

# Title IV-E: Helping Tribes Meet the Legal Requirements

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March 2010

A working paper developed through the Indian Child Welfare  
Community of Practice  
<http://childwelfare.ncaiprc.org>



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**Tribally-Driven** Research

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Funding for the development of this paper was provided by the Administration for Native Americans at the U.S. Department of Health and Human Services



The NCAI Policy Research Center would also like to thank the Association on American Indian Affairs and the National Indian Child Welfare Association for their support of this project.

### **Association on American Indian Affairs**

As one of our core partner organizations, the Association on American Indian Affairs has provided important technical guidance and support for the development of this paper, and in the planning of our agendas and meetings. We appreciate their continued support of the CoP.



### **National Indian Child Welfare Association**

The National Indian Child Welfare Association played an important role in the initial development of the Indian Child Welfare CoP and provided strategic guidance for the development of this paper. We appreciate their leadership in the field and ongoing support.



P.L. 110-351 authorizes Indian tribes to submit a plan to the Department of Health and Human Services (HHS) to operate the Title IV-E Foster Care and Adoption Assistance Program directly. It also recognizes the right of tribes to continue or seek new agreements with states to operate the program. This paper addresses the policies and codes that tribes will need to have in place in order to gain approval of their plans and successfully operate the program.

### **Overview of the Title IV-E program**

The basic federal child welfare statute can be found in Titles IV-B and IV-E of the Social Security Act.<sup>1</sup> This statute has provided core funding for state child welfare systems and established certain requirements that must be included in state statutes in order for states to receive these funds. Title IV-B and IV-E are intended to operate in tandem to prevent the need for out-of-home placement of children, and, where such placement cannot be avoided, to provide protections and permanent placements for the children involved.

Together, Title IV-B and Title IV-E are the basis for many of the federal law requirements of the child welfare system. A few key requirements are:

- Case plans providing for children in foster care to be placed in the least restrictive setting which is in close proximity to the home of the child's parents<sup>2</sup>
- Case review systems providing for court or administrative reviews of each child at least once every six months and permanency hearings within 12 months and at least every twelve months thereafter<sup>3</sup>
- Reasonable efforts to prevent removal of children from their families or to facilitate the return of children who have been removed must be made except, at the option of a state or tribe, where a parent has a pattern of abusive behavior with the child in question (aggravated circumstances), criminal behavior with another child of the parent or the parental rights of a parent to a sibling of the child in question have been previously terminated involuntarily.<sup>4</sup>
- Health and safety of children must be the paramount concern in all decisions regarding provision of services, placement and permanency planning decisions;<sup>5</sup> the law requires and encourages the establishment and utilization of various mechanisms to achieve this goal, including criminal background checks of prospective foster and adoptive parents, and relative guardians.<sup>6</sup>
- Incentive payments intended to increase the number of foster children placed for adoption are made available.<sup>7</sup>

- Expedited permanent placements for children are sought by (1) mandating petitions for termination of parental rights once a child has been in foster care for a period of 15 out of 22 months (subject to certain exceptions),<sup>8</sup> (2) encouraging the use of concurrent planning -- namely, planning for an out-of-home permanent placement, such as adoption, at the same time that efforts are being made to reunify the child with his/her family,<sup>9</sup> (3) removing state jurisdictional barriers which delay interstate adoptions,<sup>10</sup> (4) extending the reasonable efforts and case plan documentation requirements to also include efforts to find a permanent placement for a child,<sup>11</sup> (5) permitting tribes and requiring states to use Title IV-B, Subpart 2 funding for "Adoption Promotion and Support Services" and "Time-Limited Family Reunification Services";<sup>12</sup> and (6) by funding relative guardianships, in addition to adoption and foster care.<sup>13</sup>

The Title IV-E Foster Care and Adoption Assistance program provides federal money for foster care, adoption assistance, and relative guardianship payments on an "open-ended" entitlement basis for children who meet Title IV-E eligibility requirements. These requirements are that (1) the child's family has an income below the level set by the Title IV-E statute, which is based upon the now defunct Aid to Families with Dependent Children (AFDC) program income eligibility levels that were in effect on July 16, 1996<sup>14</sup>, and (2) certain legal findings have been made by a court of competent jurisdiction, or in the case of a voluntary placement, there is an agreement between the parent(s) and the agency administering the Title IV-E program. Title IV-E also provides grant money to assist and provide services to youth who are aging out of the foster care system through the John H. Chafee Foster Care Independence Program which is a capped entitlement.<sup>15</sup> In practice, the amount that state and tribal governments receive from the program essentially depends upon two factors:

1. The amount that the governmental entity spends on (a) foster care maintenance, adoption assistance and guardianship payments, and (b) administration, data systems and training related activities for Title IV-E eligible children; and
2. The reimbursement rate for these payments and activities. The reimbursement rate for the foster care, adoption assistance and guardianship payments is determined by the Federal Medical Assistance Percentage (FMAP) rate which is calculated based upon per capita income levels within the state or the tribal service area.<sup>16</sup> Reimbursement for administration and development of data systems is set by statute at 50% and training is set at 75% (with a few exceptions).<sup>17</sup>

The recently-passed Fostering Connections to Success and Increasing Adoption Act of 2008, P.L. 110-351, contained the following provisions specific to tribes:

*Direct funding to tribes.* Authorizes tribes, tribal organizations and tribal consortia at their option to apply to the Department of Health and Human Services (HHS)

to administer the Title IV-E foster care and adoption assistance program and receive direct funding from HHS.<sup>18</sup> Except in limited circumstances, tribal plans for administration of the program would have to fulfill the same requirements as the statute sets out for state plans.

*Tribal-state agreements.* Tribal-state agreements are an alternative to direct funding from the federal government (HHS). When tribes request to enter into a IV-E agreement with a state, the state is required to negotiate with the tribe in good faith.<sup>19</sup> Any tribal-state agreement in effect on the date of enactment will remain in effect subject to the right of either party to revoke or modify the agreement and future tribal-state agreements are authorized.<sup>20</sup> The state may utilize the tribe's FMAP for payments made pursuant to a Title IV-E tribal-state agreement (see below).<sup>21</sup> Allowing the state to use the tribe's FMAP when in an agreement will often prove to be a financial incentive to the state. Some states provide state funds to tribes to help them meet the non-federal match requirements under Title IV-E. Because the tribal FMAP is likely to require less non-federal match than a state FMAP, this will reduce the expenditures for match by these states.

*Eligibility for foster care maintenance payments.* All Indian children placed by Indian tribes who are operating the Title IV-E program pursuant to an HHS-approved plan or through a tribal-state agreement are eligible to receive IV-E foster care maintenance or adoption assistance payments (or, at the option of the tribe, relative guardianship payments) if they otherwise meet Title IV-E criteria.<sup>22</sup> In implementing the AFDC eligibility provision in Title IV-E (the so-called "look back" provision), the AFDC standards of the state where the child resides at the time of removal shall govern.<sup>23</sup>

*Hold harmless.* Any Indian family currently receiving benefits, such as maintenance payments, cannot lose those benefits as a result of the amendments to the IV-E law, regardless of whether an existing tribal-state agreement remains in force.<sup>24</sup>

*Service Area.* Tribes, tribal organizations and tribal consortia must specify in their plans the service area or areas and population that they intend to serve.<sup>25</sup>

*Foster Care Standards.* Tribes may utilize their own foster care standards that must be reasonably in accord with recommended standards developed by national organizations<sup>26</sup> (presumably this reference would include standards that have been developed by organizations like the National Indian Child Welfare Association [NICWA] that specifically address issues relating to licensure of Indian homes).

*Financial Capacity.* An Indian tribe, tribal organization or tribal consortium seeking to operate the IV-E program must include in its plan evidence that it has not had any uncorrected significant or material exceptions under Federal grants or contracts that directly relate to the administration of social services for the 3 year period before the date on which it submits the plan.<sup>27</sup>

*Tribal FMAP rate used for federal payments.* Tribes, tribal organizations and tribal consortia placing children in foster care, adoptive placements and guardianships will be reimbursed based on their federal medical assistance rate (FMAP), except that in no case shall the Secretary approve a tribal rate that is lower than that of any state in which the tribe is located. The FMAP rate is calculated based upon the per capita income of the tribal service population as defined in its plan. (In other words, a tribe with a lower level of income will receive a higher percentage of federal funding.) A tribe may submit to the Secretary information relevant to this calculation, and the Secretary must take it into consideration.<sup>28</sup>

*Source of matching funds/DHHS regulations.* Tribes may use every source of match that states are permitted to use and all other sources otherwise permitted by law currently, such as Public Law 93-638 contract funds.<sup>29</sup> In addition, there are provisions allowing for the limited use of in-kind match with instructions to HHS to promulgate permanent regulations on the use of in-kind match by October 1, 2011. Until the regulations are promulgated, tribes may claim up to 25% of administrative costs and 12% of training costs as in-kind expenditures from certain third party sources – specifically from a State or local government, tribal entity other than the one making the application, public institution of higher education, tribal college or university or a private charitable organization, such as Casey Family Programs. If regulations are not promulgated by FY 2015, then the right to use in-kind match expires. There is a grandfather clause allowing tribes that have entered the program prior to the issuance of regulations to continue using in-kind under the statutory formula until October 1, 2013.<sup>30</sup>

*Nunc pro tunc limited to 12 months.* Nunc pro tunc (retroactive) tribal court orders and affidavits can be used to correct previous court orders that were not in compliance with the “contrary to the welfare” of the child determination required by law in order for a child to be eligible under Title IV-E, but only for the first 12 months after a plan has been approved by HHS.<sup>31</sup>

*Chafee Independent Living Program.* Tribes, tribal organizations and tribal consortia are made eligible to receive a direct allocation from the Federal government from the John H. Chafee Independence Program. The amount of the award will be calculated based upon the percentage of children in the state that are under a tribe’s custody and will be a deduction from the state’s allocation. Tribes will also be permitted to access the program through tribal-state agreements and States are required to negotiate agreements in good faith if requested by a tribe. HHS is given some flexibility as to the exact nature of the payments to be made to tribes.<sup>32</sup>

*Regulations/In-Kind.* Except in the case of regulations pertaining to in-kind match, the Secretary of HHS is instructed to adopt regulations to implement this legislation within one year after enactment. The regulations on in-kind match are required to be completed by September 30, 2011. The Secretary is required to consult with Indian tribes, tribal organizations and tribal consortia in developing regulations.<sup>33</sup>

*Effective date.* These provisions took effect on October 1, 2009.<sup>34</sup>

*Implementation.* \$3 million/year is appropriated to assist tribes in implementation. This money may be used to provide technical assistance to tribes operating programs under Title IV-B or IV-E and to make development grants for tribes that intend to apply for direct funding under Title IV-E.<sup>35</sup> In FY 2009, HHS used these funds to make grants totaling \$1.5 million to six tribes that are developing their capacity to apply for and directly operate the IV-E program. In addition, a contract has been awarded to create a National Resource Center for Tribes that will be providing technical assistance in the future.<sup>36</sup>

*Other provisions.* State, local and tribal child welfare agencies and private nonprofit organizations are eligible to apply for a new \$5million/year family connection competitive grant program.<sup>37</sup>

### **Jurisdictional Issues**

There are a few different ways in which a child in need of assistance could typically become a client of a tribal Title IV-E program:

1. The child is a member of the tribe subject to the tribe's jurisdiction pursuant to its inherent sovereign authority;
2. The child is an Indian child of another tribe that has become subject to the tribe's jurisdiction pursuant to its tribal code and federal law;
3. The child is a member of, or eligible for membership in the tribe, and has been transferred to tribal jurisdiction pursuant to the provisions of the Indian Child Welfare Act; or
4. The tribal agency has taken custody of the child pursuant to a state court order.

