

The Indian Child Welfare Act of 1978

1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the **best interests** of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. (Pub. L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

Creation of IFPA

- Includes the first 42 sections of HB 135 (32A-28-1, *et seq.*) that govern child-custody proceedings involving Indian children
- Tribally-led
- Based on the lived experience of tribal workers, tribal leadership, other practitioners and impacted families
- Drew from existing law set forth in the:
 - Indian Child Welfare Act of 1978 (ICWA)
 - Bureau of Indian Affairs (BIA) Indian Child Welfare Act Regulations
 - BIA Guidelines (2016)

Strengthens and surpasses the requirements of ICWA and existing law

Child Custody Proceedings

- IFPA applies to every “child custody proceeding”
- IFPA expands the definition of child custody proceedings to include investigations and other preliminary activities preceding the formal initiation of an action (§ 32A-28-2(C)) (cf ICWA at § 1903(1) and ICWA Regs at § 23.2 (Child custody proceedings include only formal proceedings = foster care placement, TPR, preadoptive placement, adoptive placement))



Indian Child

HB 135 expanded who is considered an “Indian Child” by requiring only that the child be a member or eligible for membership in an Indian tribe rather than a member or a child of a member and eligible for membership (§ 32A-1-4(O) “Indian child” in conjunction with § 32A-1-4(N) “Indian”)(*cf* ICWA “Indian” at § 1903(3) and “Indian Child” at § 1903(4) and ICWA Regs “Indian” and “Indian Child” at § 23.2)

Tribal Membership

- Neither ICWA nor the ICWA regulations define “member” or “membership”
- HB 135 (32A-1-4(U)): “‘member’ or ‘membership’ means a determination made by an Indian tribe that a person is a member of or eligible for membership in that Indian tribe”
- HB 135 (§ 32A-28-6) as well as the ICWA regulations (§ 23.108) make clear that the Tribe has sole right to determine membership and membership eligibility, as defined by the Indian tribe’s law, custom, tradition and practice (§ 32A-28-6: CYFD shall not determine tribal membership; § 23.108: state court cannot substitute its own determination regarding membership)

Best Interest of Indian Child

IFPA Guidance to Courts

When making a best interest determination, court must, after allowing testimony of all parties and the tribe, consider following:

- Prioritization of placement in accordance with placement preferences
- Prevention of unnecessary out-of-home placements
- Critical importance to child of establishing, developing or maintaining a political, cultural, social and spiritual relationship with tribe and tribal community and with familial ties such as clanship and family with unique cultural characteristics
- Importance to child of ability of tribe to maintain its existence and integrity in promotion of the stability and security of Indian children and families

Protection, safety and well-being of child (§ 32A-28-36)

Determining Good Cause Not to Transfer

A finding of good cause *shall not* be based on:

- (1) Advanced stage of proceeding if parent, guardian, Indian custodian or tribe did not receive notice until advanced stage
- (2) Timing of tribe's intervention
- (3) Whether there have been prior proceedings involving child for which no transfer motion filed
- (4) Predictions of whether transfer could result in change of placement
- (5) Child's cultural connections with tribe or its reservation
- (6) Consideration of perceived inadequacy of tribe's judicial system
- (7) Consideration of perceived socioeconomic conditions within tribe or reservation
- (8) Delay in placing child with child's extended family members or adult relatives regardless of stage of proceeding (§ 32A-28-7(G))

IFPA Expansion of Active Efforts Requirement

IFPA expands the active efforts requirement beyond providing remedial services and rehabilitative programs at adjudication and TPR to include:

- Active efforts requirement applies to voluntary proceedings
- Active efforts to determine whether there is reason to know the child is an Indian child (§ 32A-28-43(A))
- During investigation, active efforts to identify extended family members and fictive kin able to be alternative care providers or to ensure safety of child (§ 32A-28-12(B))
- In petition and at every court hearing, CYFD must make, and court must find that CYFD made, active efforts to comply with notice requirements; and, active efforts to comply with placement preferences
- During investigation, active efforts to collaborate with tribe to identify a QEW (§ 32A-28-17(C))

