mandates and goals of ICWA.

Recommendation III

Consistent use of measurement tools is needed to evaluate compliance with ICWA and to improve enforcement. Development of standardized measures across jurisdictions for certain provisions of ICWA would allow for a national comparison of compliance and would facilitate linkage with child outcomes associated with compliance. The National Council of Juvenile and Family Court Judges' ICWA toolkit is a great reference source in this regard.⁴⁸

Adding ICWA performance measures to the Statewide Automated Child Welfare Information System (SACWIS) and the Tribal Automated Child Welfare Information System (TACWIS) or to the federal Administration for Children and Families (ACF) Child and Family Services Reviews would enable cost-effective monitoring and reporting of ICWA provisions. Courts should be required to report on a limited set of compliance measures or assessments in all judicial records. Granting official oversight to the ACF, the BIA, or both, as recommended by the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence (2014), would advance compliance standards and data.⁴⁹

Development of standardized measures across jurisdictions for certain provisions of ICWA would allow for a national comparison of compliance and would facilitate linkage with child outcomes associated with compliance.

Conclusion

American Indian children are disproportionately represented in foster care. ICWA attempts to address and reverse decades of policies of acculturation and assimilation stemming from the forced removal and adoption of Indian children. ICWA demands additional responsibilities for the public child welfare system and special oversight by the courts when Indian children are involved in the court system in order to promote the well-being of Indian children and their families. To date, implementation of ICWA is inconsistent and compliance measurement relatively scarce. Whether at the local or national level, compliance data are necessary to ensure fulfillment of ICWA requirements and sanctions and to investigate whether or not ICWA desired outcomes are being achieved.



Endnotes and References

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