It is worth looking at the legal underpinning for each of these situations.

*Inherent sovereign authority – tribal members:* Federal common law has long recognized that “Indian nations” are distinct political communities retaining their original natural rights...”<sup>38</sup> Indian tribes possess “attributes of sovereignty over both their members and their territory.”<sup>39</sup> As summarized by one court, “Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate... [and are] qualified to exercise powers of self-government...by reason of their original tribal sovereignty.”<sup>40</sup> Congress has been recognized as having the authority to limit the exercise of this sovereignty<sup>41</sup> and the courts have held that tribes have been implicitly divested of certain powers by reason of their “dependent status”.<sup>42</sup> However, in exercising its authority over American Indian and Alaska Native affairs, there is a “distinctive obligation of trust incumbent upon the [federal] Government that “involves moral obligation of the highest responsibility”.<sup>43</sup> In recent years, Congress has reaffirmed the principle of tribal self-government repeatedly.<sup>44</sup>

Tribal exercise of jurisdiction over the domestic relations of tribal members who maintain tribal relations has been recognized in a long series of cases dating from the 1800s to the present. In 1916, the United States Supreme Court acknowledged that “personal and domestic relations of the Indians” have been regulated from “an early period...according to their tribal customs and laws”.<sup>45</sup> This has meant that states have no jurisdiction over such matters when they involve members of the tribe domiciled or resident on the reservation because it “would subject a dispute arising on the reservation to a forum other than the one they have established for themselves.”<sup>46</sup>

The exclusive jurisdiction of tribes over child welfare matters has been partially modified for tribes in certain states by Public Law 83-280 (hereinafter P.L. 280)<sup>47</sup>, although the extent of the grant of jurisdiction to those states has been a matter of controversy. (See discussion in footnote 61.) Regardless of the extent of state jurisdiction provided by P.L. 280, however, it is clear that tribes in P.L. 280 states have at least concurrent jurisdiction over children resident or domiciled on the reservation.<sup>48</sup> Thus, any tribal court order involving such children granting placement and care responsibility to the tribal agency administering Title IV-E would clearly be sufficient to trigger the statute.

Finally, it should be noted that the Indian Child Welfare Act (ICWA)<sup>49</sup> also recognizes exclusive tribal jurisdiction over American Indian and Alaska Native children residing and domiciled off of the reservation if they are wards of the tribal court.<sup>50</sup> The most common example would be a situation where a child was living on the reservation, became the subject of a child welfare case in tribal court where the court issued an order making the child a ward of the court, and then the child moved off of the reservation.

*Jurisdiction over Indian children who are not members of the tribe exercising jurisdiction:* The Indian Child Welfare Act has clarified that tribes have the same right to exercise jurisdiction over all American Indian and Alaska Native children resident or domiciled on their reservations, regardless of their tribal origin. Tribes more than likely have the same right under their inherent sovereignty.<sup>51</sup> An Indian child is defined in ICWA as an unmarried child under 18 who is a member of a federally recognized Indian tribe or who is eligible for membership and the child of a member.<sup>52</sup> Reservation is defined to include any land within the boundaries of a reservation, dependent Indian communities, Indian allotments and any other land held in trust for an Indian tribe or individual or which is otherwise subject to a restriction on alienation.<sup>53</sup> Thus, a tribal court order that makes the requisite Title IV-E findings in regard to such children would be sufficient for the Title IV-E statute to be applied.

A number of tribal courts have also asserted jurisdiction over children who do not fall within the definition of “Indian child” in ICWA, e.g., Canadian Indian children<sup>54</sup> or children recognized as Indian by the tribal community.<sup>55</sup> Given the strong tribal interest in and history of regulating domestic relations of Indian families resident or domiciled within the tribal community, these jurisdictional assertions would seem to be legitimate – particularly where the child has a close connection to individuals (e.g., tribal members) clearly subject to the tribe’s sovereign powers.<sup>56</sup>



*Transfer of jurisdiction:* The Indian Child Welfare Act recognizes that tribes have concurrent jurisdiction over their children wherever located.<sup>57</sup> The Supreme Court has characterized this as presumptive tribal jurisdiction.<sup>58</sup> This is usually achieved through a provision in ICWA that provides for transfer of cases from state court to tribal court if requested by the parent, Indian custodian or tribe, absent parental objection or good cause to the contrary.<sup>59</sup>

Where a child has been transferred to tribal court, a tribal court order meeting the requirements of Title IV-E should be sufficient to bring an otherwise eligible child within Title IV-E. In many such cases, however, a state court order may have been issued meeting the requirements of Title IV-E and the child may have already been found eligible. In such case, who has financial responsibility for that child may become an issue that needs to be resolved between the tribe and state.

*Custody through state court order:* If a tribe's service area includes areas outside the tribe's exclusive jurisdiction, it may obtain custody of a child through a state court order. If this is likely to be an ongoing practice, it would probably be beneficial if an agreement or protocols are developed which address jurisdictional and funding issues.

In most cases, this is an issue only where the tribe's service area includes areas outside of reservation boundaries or which are not considered "Indian country".<sup>60</sup> However, there are some court decisions which have interpreted P.L. 280, which recognized the authority of certain states over "civil causes of action" involving Indian people residing in the state, to provide those states with concurrent jurisdiction over tribal children resident or domiciled on Indian reservations in the context of child custody proceedings.<sup>61</sup>

### **Existing tribal court systems and codes (a sample)**

Tribes have always had systems for addressing their internal conflicts and relationships. Historically, these systems were informal, unwritten and based upon a holistic philosophy and a way of life.<sup>62</sup>

Today, "[t]ribal courts play a vital role in tribal self-government and the Federal government has consistently encouraged their development."<sup>63</sup> Congress has enacted the Indian Tribal Justice Act which authorized funding for tribal courts and tribal judicial conferences,<sup>64</sup> recognized inherent tribal sovereignty and the right of tribes to choose their own court systems<sup>65</sup> and created an Office of Tribal Justice Support in the Bureau of Indian Affairs.<sup>66</sup>

Information about tribal courts is not as readily available as is the case for other court systems. There is no formal place where detailed information about such courts is compiled. There have been efforts by organizations such as the Tribal Law and Policy Institute, National Indian Law Library and National American Indian Court Judges Association, sometimes assisted by the federal government, to develop databases about

tribal codes and tribal courts. It is largely from these sources from which the information about tribal codes in this paper is derived. However, these databases are works in progress, admittedly incomplete, and sometimes out of date since tribes do not routinely report amendments to their codes to these databases. Moreover, it is worth noting that there are 564 tribes, each of which has the authority to operate its own system.

Nonetheless, there is enough information available to provide an overview sufficient for the purposes of this paper and also enough examples of tribal codes and court procedures pertaining to child welfare issues to allow a number of useful observations to be made.

Except for California where only a limited number of the 100 tribes have established courts, almost every tribe in the lower 48 has established some kind of tribal judicial system. The scope of some tribal systems is limited, however, particularly in P.L. 280 states.<sup>67</sup> There are approximately 200 tribes that have or are part of tribal court systems in these 47 states. In Alaska, most Native villages have established mechanisms for judicial-type decision making.<sup>68</sup>

In addition, there are approximately 20 Code of Federal Regulations (C.F.R.) courts.<sup>69</sup> These are courts established by the federal government that perform the function that a tribal court would fulfill. Tribes may enact their own tribal codes to be utilized by the C.F.R. court, subject to approval by the Assistant Secretary of Indian Affairs.<sup>70</sup> Tribes may opt out of the system by establishing their own court system<sup>71</sup> and must approve the appointment of C.F.R. judges.<sup>72</sup> If the tribe has not enacted its own code, then the C.F.R. court operates pursuant to federal regulations promulgated by the Bureau of Indian Affairs.

Tribal courts have a variety of forms. Indeed, this is understood by the federal government. The definition of “tribal court” in the Indian Child Welfare Act is deliberately broad – “a Court of Indian Offenses, a court established under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.”<sup>73</sup>

There are a handful of courts that are almost exclusively traditional in nature, for example, a few of the Pueblos in New Mexico and the Emmonak Village Elders court in Alaska.<sup>74</sup> There are also those tribes that do not have a judicial system *per se*, but which make child welfare decisions through a different mechanism such as a tribal council. This is particularly true in Alaska where tribal councils often function as tribal courts, particularly in very small villages, with the village Chief or President acting as the presiding judge. In some cases, elders are added to the judicial panel.<sup>75</sup> On the other extreme, there are court systems that are modeled almost entirely upon the Euro-American model of jurisprudence.<sup>76</sup>

The most common systems are hybrid systems, based largely upon the American model, but which try in different ways to incorporate tribal laws, customs and mores. In some cases, these systems may operate side-by-side with more traditional forms of

dispute resolution. As one commentator stated, “On the one hand, many tribal populations insist on importing and advancing traditional cultural values into the process of adjudication and urging a greater degree of flexibility and informality within court procedure. But many people are also taken by the allure of civil rights and legal process.”<sup>77</sup>

Tribal codes cover a range of subjects, including but not limited to, membership, health and safety issues, family law, land use, conservation and environmental protection, hunting and fishing, commercial codes, education, health care and housing.<sup>78</sup> While many tribes have lengthy tribal codes with detailed procedures, others have only a few ordinances and some function solely based upon unwritten tribal law.<sup>79</sup>

In general, it should be emphasized that most tribal courts operate in a manner that is similar in most respects with non-tribal justice systems. Thus, in the child welfare context, codes governing these courts routinely provide for emergency removals, preliminary hearings, adjudicatory, dispositional and/or permanency hearings.<sup>80</sup> Guardian *ad litem*s and Court Appointed Special Advocates (CASAs) are often appointed.<sup>81</sup> Witnesses are called and legal findings are made, although unlike non-Indian courts, tribal judges do not always have a legal degree -- although many do.<sup>82</sup> Many tribes have established family or juvenile courts specifically to hear these cases.<sup>83</sup> Codes typically set out standards for determining whether a child has been subjected to abuse or neglect, whether the child can stay with his or her parents or if removal from the home is necessary, what placements are preferred and, as a last resort, whether parental rights should be terminated and what standards of proof should be applied.<sup>84</sup> Many tribal systems have Indian Child Welfare workers, probation officers, community review boards, tribal prosecutors and law enforcement personnel and other categories of people similar to those involved in state systems.<sup>85</sup> In a few cases, there are codes dealing with criminal sexual abuse,<sup>86</sup> as well as specific standards to determine when state and other tribal court decisions should be recognized and honored.<sup>87</sup>

Yet, it must also be emphasized that there are numerous ways in which tribal court systems try to incorporate tribal culture. One of the most ubiquitous elements found in tribal codes are alternative dispute resolution provisions. In most cases, these informal mechanisms operate within the basic structure of the tribal legal system, much as alternative dispute resolution provisions increasingly found in non-Indian courts. These provisions typically provide for informal conferences with the family and tribal employees and/or community members that seek to develop a plan to remediate the problem and obviate the need for court action. Many tribes also have mechanisms for developing plans after a petition has been filed – a consent decree with the family or something similar.<sup>88</sup>

In some cases, these alternative dispute resolution systems may operate as an alternative to the “regular” tribal court system.<sup>89</sup> The Navajo peacemaker court is perhaps the best known of these systems. In that system, the peacemakers are community members who are leaders in the community because they are respected, and not because they hold a position of power or authority. The participants in the process include not

only the individuals whose actions have given rise to a need for intervention, but also the individuals' extended family and clan members. The participants talk out the problem with the goal of reconciliation. The peacemakers are not neutral; they state their opinions and serve as tradition-based teachers. The goal of the process is to reach consensus on a plan of action. If that does not happen, the case may be sent back to the "conventional" tribal court system.<sup>90</sup> Another example can be found on the Hopi Reservation where traditional village governments have the authority to deal with family disputes as an alternative to the tribal court.<sup>91</sup> Some believe that the existence of these more informal, communal mechanisms is a reflection of a continuing tribal world view emphasizing holistic solutions, rather than the adversarial, and often punitive, processes incorporated in the Western legal system.<sup>92</sup>

More typically, tribes attempt to incorporate tribal customs and culture into the deliberations and decisions of a Western-style tribal court system, often through the development of tribal common law<sup>93</sup> or provisions in tribal codes. As to the latter, there are numerous examples.

