Current Issues in Indian Child Welfare Policy: Foster Care Payment Contracts

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By Casey Ross-Petherick

The Indian Child Welfare Act (ICWA) sets standards for custody cases involving American Indian children. The legislation was passed by Congress in 1978, during the renaissance of federal Indian policy toward a model that encourages self-determination by tribal governments. The statute sets forth several congressional findings, among which is recognition of the special relationship between American Indian tribes and the United States government. The statute also confirms that state governments often fail to recognize the unique cultural standards of American Indian families. In response to these findings and circumstances, Congress set forth specific procedures for placement of American Indian children when they are removed from their homes.

ICWA was necessary to stop the unwarranted removal of American Indian children from Indian families. In the decades leading up to passage of ICWA, federal policy was not supportive and deferential to native families. Indian children were removed from their homes, not because of abuse or neglect, simply for being Indian. These children were placed in boarding schools, where they were taught to dress, speak and behave like non-Indians. The non-Indian teachers prohibited speaking of native languages and practice of traditional Indian religion. Stories of these events have been handed down by the victims, who are now elders in tribal communities. Victim's children, grandchildren and great-grandchildren still feel the results of the federal policy of forced assimilation, as these events are still very much in the forefront of the memory of tribal communities.

Since passage of ICWA, state courts and tribal courts have grappled with compliance, working toward finding workable solutions that protect the best interests of Indian children. State social workers and tribal Indian child welfare workers work across systems to address the unique needs of Indian children.

FOSTER CARE AGREEMENT CHANGES

One mechanism for collaboration between state and tribal agencies is developed under an agreement between the tribes and the state on foster care payments for Indian children. The agreement defines the roles of the state social workers from the Oklahoma Department of Human Services...
(OKDHS) and the tribal Indian child welfare workers from several of the 38 federally recognized tribal governments in Oklahoma. These agreements have been in place for several years, and have been rarely modified in substance and form — until now.

The proposed agreement has been delivered to several tribes in Oklahoma. The proposed foster care agreement makes several substantive changes. Nearly every section of the nearly 20-page document is altered in some way. Some changes are technical in nature and have little, if any, substantive effect on service providers. However, some sections are very different than agreements from previous years and warrant serious consideration for tribal governments contemplating signing. A close examination of the major issues is required for meaningful agreement between the parties.

Several sections have been moved from their original locations in the document to other sections. Some of these changes are purely technical to make the document flow better, while others make a bigger impact on the agreement. For example, a change that moves a section regarding tribal child welfare services provision from the “Assurances” section to the “Expectations” section of the agreement changes the relationship from one of collaboration between the state and the tribe, to one of attempted dictation of tribal policies and procedures.

Other changes “water down” the requirements imposed on the state. For example, the section regarding notification by OKDHS to the tribe of allegations involving an Indian child changes the requirement from 24 hours after the removal to “as soon as possible” after the removal. The notification section also changes the requirements for OKDHS regarding compliance with ICWA and the Oklahoma Indian Child Welfare Act (OICWA), by watering down the language “OKDHS shall conform with provisions of the ICWA and OICWA,” substituting in its place, “OKDHS shall make every effort to conform with the provisions of the ICWA and OICWA.”

In an altogether new section, the proposed agreement contains a broad records provision, requiring tribes to maintain certain records. The section also permits the wholesale audit and notice examination of tribal custody children’s records by the U.S. Department of Health and Human Services, OKDHS, the Oklahoma State Auditor and Inspector and any other “appropriate state and federal entities.” Although accountability and transparency is important, tribal advocates feel that privacy and tribal sovereignty should not be disregarded, and that there is a possibility for abuse of sensitive records involving Indian children.

The proposed agreement contains a new section for information security, which appears to be standard boilerplate language. However, prospective tribal signatories to the agreement should pay particular attention to additional requirements imposed on the tribe, including an annual audit of information security risk, which must comply with state standards as approved by the Office of State Finance. This new requirement does not appropriate any funding for compliance efforts. This new section also requires compliance with federal information processing standards, and requires that tribes develop continuity and disaster recovery plans in compliance with Oklahoma Information Security Policy. Tribes must also submit annual executive summaries of OKDHS’ Information Security Office. These additional requirements impose a heavy burden on tribes, and non-compliance may result in withholding of foster care payments.

Another concerning deletion from the proposed agreement relates to indemnity of the parties. The previous agreements contained an extensive indemnity clause, holding the signatories harmless for revocation, termination or violation of the agreement, and setting forth indemnity for the non-violating party by the violating party. The new agreement is silent as to indemnity of the parties. This erasure could impose liability on tribes for issues arising as a result of revocation, termination or violation of the agreement, even if the violation is committed by OKDHS.

Expected implementation issues are also of concern for tribes contemplating entering into the proposed foster care agreement. The agreement references the OKDHS computer networking system, also known as EKids, and requires
tribes to input information into that system. Additional training will be needed for tribes to meet this requirement, otherwise compliance with this section will be difficult to assure.

Additional issues arise when looking at each line of the previous agreement and comparing it to the proposed agreement, including issues of sovereign immunity, training needs, placement preferences and custody standards. Each issue is important, and tribes should cautiously review the proposed changes before entering into the new agreement.

Tribes working toward entering into a foster care agreement may contact the Oklahoma Indian Child Welfare Association to learn more about the proposed changes. For more information, contact the Native American Legal Resource Center at OCU Law at (405) 208-5017.

3. FIPS 200.
5. The Oklahoma Indian Child Welfare Association serves as the statewide organization for tribal Indian Child Welfare programs in Oklahoma. The Association provides leadership and training on a variety of issues aimed at implementing best practice models for working with American Indian and Alaska Native children. OICWA works on behalf of all 38 federally recognized tribes in Oklahoma. Membership of the Association includes a majority of Oklahoma tribes.

ABOUT THE AUTHOR

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