IFPA Expansion of Active Efforts Requirement (continued)

- Active efforts at inception of case and periodically throughout case, to identify a preferred placement (§ 32A-28-21(C))
- Ongoing active efforts to search for and identify relatives (§ 32A-28-21(C))
- Active efforts to place siblings in custody together and provide reasonable visitation if not placed together (§ 32A-28-26)
- Active efforts made to implement *child's cultural maintenance plan in conjunction with tribe and family* (§ 32A-28-27(B))
- Active efforts to identify and work with all tribes for which there is reason to know to verify whether child is an Indian child (§ 32A-28-43(B))



PLACEMENT PREFERENCES

IFPA, ICWA, and the ICWA Regs, all require the Indian Child to be placed in the least restrictive placement that:

- Most closely approximates a family, taking into consideration child's sibling attachment
- Allows child's special needs, if any, to be met
- In reasonable geographic proximity to child's home, extended family members or siblings; and

Placement preferences established by tribe apply

(§ 32A-28-21(G); 32A-28-21(I))

PLACEMENT PREFERENCES (CONTINUED)

IFPA provides that placements be made in accordance with order of preference established by tribe by any means, or, if tribe has not established, in accordance with following order of preference:

1. Extended family member
2. Foster home licensed, approved or specified by the tribe
3. Foster home licensed or approved by a licensing authority in NM in which one or more of the licensed or approved foster parents is an Indian (§ 32A-28-21(A))

NOTE: IFPA eliminated the placement preference set forth in ICWA and the ICWA Regs of an institution for children approved by tribe or operated by Indian organization which has a program suitable to meet child's needs

PLACEMENT PREFERENCES, CONTINUED

IFPA added provisions to help ensure that placement preferences are met

- A child under 3 months old cannot be placed outside the preferences under any circumstances (§ 32A-28-21(B))
- If child placed contrary to placement preferences, a secondary permanency plan not permitted, and before plan changed to adoption or another permanent placement, CYFD must:
 - ❖ Conduct monitoring every 30 days
 - ❖ At inception of case and periodically throughout case, make active efforts to identify placement that aligns with preferences (§ 32A-28-21(C); list of minimum actions that CYFD must take)



PLACEMENT PREFERENCES, CONTINUED

If child not in preferred placement, then:

- hearing no less than every six months
- CYFD continue to have burden of establishing, by clear and convincing evidence, why good cause continues to exist (§ 32A-28-21(D))

IFPA follows the ICWA Regs in providing that good cause does not include:

- (1) socioeconomic status of placement
- (2) ordinary bonding or attachment that occurred from time spent in a non-preferred placement made in violation of IFPA; and adds:
- (3) home environment that does not impact child's safety and well-being
- (4) extent of participation of parents or child in tribal, cultural, social, religious or political activities (§ 32A-28-21(H))

INTERVENTION

- IFPA follows ICWA that the tribe has the right to intervene at any point in proceeding (§ 32A-28-14(A))
- IFPA creates an intervention statute specifically for Indian children that permits the child's relative or extended family member, guardian or Indian custodian to file motion to intervene at any point (§ 32A-28-14(B))
 - Court consider rationale for proposed intervention and whether in child's best interest (§ 32A-28-14(C))
 - When court determines in child's best interest court may permit intervention unless party opposed can demonstrate viable plan for reunification in progress and intervention could impede progress (§ 32A-28-14(D))

Intervention

- IFPA at § 32A-28-19(C) prohibits consideration of bonding between the child and the child's foster parent as a factor in terminating parental rights so that the mandatory intervention provisions of § 32A-4-27 do not apply to proceedings involving an Indian child