Many tribal codes recognize the rights of extended family, grandparents and traditional custodians to continued visitation even where parental rights have been terminated, as well as their right to participate in the judicial proceeding.<sup>94</sup> Extended family is defined in many codes to include a large number of people beyond those typically included in non-Indian definitions – people such as clan and band members,<sup>95</sup> individuals who traditionally assist with parenting,<sup>96</sup> any person viewed by the family as a relative,<sup>97</sup> first cousins of parents (defined as aunts and uncles),<sup>98</sup> step-family and godparents.<sup>99</sup> Concepts such as grandparents may include brothers and sisters of the child's lineal grandparents.<sup>100</sup> One particularly broad definition notes that "there are formal and informal ties, which bind the community...based upon bloodlines, marriage, friendship and caring. All women in the community become 'auntie' or 'grandma' when they become a certain age, regardless of blood relationship...any member of the Skokomish Indian Tribe community who is reliable, responsible, loving and willing to care for a youth may be considered extended family."<sup>101</sup>

Some tribes specifically prefer guardianship to adoption, open adoptions to closed adoptions, or discourage termination of parental rights except in extreme circumstances, based upon a belief that it is seldom in a child's best interest to completely sever ties with natural parents and extended family.<sup>102</sup> A number of tribes recognize traditional or customary adoptions.<sup>103</sup> A traditional adoption typically involves a ceremony or other "informal" tribal process that recognizes a new permanent parent for a child while still retaining natural parents as part of the child's extended family network. In some cases, natural parents who are no longer raising their child have responsibilities under codes to provide continued financial support for that child.<sup>104</sup> Some codes have best interests definitions that specifically tie best interests to the child's relationship with the tribe, culture and extended family<sup>105</sup> and many codes specifically recognize the relevance, or even the controlling nature of, tribal laws and customs in interpreting the codes.<sup>106</sup>

There are a number of variations on placement preferences among tribes. Although most tribal codes include preferences similar to the Indian Child Welfare Act preferences (extended family, members of the child's tribe, other Indian families, foster homes licensed by the tribe, Indian homes licensed by a non-Indian authority<sup>107</sup>), there are variations. For example, a number of tribes add a fourth category covering other persons who are familiar with the child's tribal affiliation and special needs.<sup>108</sup> Some tribes have a strong preference for on (or sometimes near) reservation placements, treating off reservation placements as disfavored.<sup>109</sup> A few tribes favor tribal extended family members<sup>110</sup> or traditional custodians.<sup>111</sup> Others provide some preference to parental recommendations.<sup>112</sup>

Of course, given the diversity of tribes and tribal codes, it is difficult to generalize. For example, it is certainly true that a number of tribes have fairly conventional termination of parental rights and adoption provisions that essentially sever the connection between a child and natural parents upon termination and replace it with the adoptive parent-child relationship.<sup>113</sup> These different codes are reflective of the variances between tribes, their different cultures and the extent to which they have adopted Western ideas about child welfare.

**Legal framework required: Title IV-E issues that must be addressed by codes, regulations or policies**

Although most tribes have a pre-existing judicial infrastructure, operating Title IV-E will require some modifications to the tribal code in most cases. A Title IV-E plan has 33 separate elements that it must meet and many of those elements have several subparts.<sup>114</sup> HHS provides a template that must be used for the submission of Title IV-E plans based upon these elements. Generally, HHS requires that compliance with each of the Title IV-E statutory requirements be demonstrated by reference to official documents that are in written form based upon a legitimate exercise of sovereign authority by the tribe.<sup>115</sup> As an example, one state plan (Maine) includes reference to statutes (codes), rules, standards, manuals, policies, statements, reviews, approved plans, memos, approved policy statements and court orders.<sup>116</sup>

The following are the main legal issues that tribes will need to address to administer the Title IV-E program. As noted, some issues are probably best addressed in a tribal code, but others might be achieved through court rules, administrative regulations or policies or intergovernmental agreements. In general, those requirements that involve judicial findings, procedures or orders should probably be in the tribal code. Requirements that pertain only to the agency and its operation may be dealt with in a code if the tribe prefers, but can also be the subject of agency regulations, manual, policies and the like which are more easily changed. In some cases, tribes may choose to put general language in their codes authorizing agencies to take certain actions, but leave specifics to the agency.

In terms of the substance of the legal framework, some of the requirements in Title IV-E are very specific and the tribe does not have much flexibility if it wants to

operate the program. Other requirements are not so specific and, in that case, the tribe has the authority to determine how those requirements should be interpreted in accordance with its own cultural beliefs. In this paper, I will try to indicate instances where this flexibility is present or not present and include examples of how tribes have attempted to deal with certain cultural issues in the context of their child welfare codes. To the extent that flexibility is present, it can be an opportunity for tribes to codify their beliefs about child welfare and how the child welfare system should operate.

## **1. Legal standards that pertain to children and families involved in child custody proceedings**

### **a. *Determination that a child is in need of care***

There is no specific Title IV-E requirement as to when a child can become subject to the jurisdiction of the court or subject to supervision by a child welfare agency. There are provisions, however, that provide that an agency can be reimbursed for administrative expenses for a child who has not been removed from the home, but who is at imminent risk of removal.<sup>117</sup>

*Tribal Code standards to be developed:* None, unless the tribe chooses to place such children under the jurisdiction of the tribal court in which the development of criteria would be appropriate.

*Standards that may be in other written documents:* Administrative policies defining when a child will become subject to supervision by the tribal child welfare agency because of an imminent risk of removal unless services are provided will help to document a Title IV-E claim for reimbursement of administrative expenses incurred to provide service for that child and family.

*Limitations on tribal discretion:* In order to make a claim for administrative expenses, the child must be at imminent risk of removal. According to HHS, “the three acceptable methods of documentation indicating that a child is a candidate for foster care benefits are: (1) A defined case plan which clearly indicates that, absent effective preventive services, foster care is the planned arrangement for the child, (2) an eligibility determination form which has been completed to establish the child's eligibility under title IV-E, or (3) evidence of court proceedings in relation to the removal of the child from the home, in the form of a petition to the court, a court order or a transcript of the court's proceedings.”<sup>118</sup>

**b. *Removal of a child from home***

In order for a child to be eligible for Title IV-E foster care maintenance payments, the court must make findings that 1) continuation in the home from which the child was removed would be contrary to the welfare of the child, and 2) reasonable efforts to prevent removal have been made, and the court order must provide the tribal agency (or a public agency with which the tribe has an agreement) with placement and care responsibility for the child.<sup>119</sup> In general, the contrary to the welfare finding must be made in the first court order sanctioning removal of the child from the home<sup>120</sup> and the reasonable efforts determination must be made within 60 days after removal of the child from the home.<sup>121</sup> For the first twelve months that the tribal plan is in effect, these findings may be made retroactively (*nunc pro tunc*) or based upon affidavits for children that are already in care.<sup>122</sup>

*Tribal Code standards to be developed:* Define the term “contrary to the welfare of the child” and what constitutes “reasonable efforts”. Include any other criteria that the tribe believes are relevant to a decision about when a child should be removed from his or her home. This may include a tribal definition of “best interests of the child”.

*Standards that may be in other written documents:* If the tribe decides to allow for *nunc pro tunc* orders for the first twelve months that it is operating under the program, this might be the subject of a court rule or a code amendment.

*Limitations on tribal discretion:* The reasonable efforts requirement applies to 1) providing services to prevent the removal of a child from his/her home, 2) reunifying a child with his/her birth family after removal, and 3) finalizing a permanent placement for a child. ASFA allows, but does not require, tribes to exempt certain families from the reasonable efforts requirement when one of the following circumstances exists: 1) aggravated circumstances which are defined by the tribe (examples given are abandonment, torture, chronic abuse or sexual abuse of a child); 2) the parent previously had parental rights involuntarily terminated to a sibling of the current child in custody; 3) the parent has committed or aided, abetted, attempted, conspired or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or 4) the parent has committed a felony assault that results in serious bodily injury to the child or another child of the parent.<sup>123</sup>

*Example of “best interests” definition in tribal code:*

*Pueblo of Zuni tribal code, section 9-2-1*

*All actions and decisions made under the authority of this Code shall be implemented to serve the best interests of the child. In determining the best interests of the child the following principles shall govern:*

- A. A child’s need for love, nurturing, protection and stability. A child must have a safe and nurturing home environment offering emotional support and comfort, the basic needs of food, clothing and shelter, reasonable medical care and protection from danger, violence, or exposure to harmful conduct including drug or alcohol abuse.*
- B. A child’s need for family. A child must have connection to loving family members for guidance and nurturing. Although not all children have the benefit of family care, nothing can replace the primary role of loving parents and family in a child’s life.*
- C. A child’s need for identity and development. A child must develop self-identity and awareness of his or her unique role within the larger community, including the child’s cultural community. This is done by participation in cultural activities, speaking one’s native language, and having opportunities and encouragement to pursue education and enrichment.*
- D. A child’s need for happiness. A child cannot be happy unless his or her primary needs are met; but a child also needs opportunities for play and recreation, leisure time and other activities the child enjoys, and possession of toys and other personal items of importance to the child.*

**c. Placement preferences**

Title IV-E requires that placement with relatives be considered first<sup>124</sup> and that placement may not be delayed or denied based upon the race, color or national origin of the foster parent;<sup>125</sup> placement based upon political status (e.g., membership in an Indian tribe) would not violate this provision.<sup>126</sup> It is also required that a child be placed in the least restrictive setting and in close proximity to the parents’ home, unless the best interest and special needs of the child require otherwise.<sup>127</sup> Reasonable efforts must also be made to place siblings in the same home.<sup>128</sup>

*Tribal Code standards to be developed:* Establish placement preferences. Develop a tribal definition of the term “relative”.

*Limitations on tribal discretion:* See above



*Example of placement preferences provision in tribal code:*

*Code of the Confederated Tribes of the Grand Ronde Community of Oregon, section 7.13*

*(b) PLACEMENT PROVISIONS:*

*(1) Placement Priorities: When a Youth-in-Need-of-Care has been placed in the temporary legal custody of the ICW Program, and cannot be released to a parent, guardian, or custodian, the Program shall, whenever possible, considering foremost the best interests of the child and the child's health, safety, and welfare, place the child in the temporary physical custody of one of the following, in order of preference and priority:*

*(A) Relatives or extended family members;*

*(B) Private Tribal home, licensed or approved by the ICW Program, close to the parental home;*

*(C) Private Native home, licensed or approved by the ICW Program, close to the parental home;*

*(D) Private non-native home, licensed or approved by the ICW Program, close to the parental home; or*

*(E) Tribal Youth Shelter. The Tribal Youth Shelter may be preferred over other placement options at the discretion of the ICW Program.*

*(2) Other Placement: Notwithstanding the above, the ICW Program, with good cause shown, shall have the discretion to place the child in a placement that serves the best interests of the child.*

*(3) Siblings: Siblings shall be placed together whenever possible, if it is in their best interests to do so.*

*(4) Least Restrictive Placement: A child shall be placed in the least restrictive placement available to meet the child's treatment needs.*

*(5) Proximity to Parent: A child shall be placed in as close proximity to the parent as possible, to facilitate and encourage visitation and reunification.*

*Examples of definition of "relatives" ("extended family") in tribal codes:*

*Winnebago Tribe of Nebraska, section 4-102*

*"Extended family" means a tribal member who has reached the age of eighteen and who is the minor's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second*

*cousin, or stepparent, or is recognized by tribal custom as an extended family member.*

*San Ildefonso Pueblo, section 18.6*

*(10)"Extended Family" means any person who provides parenting to a child in the traditional Pueblo way.<sup>129</sup>*

**d. Termination of parental rights**

Title IV-E requires that a termination of parental rights (TPR) petition must be filed and efforts made to locate an adoptive family (1) when a child has been in foster care for 15 of the last 22 months, (2) if the child has been abandoned as defined by tribal law, or (3) if the parent has committed murder, voluntary manslaughter or felony assault that led to serious bodily injury against any of his or her children. There are three exceptions to this requirement: (1) the child is being cared for by a relative, (2) a tribal agency has a compelling reason for determining that filing the petition would not be in the best interests of the child, or (3) in any case where reasonable efforts are required, the tribe has not provided to the family of the child those services which the tribe deems necessary for the safe return of the child.<sup>130</sup>

*Tribal Code standards to be developed:* Define the circumstances under which termination of parental rights will take place and what evidentiary standard is required. Define “abandonment”. Since one of the exclusions from the TPR filing requirement is where placement has been made with the child's extended family,<sup>131</sup> a tribe’s definition of “relative” will also impact the implementation of this requirement.

*Limitations on tribal discretion:* The tribe must have a TPR provision and must apply the exceptions to the requirement that a TPR be filed in certain circumstances on a case-by-case basis. An across-the-board exclusion is not allowed. However, in setting the TPR standard, the tribe has discretion to make the requirements for TPR as stringent as it would like. Where that legal standard cannot be met in terms of a specific parent of an Indian child, this would normally constitute a compelling reason not to file a TPR petition because it would not be in the best interests of the child.<sup>132</sup>

*Example of TPR provision in tribal code:*

*Skokomish Tribal Code (excerpts)*

**3.02.150 Purpose**

*The Skokomish Indian Tribe has not traditionally provided for the termination of a parent's rights. It is currently the custom of the Tribe to view involuntary termination of a parent's rights as a last resort when it is clear that long-term guardianship is insufficient to meet the needs of the youth and an adoption has been arranged.*

**3.02.157 Grounds for Termination and Burden of Proof**

*The Court may order termination of a parent's rights only when an appropriate adoptive home is available and an adoption petition has been filed in conjunction with the termination petition. In addition, the Court must, in cases of voluntary termination, first approve the parent's consent as provided herein, or in cases of involuntary termination, the Tribe must prove by clear and convincing evidence each of the following:*

*(a) That the youth has been abandoned or is a "Child in Need of Care" as provided in S.T.C. 3.02.050 through S.T.C. 3.02.052.*

*(b) That termination of the parent's rights and adoption are in the best interest of the youth and of the Skokomish Indian Tribe;*

*(c) That the Tribe has offered or helped arrange for appropriate resources to help the parent care appropriately for the youth; and*

*(d) That it is unreasonable to expect that the parent will ever be able to care appropriately for the youth.*

*Example of definition of "abandonment" in tribal code:*

*Nez Perce Tribal Code, section 5-1-1*

*(a) "Abandon" means the failure of the parent(s), guardian or custodian to provide reasonable support and to maintain regular contact with a child. Failure to maintain a normal parental relationship with the child without just cause for a period of one year shall constitute prima facie evidence of abandonment. Custody with extended family members or voluntary consent to placement does not necessarily constitute abandonment.*

**e. Kinship care/guardianships**

Title IV-E provides tribes with the option to cover relative guardianships in the Title IV-E program. If a tribe chooses to do so, there are various requirements including findings that (1) returning the child home and

adoption are not appropriate options, (2) the child has a strong attachment to the proposed guardian (and has been consulted about the guardianship if 14 years of age or older), (3) the guardian has a strong commitment to permanently caring for the child, and (4) the child was eligible for foster care maintenance payments for six consecutive months while living in the home of the guardian (whether or not the child actually received payments).<sup>133</sup> Although an agency can make these findings, guardianship itself will require a court order. Thus, in most cases, the Court will be reviewing these findings. In addition, a kinship guardianship agreement is required.<sup>134</sup>

*Tribal Code standards to be developed:* Develop standards governing the court's issuance of an order of guardianship. The tribal definition of "relative" will be an important part of the code for this purpose.

*Standards that may be in other written documents:* Standards are needed for making the required findings described above. If the agency is empowered to make these findings, then it may be appropriate to include these standards in agency regulations or manuals. If the tribe decides that the court needs to make these findings, then the requirements should be in the tribal code. The contents of guardianship agreements should also be specified in agency policies and procedures.

*Limitations on tribal discretion:* Title IV-E requires that the specific findings described above be made, but does not specify the criteria for making those findings. Title IV-E also sets minimum standards for kinship guardianship agreements. Agreements must specify the amount of the payment, additional services that the child and guardian will be eligible for and how to apply for them, that the cost of obtaining guardianship will be reimbursed up to a maximum of \$2,000, and that the agreement will remain in force regardless of where the guardian resides.<sup>135</sup>

#### **f. *Adoptions***

Adoption assistance payments under Title IV-E are possible to children with special needs who are the subject of adoption assistance agreements.<sup>136</sup> Special needs are present where – because of the child's ethnic background, age, membership in a minority or sibling group, or the presence of certain medical conditions or physical, mental or emotional handicaps – adoptive placement with a non-subsidized adoptive family has not been possible.<sup>137</sup> In addition, all adoptive families must be notified of their potential eligibility for an adoption tax credit.<sup>138</sup>

*Tribal Code standards to be developed:* Standards governing the issuance of an order of adoption should be developed. Where tribal cultural values are different than those of the mainstream culture, this is particularly

important. Codification of such principles increases the likelihood that tribal customary adoptions will be recognized as adoptions within the meaning of Title IV-E.<sup>139</sup>

*Standards that may be in other written documents:* Define what is required in an adoption assistance agreement. Define a child with “special needs”. Include the notice requirement in a procedures manual.

*Limitations on tribal discretion:* There are a number of provisions that must be included in adoption assistance agreements, including the duration of the agreement and the amount of the payments, that the agreement remains in effect regardless of where the adoptive parents live and that services and other protections for the child specified in the agreement will be provided if the child moves outside of the tribe’s jurisdiction.<sup>140</sup>

*Examples of adoption provisions in tribal codes:*

*Pawnee Tribe of Oklahoma Code, section 7-703*

*There shall be three types of adoptions recognized by this Tribe, namely:*

*(a) Statutory adoptions under Tribal law entered into pursuant to Subchapter A of this Chapter.*

*(b) Statutory adoptions under the laws of some other Tribe, State, or Nation having jurisdiction over the parties and the subject matter.*

*(c) Traditional adoptions which may be for the purpose of establishing any traditionally allowed family relationship between any persons, and which shall be governed by the Tribal Common Law until such time as the proper procedures for such adoptions are written down as a part of the Tribal Code at which time traditional adoptions shall be governed by such procedure. Unless otherwise specifically provided by Tribal statute, traditional adoptions create a particular stated family relationship between persons for all purposes other than enrollment and the probate of decedents estates.*

*Sisseton Wahpeton Oyate Code, section 38-03-24*

*ECAGWAYA OR "TRADITIONAL ADOPTION" - Means according to Tribal Custom, the placement of a child by his natural parents with another family but without any Court involvement. After a period of two (2) years in the care of another family, the court, upon petition of the adoptive parents, will recognize that the adoptive parents, in custom or traditional adoption have certain rights over a child even though parental rights of the natural parents have never been terminated. Traditional adoption must be attested to by two (2) reliable witnesses. The court, in its discretion, on a case by case basis, shall resolve any questions that arise over the respective rights of the natural parents (and the adoptive*

*parents) in the custom adoption. The decision of the Court shall be based on the best interests of the child and on recognition of where the child's sense of family is. Ecagwaya is to raise or to take in as if the child is a biological child. The Court shall take "Judicial Notice" after proper due process proceedings, that, indeed, Ecagwaya is a custom and tradition of the Tribe.*

**g. *Voluntary placements***

Voluntary placements (provided that all general eligibility requirements have been met) can be reimbursed under Title IV-E for 180 days if there is an agreement in place between the agency and parent(s). Payment can continue in excess of 180 days only if there is a judicial determination that the placement is in the best interests of the child.<sup>141</sup>

*Tribal Code standards to be developed:* Standards pertaining to whether a voluntary placement in excess of 180 days is in the best interests of the child.

*Standards that may be in other written documents:* Define what is needed in a voluntary placement agreement.

*Limitations on tribal discretion:* None

**2. *Judicial/administrative proceedings***

**a. *Case review systems***

Title IV-E requires that the status of the child must be reviewed at least every 6 months, although it can be done more frequently at the discretion of the tribe.<sup>142</sup>

*Tribal Code standards to be developed:* If this review is going to be conducted by the court, then it would be preferable to have standards governing the review in the tribal code.

*Standards that may be in other written documents:* If the review is to be done administratively, then the standards could be adopted as a regulation or administrative policy.

*Limitations on tribal discretion:* The review must be conducted by either a court or, if done administratively, by a panel that includes at least one person that is not responsible for the delivery of services to the child or parents.<sup>143</sup>

**b. Permanency hearing**

A permanency hearing is required no later than 12 months after the child has entered foster care and at least every 12 months thereafter.<sup>144</sup> The hearing must be held by a court or an administrative body appointed and approved by the court. In cases where a court has found that reasonable efforts to preserve or reunify a family are not required, the hearing must be held within 30 days.<sup>145</sup> Tribes will be required to make reasonable efforts to achieve permanency. Reunification, adoption, guardianship and relative placement are all recognized as permanency options. If there are compelling reasons for a different long-term placement, these reasons must be documented by the agency to the court.<sup>146</sup> One example of a compelling reason specified in the regulations is a situation where “the Tribe has identified another planned permanent living situation for the child.”<sup>147</sup>

*Tribal Code standards to be developed:* The requirement for a permanency hearing should be included in the tribal code, including a decision as to whether the review should be by the court or an administrative body. The tribal definitions of “reasonable efforts” and “relative” will be significant here as well.

*Limitations on tribal discretion:* Long-term foster care arrangement with non-relatives cannot be considered acceptable permanent placements unless there are specific reasons documented by the agency on a case-by-case basis as to why this should be permitted.

**c. Appeals – denial of benefits/eligibility**

Title IV-E requires that the opportunity for a fair hearing before the agency be provided to any individual whose claim for benefits is denied<sup>148</sup> or to any individual outside of the tribe’s jurisdiction who asserts that placement with that individual was delayed or denied because the placement would have been cross-jurisdictional in nature.<sup>149</sup>

*Tribal Code standards to be developed:* If this hearing is going to be conducted by the court, then it would be preferable to have standards governing the review in the tribal code.

*Standards that may be in other written documents:* If the hearing is to be done administratively, then the standards could be adopted as a regulation or administrative policy.

*Limitations on tribal discretion:* As long as the hearing is “fair”, there are no restrictions upon how it is structured.