Permanency Planning and Tribe's Input

- ICWA and the ICWA Regs do not address the tribe's participation in permanency planning, but IFPA contains provisions to help ensure that the tribe's recommendation regarding the child's permanency plan are considered
- § 32A-28-19(D) provides that a TPR cannot be ordered if the tribe proposes an alternate permanency plan (to adoption), unless CYFD can show good cause supported by clear and convincing evidence why alternate permanency plan should not be ordered

32A-28-2 Definitions

- D. "cultural compact" means an agreement that documents how an Indian child placed in an adoptive or guardianship home will continue to actively participate in the child's cultural learning and activities and that is entered into among:
 - (1) the adoptive parents or guardians of the Indian child, which parents or guardians are not members of the Indian child's tribe; and
 - (2) the Indian child's tribe;

32A-28-23. Adoptive and guardianship placements; maintenance of culture; cultural compacts.

To ensure that the Indian Family Protection Act is fully implemented and that all Indian children have the opportunity to maintain strong connections to their culture, if the household into which an Indian child is placed for adoption or guardianship does not include a parent who is a member of the Indian child's tribe, the court shall require the parties to the adoption to enter a cultural compact, at the discretion of the Indian child's tribe, that documents the parties' agreement regarding how the Indian child will continue to actively participate in the Indian child's cultural learning and activities and engagement with family members. Each cultural compact shall be specific to the Indian child and shall articulate the Indian child's understanding as the Indian child grows and matures. The cultural compact shall become part of the court record, shall be enforced by the court and shall be included in the adoption decree.

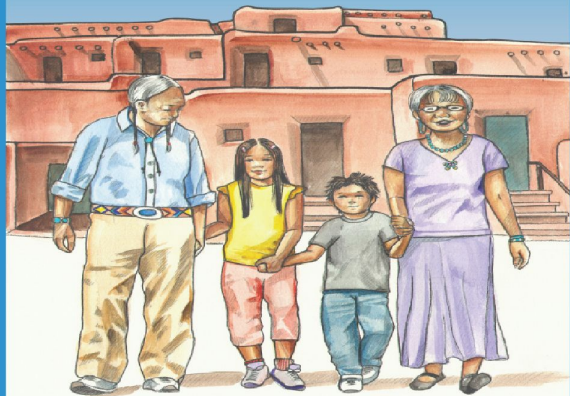
Right to Services

IFPA makes clear that an Indian child residing on or off reservation has same rights to services that are available to other children in the state; cost determined and provided for in same manner as for other children of the state, using tribal, state and federal funds (§ 32A-28-10)

Training

- Neither ICWA nor the ICWA Regs address training
- IFPA makes extensive provisions for training:
 - § 32A-28-22(A) AOC in collaboration with CYFD must develop and deliver annual mandatory training to children's court judges, district court judges, attorneys, guardians ad litem and youth attorneys; training to include information on IFPA, including cultural compacts and the tribes geographically located in NM
 - § 32A-28-22(C) if child is placed in household that does not include a foster parent or guardian who is a member of child's tribe, upon placement and at least annually thereafter, CYFD must provide mandatory training to the foster parent; training must address conditions on foster care placements under federal, state and tribal law; CYFD to work with each tribe in NM to develop the training

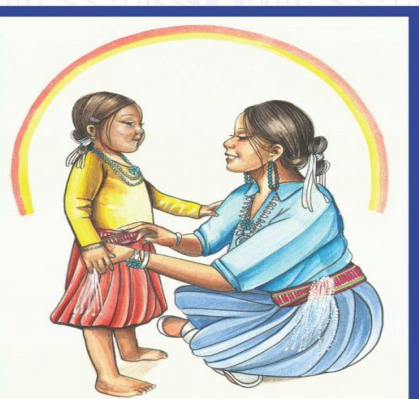
Native children need their communities.



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Thank you!



**Native children need their communities.
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 **INDIAN FAMILY
PROTECTION ACT**

Native children need their communities.



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