***d. Alternative Dispute Resolution***

Although Title IV-E does not require the adoption of alternative dispute resolution systems, many tribes have such mechanisms in their tribal codes.<sup>150</sup> Title IV-E includes a Family Connection competitive grant program that may be used to fund certain types of alternative processes – for example, family group decision-making meetings.<sup>151</sup>

**3. Required administrative procedures**

***a. Licensing of foster and adoptive homes, guardianships and child care institutions***

Tribes have the authority to set their own standards for foster and adoptive homes, child care institutions, and guardianships.<sup>152</sup> Under Title IV-E, there must be a tribal governmental entity specifically charged with the responsibility to develop standards for foster family homes and child care institutions.<sup>153</sup> Non-safety waivers of the standards for relative foster homes are allowed.<sup>154</sup> If an individual has committed certain crimes, he/she may not be approved as a foster or adoptive parent or as a guardian.<sup>155</sup> In the case of foster and adoptive parents, this is true regardless of whether Title IV-E funds are used for the placement.<sup>156</sup> (See also next section on background checks.)

*Tribal Code standards to be developed:* The code should probably specify the types of individuals who are ineligible to be foster parents, adoptive parents or guardians. Actual licensing standards would normally not be in the code, however, but a tribe may want to specify in its code which tribal governmental entity has been charged with the responsibility to develop the standards.

*Standards that may be in other written documents:* In order to operate the program, a tribe must have licensing standards in place for foster family homes and child custody institutions.

*Limitations on standards:* The tribe may not license or approve a foster or adoptive parent, regardless of whether Title IV-E funds are used for the placement, who was convicted of a felony for child abuse or neglect, spousal abuse, crime against children or a crime involving violence (except in case where the violent crime was physical assault or battery, in which the individual is disqualified only if the felony was committed within the last 5 years). Any individual with a drug-related offense within the last 5 years is also disqualified.<sup>157</sup> The same restrictions apply to guardians who receive Title IV-E payments.<sup>158</sup> Similar restrictions have already been imposed by the Indian Child Protection and Family Violence Prevention Act upon tribes operating “638 contracts” pursuant to the



Indian Self-Determination and Education Assistance Act or receiving grants awarded under the Tribally Controlled Schools Act.<sup>159</sup> Standards for tribal foster family homes and tribal child care institutions must be reasonably in accord with standards recommended by national organizations.<sup>160</sup>

***b. Background checks***

Title IV-E requires (1) finger-print based criminal record checks, and (2) checks of any child abuse and neglect registry maintained by States/Indian tribes. These requirements apply to all prospective foster and adoptive parents, regardless of whether Title IV-E funds are used for the placements, and for guardians that will be receiving Title IV-E guardianship assistance payments. Child abuse and neglect registries must be checked for all jurisdictions in which any adult living in the home has resided in the last five years. Safeguards must be in place to prevent this information from being used for any purpose other than the licensing or approval of a foster care or adoptive home.<sup>161</sup>

*Tribal Code standards to be developed:* A tribe may want to include privacy provisions in its code that will ensure that the information received is used only for the purposes intended.

*Standards that may be in other written documents:* Procedures for conducting background checks may be included in regulations or a policy manual.

*Limitations on tribal discretion:* The check for criminal records must include a search of national crime information databases (defined as the National Crime Information Center and its incorporated criminal history databases, including the Interstate Identification Index).<sup>162</sup> Of note, the Indian Child Protection and Family Violence Prevention Act has already been interpreted to require that tribes who operate “638 contracts” or receive grants under the Tribally Controlled Schools Act conduct a criminal history record check of all prospective foster parents.<sup>163</sup>

***c. Case plans***

A case plan is required for each child receiving foster care maintenance payments.<sup>164</sup>

*Standards that may be in other written documents:* Procedures for developing case plans and the contents of the case plan may be included in regulations or a policy manual.

*Limitations on tribal discretion:* A case plan must be a written document developed within 60 days of the removal of the child that includes (1) a description of the placement, including a discussion about its safety and appropriateness, (2) a plan for ensuring that the child is receiving safe and proper care and describes the services will be provided to reunite the child and family or move the child toward an alternative permanent placement, (3) the health and education records of the child, (4) a written plan to assist foster children over the age of 16 to transition from foster care to independent living, (5) documentation of efforts to find a permanent placement if the goal is not reunification, (6) a description of the steps taken and findings made (there are several requirements laid out in the statute) if a decision is made to place the child in a relative guardianship, and (7) a plan for ensuring the educational stability of the child while in foster care.<sup>165</sup> Title IV-E also requires that there be standards pertaining to the content and frequency of caseworker visits. Visits must be made on at least a monthly basis.<sup>166</sup> (Case plans may also contain other pieces of specific information relating to the child and family that are not required by Title IV-E.)

**d. *Employment practices***

Title IV-E requires merit-based employment practices.

*Standards that may be in other written documents:* Hiring procedures may be specified in the tribal code or developed administratively as part of regulations or a policy manual.

*Limitations on tribal discretion:* There is no specific federal definition of merit-based.

**e. *Home studies***

Agencies must conduct home studies within 60 days of a request from another jurisdiction and accept home studies from other jurisdictions unless there are specific findings that a decision in reliance on the report would be contrary to the welfare of a child.<sup>167</sup>

*Standards that may be in other written documents:* This may be handled through administrative policies. A tribe could choose to define “contrary to the welfare of a child” in either its code or regulations to guide its review of home studies from other jurisdictions.

*Limitations on tribal discretion:* See above.

**f. Payments**

The tribe sets the level of foster care maintenance payments and negotiates adoption assistance, and (at the tribe's option) relative guardianship payments.<sup>168</sup>

*Tribal Code standards to be developed:* In its code (or by resolution), a tribe should either set the level of foster care and adoption assistance payments or establish a mechanism and/or process for determining the level of payments.

*Standards that may be in other written documents:* Developing provisions in a manual for tracking expenditures for the purpose of drawing down federal funding, including the tracking of in-kind expenditures, is essential.

*Limitations on tribal discretion:* Obviously, the tribal ability to set foster care maintenance payment levels is limited by its ability to fund the tribal match portion of the payments which may not be in-kind. The amount paid to a family pursuant to an adoption assistance or guardianship agreement may not exceed the level set for foster care maintenance payments and the agency must also pay nonrecurring costs incurred by the adoptive parents or guardian (within certain limits).<sup>169</sup>

**g. Maximum number of children in foster care**

The plan must provide for specific goals for each fiscal year as to the maximum number of children (by number or percentage of foster care placements) who will remain in foster care in excess of 24 months and describe the steps that will be taken to achieve this goal.<sup>170</sup>

*Tribal Code standards to be developed:* Setting the maximum number of children that may be in long-term foster care must be implemented through the adoption of a law or an administrative regulation having the force of law.<sup>171</sup>

*Standards that may be in other written documents:* The steps that will be taken to achieve this goal should be included in agency policies.

**h. Providing services**

The agency's program must include preplacement, reunification, and permanency services (which may be funded by other funds, such as ICWA or Title IV-B funds) and ensure that the child is enrolled in school.<sup>172</sup>

*Standards that may be in other written documents:* The steps that will be taken or arrangements that will be made to ensure that these services are provided should be specified in an agency procedures manual or some other appropriate written document as they are part of the plan that must be submitted to HHS.

***i. Training***

The agency must provide training to foster parents and may train a variety of agency and court personnel using Title IV-E dollars.<sup>173</sup> The list of individuals who may receive training includes adoptive parents, guardians, court judges, prosecutors, court appointed special advocates or guardian *ad litem*s, child placement agencies, child protection services, family preservation and support services and law enforcement.<sup>174</sup> By regulation, all training activities must be included in the tribe's Title IV-B plan.<sup>175</sup> HHS has interpreted the law as requiring tribes to operate the Title IV-B, Part 1 child welfare program in order to be eligible for directly operating Title IV-E.<sup>176</sup>

*Standards that may be in other written documents:* The training plan for each year should be included in the appropriate agency document. As indicated by the list of potential participants, training will need to focus on the issues from both a service provider and court system perspective.

***j. Eligibility determinations***

In order to be eligible for Title IV-E funding, a child's family must have an income level below the level that would have made them eligible for the now defunct Aid to Families with Dependent Children (AFDC) on July 16, 1996. The AFDC standards of the state where the child resided at the time of removal govern.<sup>177</sup>

*Standards that may be in other written documents:* A procedure for making eligibility determinations should be included as part of the agency's written policies.

*Limitation on tribal discretion:* The statute is explicit that the 1996 AFDC standard must be met for the state where the child resided at the time of removal. This is a problem for tribes located in more than one state, but it appears to be unlikely that HHS will interpret this provision to provide flexibility. A legislative fix may be necessary.

***k. Reports and evaluation***

Title IV-E requires the submission of various reports, data and evaluations.<sup>178</sup>

*Standards that may be in other written documents:* These requirements should be summarized in an agency procedures manual or some other appropriate written document as they are required to be part of the plan that must be submitted to HHS. (An analysis of the data requirements is outside the scope of this paper. A separate paper on Title IV-E data requirements has been prepared for the NCAI Policy Research Center.)

***l. Chafee program***

Tribes are eligible to separately apply for funds from the Chafee Independent Living Program which provides a range of services to youth who are aging out of the foster care system.<sup>179</sup>

*Standards that may be in other written documents:* If a tribe chooses to operate this program, the program requirements should be summarized in an agency procedures manual or similar document.

***m. Cross-system coordination***

In order to fully implement the Title IV-E program, cross-system coordination will be required between the tribal IV-E agency and the state Title IV-B/IV-E agency, state Medicaid office, Title IV-D child support enforcement program, the tribal TANF program (or state if the tribe is not operating TANF), Title XX programs (very few tribes operate Title XX programs), appropriate law enforcement personnel, the tribal court system and the state court system, particularly if the tribal IV-E agency will be accepting care and responsibility of children who are not resident or domiciled on the reservation or within Indian country.<sup>180</sup>

*Standards that may be in other written documents:* Cross-system coordination requirements should be summarized in an agency procedures manual or similar document. Written agreements with some of the coordinating agencies may also be beneficial.

**4. Jurisdictional issues**

***a. Who is subject to the jurisdiction of the court (personal jurisdiction)***

Title IV-E recognizes tribal authority to determine the service population to be covered by the plan.<sup>181</sup> As part of this determination, the tribe needs to decide the maximum age of children to be covered by Title IV-E. It is

mandatory to cover children through age 17 and optional to cover children who are 18, 19 or 20 (subject to certain additional requirements specified in the statute that the older youth must meet in order to be eligible, see below).<sup>182</sup> Transition plans must be developed for youth aging out of the system.<sup>183</sup> If the tribe receives Chafee funds for these youth, it must have objective criteria for determining eligibility for services.<sup>184</sup>

*Tribal Code standards to be developed:* The code needs to define which children are subject to the tribe's jurisdiction and, if the tribe decides to increase the maximum age to 18 or older, then it should include that in the code as well. If the tribe's IV-E plan extends beyond tribal members, the tribe would either need to recognize in its code that it has jurisdiction over non-member children and families or negotiate an agreement with the state regarding obtaining care and custody through state court.

*Standards that may be in other written documents:* The development of transition plans and criteria for determining eligibility for Chafee funds (if the tribe receives such funds) would be appropriate subjects for agency regulations or policy manuals.

*Limitations on tribal discretion:* Transition plans, objective criteria for access to Chafee funds and covering all children who have not attained the age of 18 are mandatory requirements. Tribes have the option of including youth between the ages of 18-20 years old who are in foster care or the subject of adoptive or guardian assistance agreements, although youth who are covered through agreements may be included only if they were at least 16 years of age when the agreements became effective.<sup>185</sup> In addition, the older youth may be covered only if one of the following is true: the youth (1) is completing secondary education, (2) enrolled in post-secondary or vocational education, (3) participating in an employment program, (4) employed at least 80 hours/month, or (5) incapable of engaging in any of the aforementioned activities due to a medical condition.<sup>186</sup>

*Example of definition of "Indian" in tribal code:*

*Blackfeet Family Code - Chapter 2*

*31. Indian" - A person who is:*

- a. An enrolled member of any federally recognized Indian Tribe;*
- b. Eligible for enrollment in any Indian Tribe and a biological child of an enrolled member of an Indian Tribe; or*

*c. A descendent of a member of any Indian Tribe who is a resident or domiciliary of the Blackfeet Indian Reservation or who has significant family or cultural contacts with the Blackfeet Indian Reservation.*

***b. Definition of territorial jurisdiction***

Title IV-E recognizes tribal authority to determine the service area to be covered by the plan.<sup>187</sup> Title IV-E also prohibits denying or delaying the placement of a child for adoption when an approved family is available in another jurisdiction.<sup>188</sup>

*Tribal Code standards to be developed:* Tribal codes should specify the territory over which the tribe asserts exclusive jurisdiction and the circumstances under which it will exercise concurrent jurisdiction. Tribes may also choose to define their service area in the code if the area is different than the area over which the tribe is asserting exclusive jurisdiction. Finally, tribes may also want to define the meaning of an “approved” home for purposes of this provision. For example, a tribe may want to provide that homes are considered “approved” only if they fall within the placement preferences in the tribal code.

*Standards that may be in other written documents:* If the tribe’s service area exceeds the area where it is exercising exclusive jurisdiction, an agreement with the state (or perhaps a county) will probably be necessary if the plan is to be fully implemented. There are a number of issues that will need to be resolved. For example, will these cases routinely be transferred to tribal court? Where a case is not transferred to tribal court, will the tribal agency be awarded/accept custody from a state court? If so, how will that process work?

*Limitations on tribal discretion:* It is unknown how the Title IV-E provision on inter-jurisdictional placement will be interpreted in a situation where a tribe discourages, or even prohibits off-reservation adoptions.

***c. Tribal court structure***

If there is more than one tribal court, the tribal code should specify which court has jurisdiction over child custody cases. Tribes that choose to operate Title IV-E may choose to set up a special court for these purposes if one does not currently exist.

*Tribal Code standards to be developed:* If a separate Children’s Court or Family Court is to be created, code provisions would be necessary. At a minimum, the code should empower the tribal court, or a specific part thereof, with authority over these cases.

*Standards that may be in other written documents:* Many of the details as to how such a court might operate could be included in Court Rules, as opposed to the code.

*Limitations on tribal discretion:* None

## **5. Third-party rights/obligations**

### ***a. Foster parents, preadoptive parents and relatives***

Foster parents, preadoptive parents and relatives providing care all have the right to notice of, and a right to be heard in, any proceeding held with respect to the child. This does not mean that they must be treated as a party to the proceeding, however.<sup>189</sup> In addition, all adult relatives of child placed in foster care who can be identified by due diligence (excluding individuals with a history of family or domestic violence) must be provided with notice of a child's removal from his or her family within 30 days of the removal.<sup>190</sup>

*Tribal Code standards to be developed:* To the extent that the hearings take place in court, the tribal code should spell out the rights of foster parents, preadoptive parents and relatives in regard to participation in these proceedings.

*Standards that may be in other written documents:* If proceedings are to take place within the agency, the rights of these third parties could be specified in a regulation or other agency document. Procedures to identify and notify relatives would also need to be developed by the agency and included in regulations, a policy manual or similar document.

*Limitations on tribal discretion:* See above.

### ***b. Families receiving IV-E benefits before the tribal IV-E plan is approved***

Families currently receiving benefits may not lose their benefits by reason of the approval of a tribal IV-E plan.<sup>191</sup>

*Standards that may be in other written documents:* This requirement may be incorporated into a written document governing agency procedures.

*Limitations on tribal discretion:* Existing recipients must be held harmless.



**c. Reporting of child abuse or neglect**

Title IV-E requires the agency to report child abuse and neglect to an appropriate agency or official.<sup>192</sup>

*Tribal Code standards to be developed:* The tribe may want to specify who is required to report child abuse and neglect and to whom it should be reported. This is especially so if the tribe wants to require tribal employees from multiple agencies (e.g., child welfare, police, court system) to report.

*Standards that may be in other written documents:* How such reports are handled would be an appropriate subject for agency regulations, policy documents, or court rules as the case may be.

*Limitations on tribal discretion:* Title IV-E establishes a duty to report, but does not specify any of the details.

**d. Medicaid**

All children who fall under Title IV-E are Medicaid eligible and should be enrolled in the program.<sup>193</sup>

*Standards that may be in other written documents:* Arrangements may need to be made with the State to ensure that all children obtain coverage, which should be documented in some manner.

**e. Privacy**

The plan must include safeguards to ensure that the information obtained about individuals in the Title IV-E program is used only for the administration of the program, a federal benefit program, or for valid criminal or civil investigations.<sup>194</sup>

*Standards that may be in other written documents:* If a tribe wants to provide maximum protection, it may want to place restrictions on the use of information in its code. Agency regulations might also provide adequate protection.

*Limitation on tribal flexibility:* The statute sets out the minimum level of protection that is required.

## Conclusion

In order to meet Title IV-E requirements there are a number of elements that must be included in tribal codes, regulations and/or written policies. Many of these elements are already present in tribal codes, regulations, policy manuals, and similar documents, but almost all tribes will need to modify these legal documents to some extent.

This means that tribes will need to have in place or develop a process by which these changes are going to be made. Given the impact of these requirements upon tribal children and families and their long-term consequences, a community-based process will often be the preferred approach to develop these code provisions, regulations and policies. Of course, many of the requirements are very technical. Thus, individuals with technical expertise will also need to be part of the process.

Some of the Title IV-E requirements are inflexible and a tribe will need to think through the consequences of adopting these requirements and decide whether it is willing to adopt these changes in order to operate the IV-E program. For example, there are requirements for specific findings to be made in order to obtain federal funding for foster care placements and guardianships, including eligibility standards set by statute, certain provisions that must be included in guardianship and adoptive assistance agreements, requirements for background checks and corresponding restrictions upon who can be licensed as a foster or adoptive home or approved for a guardianship, and permanency hearings and case reviews that must take place within certain time frames.

Many of the most important requirements are less prescriptive, however. For example, tribes can develop their own standards for when a child is in need and when removal from the child's home or termination of parental rights is appropriate, determine placement preferences, define "relative" and the meaning of "adoption", develop their own service areas, licensing standards and levels of payment, and create whatever tribal court structure works best for them. Thus, tribes have a significant amount of flexibility and opportunity to craft provisions that will best accomplish their goals for their children consistent with their own cultural beliefs.

There is no one right way to create the legal structure needed for the Title IV-E program. In this paper, I have tried to provide some structure for thinking about these issues – so a tribe can make an educated decision about whether to operate Title IV-E programs, understand the tools that are needed to make it work, and, if a tribe decides to operate the program, to make the decisions and adopt the legal framework necessary to take advantage of the program.

## NOTES

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<sup>1</sup> 42 U.S.C. 620 *et seq.* and 42 U.S.C. 670 *et seq.*, respectively.

<sup>2</sup> 42 U.S.C. 671(a)(16); 42 U.S.C. 675(1); 42 U.S.C. 675(5)(A).

<sup>3</sup> 42 U.S.C. 671(a)(16); 42 U.S.C. 675(5)(B) and (C).

<sup>4</sup> 42 U.S.C. 671(a)(15).

<sup>5</sup> 42 U.S.C. 622(b)(10)(B); 42 U.S.C. 629b(a)(9); 42 U.S.C. 671(a)(15); 42 U.S.C. 675(5)(E).

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<sup>6</sup>42 U.S.C. 671(a)(20).

<sup>7</sup> 42 U.S.C. 673b.

<sup>8</sup> 42 U.S.C. 675(5)(E).

<sup>9</sup> 42 U.S.C. 671(a)(15)(F).

<sup>10</sup> 42 U.S.C. 671(a)(23).

<sup>11</sup> 42 U.S.C. 671(a)(15).

<sup>12</sup>42 U.S.C. 629b(a)(4); 42 U.S.C. 629a(a)(7) and (8). See also 45 C.F.R. 1357.50(f)(1)(iii).

<sup>13</sup> 42 U.S.C. 673(d); 42 U.S.C. 674(a)(5).

<sup>14</sup> 42 U.S.C. 673(a)(3).

<sup>15</sup> 42 U.S.C. 677.

<sup>16</sup> 42 U.S.C. 674(a)(1) and (2); 42 U.S.C. 673(d)(1)(D).

<sup>17</sup> 42 U.S.C. 674(a)(3). The reimbursement rate for training relative guardians, staff of child welfare agencies, court staff, attorneys, guardian *ad litem*s and court-appointed special advocates (CASAs) phases in starting at 55% in FY 2009 and increasing by 5% each year until reaching 75% in FY 2013.

<sup>18</sup> 42 U.S.C. 679c.

<sup>19</sup> 42 U.S.C. 671(a)(32).

<sup>20</sup> 42 U.S.C. 679c(e).

<sup>21</sup> 42 U.S.C. 674(a)(1) and (2).

<sup>22</sup> 42 U.S.C. 672(a)(2)(A)(iii); 42 U.S.C. 679c(c).

<sup>23</sup> 42 U.S.C. 679c(c)(ii)(II).

<sup>24</sup> P.L. 101-351, sec. 301(d) codified as 42 U.S.C. 671 note.

<sup>25</sup> 42 U.S.C. 679c(c)(1)(B).

<sup>26</sup> 42 U.S.C. 679c(c)(2).

<sup>27</sup> 42 U.S.C. 679c(c)(1)(A).

<sup>28</sup> 42 U.S.C. 679c(d).

<sup>29</sup> 42 U.S.C. 679c(c)(1)(D)(i); 25 U.S.C. 450j-1(j). It should be noted in regard to the use of P.L. 93-638 funding that child welfare services must be within the scope of the contract and, of course, the tribe must consider the impact upon other services if it chooses to use 638 funds in that manner.

<sup>30</sup> 42 U.S.C. 679c(c)(1)(D).

<sup>31</sup> 42 U.S.C. 679c(c)(1)(C)(ii)(II).

<sup>32</sup> 42 U.S.C. 677(j).

<sup>33</sup> P.L. 101-351, sec. 301(e) codified as 42 U.S.C. 671 note.

<sup>34</sup> P.L. 101-351, sec. 301(f) codified as 42 U.S.C. 671 note.

<sup>35</sup> 42 U.S.C. 676(a).

<sup>36</sup> See [http://www.acf.hhs.gov/programs/cb/programs\\_fund/discretionary/2009.htm](http://www.acf.hhs.gov/programs/cb/programs_fund/discretionary/2009.htm)

<sup>37</sup> 42 U.S.C. 627.

<sup>38</sup> *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

<sup>39</sup> *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

<sup>40</sup> *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10<sup>th</sup> Cir. 2002) (citations omitted).

<sup>41</sup> See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

<sup>42</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-209 (1978).

<sup>43</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

<sup>44</sup> See, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*; Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*

<sup>45</sup> *United States v. Quiver*, 241 U.S. 602, 603-604 (1916).

<sup>46</sup> *Fisher v. District Court*, 424 U.S. 382, 387-389 (1976); see also *Raymond v. Raymond*, 83 F. 721 (8th Cir. 1897) and *In re Lelah-puc-ka-chee*, 98 F. 429 (N.D. Iowa, 1899). Domicile means an individual's permanent home, i.e., the place to which an individual intends to return notwithstanding temporary absences. In some cases, tribes have expansive definitions of "domicile" in their codes. See, e.g., Nisqually Tribal Code section 50.02.01(i) ("The determination of domicile and residence shall be in accordance with tribal law and custom. In the absence of other factors clearly demonstrating an intent to establish a permanent home off Nisqually Tribal lands, a child's domicile/residence shall be deemed within Nisqually Tribal lands. Periods of time spent off Nisqually Tribal lands for purposes of education, employment, health, or other similar reasons do not affect domicile on the Tribal lands.")

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<sup>47</sup> 18 U.S.C. 1162; 28 U.S.C. 1360.

<sup>48</sup> See, e.g., *Native Village of Venetie I.R.S. Council v. Alaska*, 944 F.2d 548, 559-562 (9<sup>th</sup> Cir. 1991); *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 612 N.W.2d 709, 717 (Wis. 2000); *In re M.A.*, 40 Cal.Rptr.3d (Ct.App. 2006).

<sup>49</sup> 25 U.S.C. 1901 *et seq.* It is worth emphasizing that Title IV-E does not repeal or modify any of the requirements placed upon state agencies and judicial systems by ICWA.

ICWA was enacted in 1978 as a result of “rising concern in the mid-1970s over the consequences to American Indian and Alaska Native children, American Indian and Alaska Native families and American Indian and Alaska Native tribes of abusive child welfare practices that resulted in the separation of large numbers of American Indian and Alaska Native children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Studies by the Association on American Indian Affairs (AAIA) had reported that American Indian and Alaska Native children were placed in foster care and for adoption far more frequently than non-Indian children.

The primary mechanism utilized by Congress to address this crisis was to “curtail state authority” and to strengthen tribal authority over child welfare matters. *Id.* at 45, n. 17. The ICWA “is based upon the fundamental assumption that it is in the child’s best interest that its relationship to the tribe be protected...” *Id.* at 37. Thus, the Act recognizes exclusive tribal jurisdiction over reservation-domiciled American Indian and Alaska Native children, provides for the transfer of off-reservation state court proceedings to tribal court, absent parental objection or good cause to the contrary, recognizes the right of American Indian and Alaska Native tribes to intervene in state court, requires state courts to accord full faith and credit to tribal public acts, records and court judgments, requires notice to American Indian and Alaska Native tribes by state courts, provides American Indian and Alaska Native tribes with the right to challenge and invalidate state placements that do not conform with certain of the Act’s requirements, and recognizes, as a matter of federal law, tribally-established placement preferences for state placements of off-reservation American Indian and Alaska Native children. 25 U.S.C. 1911, 1912(a), 1914 and 1915(c).

For a number of reasons, Title IV-E should not be viewed as affecting the application of the Indian Child Welfare Act.

1. The basic structure of Title IV-B and Title IV-E of the Social Security Act was put in place two years after the ICWA. That legislation, P.L. 96-272, made no specific reference to the ICWA and, in spite of its later date of enactment, has never been interpreted as modifying the provisions of the ICWA.

2. In 1994, an amendment to Title IV-B was passed requiring for the first time that state Title IV-B plans “contain a description, developed after consultation with tribal organizations...in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.” 42 U.S.C. 622(11). This remains in force.

3. Standard rules of statutory construction support this conclusion. First, Title IV-E deals with all children who meet certain eligibility requirements and become involved with the foster care or adoption system, whereas the ICWA is a specific enactment dealing with one subsection of children -- Indian children involved in child custody proceedings. It is a standard rule of statutory construction that specific legislative enactments take precedence over general statutory enactments. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). Moreover, as part of its trust relationship with Native people, Congress routinely enacts Indian-specific legislation which is specifically targeted toward the particular and special needs of Native Americans. See, generally, Title 25 of the United States Code. Such Indian-specific statutes are to be liberally interpreted for the benefit of the people on whose behalf they were enacted. See, e.g., *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 838 (1982).

<sup>50</sup> 25 U.S.C. 1911(a). Although the usual scenario is that a child becomes a ward of the tribal court when living on the reservation and then moves off, in some case tribes have utilized their concurrent jurisdiction over their members to make children residing off of the reservation wards of the tribal court. While a tribal court order issued in such a circumstance ought to be sufficient for Title IV-E purposes, questions have been raised about this exercise of jurisdiction over off-reservation children. Compare *John v. Baker*, 982 P.2d 738 (Alaska, 1999) (recognizing the exercise of this jurisdiction by Alaska Native villages) with *Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 306-307 (Ind. 1988) (questioning a tribe’s authority to proactively assert jurisdiction over off-reservation children in that manner).

<sup>51</sup> See *U.S. v. Lara*, 124 S.Ct. 1628 (2004).

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<sup>52</sup> 25 U.S.C. 1911(a).

<sup>53</sup> 25 U.S.C. 1903(10).

<sup>54</sup> See, e.g., Codes of the Confederated Tribes of the Warm Springs Reservation of Oregon and the Skokomish Indian Tribe.

<sup>55</sup> *Id.*

<sup>56</sup> Although not directly relevant to the exercise of tribal jurisdiction, it is worth noting that one state court upheld application of ICWA in a case where the tribe indicated that a child was considered a member of the tribe, even though the child was not actually eligible for enrollment. *In re Dependency of A.L.W.*, 32 P.2d 297 (Wash. Ct. App. 2001). Another state court, in holding that tribal determination of membership is conclusive, opined that it would not independently evaluate whether the tribe followed its own rules in making that decision. *In the Matter of S.N.R.*, 61 N.W.2d 77 (Minn. Ct. App. 2000).

<sup>57</sup> 25 U.S.C. 1911(b).

<sup>58</sup> *Holyfield, supra*, 490 U.S. at 36.

<sup>59</sup> 25 U.S.C. 1911(b).

<sup>60</sup> The definition of “Indian country” can be found at 18 U.S.C. 1151.

<sup>61</sup> 28 U.S.C. 1360; see, e.g., *Doe v. Mann*, 415 F.3d 1038 (9<sup>th</sup> Cir. 2005) (recognizing the concurrent jurisdiction of the state of California, a P.L. 280 state, over a child welfare proceeding involving an Indian child resident and domiciled on the reservation.) Six states – Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin are mandatory P.L. 280 states; five of the “optional” states -- Florida, Idaho, Iowa, Nevada, and Washington -- have adopted legislation that could be interpreted to include child welfare issues. Not all of the tribes in each of these states are covered by this grant of jurisdiction.

The exercise of state jurisdiction in P.L. 280 states has been controversial. The United States Supreme Court has interpreted the phrase “civil causes of action” in P.L. 280 as providing states with adjudicatory power over private civil litigation involving American Indians – for example, a lawsuit by an Indian person to enforce a contract, but has not interpreted P.L. 280 to allow for the exercise of general state civil regulatory authority over activities taking place on tribal land. See *Bryan v. Itasca County*, 426 U.S. 373, 384-385 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 205, 208-212 (1987). (An example of state civil regulatory authority would be the development of regulations pertaining to hunting and fishing.) Many tribes believe that P.L. 280 child welfare law involves the exercise of civil regulatory authority and thus P.L. 280 did not provide states with concurrent jurisdiction over involuntary child welfare proceedings. At least one state attorney general opinion has been issued that agrees with this perspective. *70 Op Att’y Gen. Wis.* 237 (1981). Thus, although *Doe v. Mann* appears to have resolved this issue in favor of state jurisdiction in those states that are part of the Ninth Circuit (Alaska, California, Idaho, Nevada, Oregon and Washington), there may still be a question concerning the validity of a state court order pertaining to a tribal child resident or domiciled on tribal land in other P.L. 280 states.

<sup>62</sup> Melton, Ada. “Indigenous Justice Systems and Tribal Society”, *Judicature* (Volume 79, no. 3), Nov.-Dec. 1995.

<sup>63</sup> *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

<sup>64</sup> 25 U.S.C. 3613, 3614 and 3621.

<sup>65</sup> 25 U.S.C. 3631.

<sup>66</sup> 25 U.S.C. 3611.

<sup>67</sup> Jones, B.J., “Role of Tribal Courts in the Justice System”, pamphlet published by the Center on Child Abuse and Neglect, March 2000 (hereinafter Jones, 2000).

<sup>68</sup> See <http://www.ntjrc.org/tribalcourts/default.asp> for information on court systems.

<sup>69</sup> Jones 2000.

<sup>70</sup> 25 C.F.R. 11.101(e).

<sup>71</sup> 25 C.F.R. 11.101(c).

<sup>72</sup> 25 C.F.R. 11.201(a).

<sup>73</sup> 25 U.S.C. 1903(12).

<sup>74</sup> Vicenti, Carey. “The Reemergence of Tribal Society and Traditional Justice Systems”, *Judicature* (Vol. 79, No. 3, Nov.-Dec. 1995 (hereinafter Vicenti, 1995); Jaeger, Lisa. “Tribal Court Development: Alaska Tribes” pamphlet published by Tanana Chiefs Conference, 2002 (hereinafter Jaeger, 2002).

<sup>75</sup> Jaeger, 2002

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<sup>76</sup> See, *e.g.*, Ely Colony Protection of Children from Child Abuse and Neglect Ordinance which essentially adopts the Nevada statutes as tribal law. Note: The codes cited in this article can be accessed through the Tribal Court Clearinghouse website at <http://www.tribal-institute.org/lists/codes.htm>.

<sup>77</sup> Vicenti, 1995; see also Sekaquaptewa, Pat. “Evolving the Hopi Common Law”, 91 Kan JI & Pol’y 761 (2000) (hereinafter Sekaquaptewa, 2000) and Zuni-Cruz, Christine “Tribal Law as Indigenous Social Reality and Social Consciousness – (Re)Incorporating Customs and Traditions into Tribal Law, 1 Tribal Law Journal 2000/2001.

<sup>78</sup> See generally <http://www.tribal-institute.org/lists/codes.htm>.

<sup>79</sup> Jaeger, 2002.

<sup>80</sup> See, *e.g.*, Codes of Bay Mills Indian Community, Blackfeet Indian Tribe, Confederated Tribes of the Grand Ronde Community of Oregon, Little River Band of Ottawa Indians, Makah Indian Tribe, Mashantucket Pequot Indian Tribe, Nez Perce Tribe, Red Cliff Band of Lake Superior Chippewas, Absentee Shawnee Tribe, Confederated Tribes of Warm Springs of Oregon, Pueblo of Zuni, Winnebago Tribe and the Coquille Indian Tribe.

<sup>81</sup> See, *e.g.*, Codes of the Bay Mills Indian Community, Coquille Indian Tribe, Blackfeet Indian Tribe, Chitimacha Indian Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Oglala Sioux Tribe, Pawnee Tribe, Red Cliff Band of Lake Superior Chippewas, San Ildefonso Pueblo, Skokomish Indian Tribe, Absentee Shawnee Tribe, Confederated Tribes of the Grand Ronde Community of Oregon, Pueblo of Zuni, Winnebago Tribe and the Nisqually Indian Tribe.

<sup>82</sup> Jones, 2000.

<sup>83</sup> See, *e.g.*, Codes of Blackfeet Indian Tribe, Little River Band of Ottawa Indians, Makah Indian Tribe, Red Cliff Band of Lake Superior Chippewas, Grand Traverse Band of Ottawa and Chippewa Indians, Hopi Tribe, Mashantucket Pequot Tribe, Oglala Sioux Tribe, Pawnee Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, Fort McDowell Yavapai Apache Community, Pueblo of Zuni and the San Ildefonso Pueblo.

<sup>84</sup> See generally <http://www.tribal-institute.org/lists/codes.htm>.

<sup>85</sup> *Id.*

<sup>86</sup> See, *e.g.*, Codes of the Blackfeet Indian Tribe, Fort McDowell Yavapai Apache Community, Oglala Sioux Tribe and the Sisseton Wahpeton Oyate.

<sup>87</sup> See, *e.g.*, Codes of the Bay Mills Indian Community, Blackfeet Indian Tribe, Confederated Tribes of the Grand Ronde Community of Oregon, Little River Band of Ottawa Indians, Mashantucket Pequot Tribe, Nez Perce Tribe, Nisqually Indian Tribe, Confederated Tribes of Siletz Indians of Oregon, Skokomish Indian Tribe, and the Absentee Shawnee Tribe.

<sup>88</sup> See, *e.g.*, Codes of the Chitimacha Indian Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Pawnee Tribe, Red Cliff Band of Lake Superior Chippewas, Confederated Tribes of the Grand Ronde Community of Oregon, Nisqually Indian Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, Makah Indian Tribe, Confederated Tribes of Warm Springs Reservation of Oregon, Pueblo of Zuni and the Skokomish Indian Tribe.

<sup>89</sup> See, *e.g.*, Codes of the Pawnee Tribe and Ysleta del Sur Pueblo.

<sup>90</sup> Zion, James W. “The Dynamics of Navajo Peacemaking”, *Journal of Contemporary Criminal Justice* 58-84, (Vol. 14, No. 1), Feb. 1998.

<sup>91</sup> See Code of the Hopi Tribe.

<sup>92</sup> Sekaquaptewa, 2000; See also, *e.g.*, Codes of the Confederated Tribes of the Grand Ronde Community of Oregon, Coquille Indian Tribe, and the Absentee Shawnee Tribe.

<sup>93</sup> Sekaquaptewa, 2000

<sup>94</sup> See, *e.g.*, Codes of the Blackfeet Tribe, Coquille Indian Tribe, Absentee Shawnee Tribe, Confederated Tribes of the Grand Ronde Community of Oregon and the Pawnee Tribe.

<sup>95</sup> See, *e.g.*, Codes from the Hopi Tribe, Pueblo of Zuni and Absentee Shawnee Tribe.

<sup>96</sup> See, *e.g.*, Code of the San Ildefonso Pueblo.

<sup>97</sup> See, *e.g.*, Code of the Oglala Sioux Tribe.

<sup>98</sup> See, *e.g.*, Codes of the Pawnee and Absentee Shawnee Tribes.

<sup>99</sup> See, *e.g.*, Codes of the Confederated Tribes of the Grand Ronde Community of Oregon and the Pueblo of Zuni.

<sup>100</sup> See, *e.g.*, Code of the Absentee Shawnee Tribe.

<sup>101</sup> Code of the Skokomish Tribe.

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- <sup>102</sup> See, e.g., Codes of the Confederated Tribes of the Grand Ronde Community of Oregon, Nisqually Indian Tribe, Skokomish Indian Tribe, San Ildefonso Pueblo, and the Blackfeet Indian Tribe.
- <sup>103</sup> See, e.g., Codes of the Pawnee and Winnebago Indian Tribes.
- <sup>104</sup> See, e.g., Codes of the Pawnee Indian Tribe and the Ute Indian Tribe of the Uintah and Ouray Reservation.
- <sup>105</sup> See, e.g., Codes of the Confederated Tribes of the Grand Ronde Community of Oregon, Pueblo of Zuni and the Coquille Indian Tribe.
- <sup>106</sup> See, e.g., Codes of Bay Mills Indian Community, Blackfeet Indian Tribe, Confederated Tribes of the Grand Ronde Community of Oregon, Grand Traverse Band of Ottawa and Chippewa Indians, Oglala Sioux Tribe, San Ildefonso Pueblo, and the Coquille Indian Tribe.
- <sup>107</sup> 25 U.S.C. 1915(a) and (b).
- <sup>108</sup> See, e.g., Codes of the Blackfeet and Nez Perce Tribes.
- <sup>109</sup> See, e.g., Codes of the Chitimacha Indian Tribe, Hopi Tribe, San Ildefonso Pueblo, Makah Indian Tribe and Nisqually Indian Tribe.
- <sup>110</sup> See, e.g., Code of the Nisqually Indian Tribe.
- <sup>111</sup> See, e.g., Code of the Winnebago Tribe.
- <sup>112</sup> See, e.g., Code of the Nez Perce Tribe.
- <sup>113</sup> See, e.g., Codes of the Chitimacha Indian Tribe and Fort McDowell Yavapai Apache Community.
- <sup>114</sup> ACYF-CB-PI-07-02 (2007), Attachment B
- <sup>115</sup> See 45 C.F.R. 1356.20(d)(i).
- <sup>116</sup> See [http://www.maine.gov/dhhs/ocfs/iv\\_eplan.pdf](http://www.maine.gov/dhhs/ocfs/iv_eplan.pdf).
- <sup>117</sup> 42 U.S.C. 672(i)(2).
- <sup>118</sup> See Children’s Bureau, “Child Welfare Policy Manual”, chapter 8.1D which can be found at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=79#79](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=79#79)
- <sup>119</sup> 42 U.S.C. 672(a)(2)(ii).
- <sup>120</sup> 45 C.F.R. 1356.21(c).
- <sup>121</sup> 45 C.F.R. 1356.21(b)(1).
- <sup>122</sup> 42 U.S.C. 679c(c)(1)(c)(ii)(I).
- <sup>123</sup> 42 U.S.C. 671(a)(15).
- <sup>124</sup> 42 U.S.C. 671(a)(19).
- <sup>125</sup> 42 U.S.C. 671(a)(18).
- <sup>126</sup> See 42 U.S.C. 1996b(3); see also *Morton v. Mancari*, *supra*.
- <sup>127</sup> 42 U.S.C. 675(5)(A).
- <sup>128</sup> 42 U.S.C. 671(a)(31).
- <sup>129</sup> States also sometimes recognize individuals as relatives who are not related by blood or marriage, often through the concept of “fictive kin”. Examples of fictive kin include a godparent or someone considered to be an aunt or uncle, even though the person is not related to the child. See, e.g., Texas Child Welfare Policy Manual, section 6322.12 (Definition of Fictive Kin or Other Designated Caregiver).
- <sup>130</sup> 42 U.S.C. 675(5)(E).
- <sup>131</sup> 42 U.S.C. 675(5)(E)(i).
- <sup>132</sup> 45 C.F.R. 1536.21(i)(2)(ii)(B).
- <sup>133</sup> 42 U.S.C. 673(d)(3)(A).
- <sup>134</sup> 42 U.S.C. 673(d).
- <sup>135</sup> *Id.*
- <sup>136</sup> 42 U.S.C. 673(a).
- <sup>137</sup> 42 U.S.C. 673(c).
- <sup>138</sup> 42 U.S.C. 671(a)(33).
- <sup>139</sup> See ACYF-CB-PA-01-01 (2001).
- <sup>140</sup> 45 C.F.R. 1356.40(b).
- <sup>141</sup> 42 U.S.C. 672(a)(2)(A)(i); 42 U.S.C. 672(e).
- <sup>142</sup> 42 U.S.C. 675(5)(B).
- <sup>143</sup> 42 U.S.C. 675(5)(B); 42 U.S.C. 672(6).
- <sup>144</sup> 42 U.S.C. 675(5).
- <sup>145</sup> 42 U.S.C. 671(a)(15)(E)(i).
- <sup>146</sup> 42 U.S.C. 675(5)(c).

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<sup>147</sup> 45 C.F.R. 1536.21(h)(3)(iii).

<sup>148</sup> 42 U.S.C. 671(a)(12).

<sup>149</sup> 42 U.S.C. 671(a)(23)(B).

<sup>150</sup> See footnote 88.

<sup>151</sup> 42 U.S.C. 627.

<sup>152</sup> 42 U.S.C. 679c(c)(2). This section only refers to tribal foster family homes and tribal child care institutions, but the same principle would apply to adoptive homes and guardianships based upon the tribe's inherent sovereignty.

<sup>153</sup> 42 U.S.C. 671(a)(10).

<sup>154</sup> *Id.*

<sup>155</sup> 42 U.S.C. 671(a)(20)(A). Although this section only refers to foster and adoptive parents, a child is eligible for guardianship payments only if he/she would have been eligible for foster care payments while living in the relative's home for six consecutive months. 42 U.S.C. 673(d)(3)(A)(i)(II). Since the child would be eligible only if the relative's home were licensed as a foster home, it is a reasonable assumption that any guardian receiving Title IV-E guardian assistance payments would be subject to these restrictions. However, it is not necessarily true that the restrictions would need to be applied to a guardian who is not receiving Title IV-E funds.

<sup>156</sup> *Id.*

<sup>157</sup> 42 U.S.C. 671(a)(20)(A).

<sup>158</sup> See footnote 155.

<sup>159</sup> 25 U.S.C. 3207 as interpreted in 25 C.F.R. 63.3. Section 3207 refers to individuals who are being considered for employment in positions that involve regular contact or control over Indian children. 25 C.F.R. 63.3 defines such individuals to include any person providing out-of-home care to an Indian child.

<sup>160</sup> 42 U.S.C. 671(a)(10); 42 U.S.C. 679c(c)(2).

<sup>161</sup> 42 U.S.C. 671(a)(20).

<sup>162</sup> *Id.* incorporating 28 U.S.C. 534(e)(3)(A) by reference.

<sup>163</sup> 25 U.S.C. 3207; 25 C.F.R. 63.3 and 63.15(d).

<sup>164</sup> 42 U.S.C. 671(a)(16).

<sup>165</sup> 42 U.S.C. 675(1); 45 C.F.R. 1536.21(g)(1) and (2).

<sup>166</sup> 42 U.S.C. 622(b)(17).

<sup>167</sup> 42 U.S.C. 671(a)(26).

<sup>168</sup> 42 U.S.C. 672(a); 42 U.S.C. 673.

<sup>169</sup> 42 U.S.C. 673 (a)(1)(B)(i), (a)(3), (d)(1)(B)(iv) and (d)(2).

<sup>170</sup> 42 U.S.C. 473(a)(3) and (d)(2).

<sup>171</sup> 45 C.F.R. 1356.21(n).

<sup>172</sup> 42 U.S.C. 422(b)(8)(A).

<sup>173</sup> 42 U.S.C. 671(a)(24); 42 U.S.C. 674(a)(3)(B).

<sup>174</sup> *Id.*

<sup>175</sup> 45 C.F.R. 1356.60(b)(2).

<sup>176</sup> See 42 U.S.C. 671(a)(2).

<sup>177</sup> 42 U.S.C. 679c(c)(1)(C)(ii)(II).

<sup>178</sup> 42 U.S.C. 671(a)(6) and (7).

<sup>179</sup> 42 U.S.C. 677(j).

<sup>180</sup> See 42 U.S.C. 472(h); 42 U.S.C. 473(b); 42 U.S.C. 471(a)(17); 42 U.S.C. 422(b)(2); 42 U.S.C. 471(a)(4); 45 C.F.R. 1357(l) and (m).

<sup>181</sup> 42 U.S.C. 679c(c)(1)(B).

<sup>182</sup> 42 U.S.C. 675(8). A plan may cover 19 and 20 year old

<sup>183</sup> 42 U.S.C. 675(5)(H).

<sup>184</sup> 42 U.S.C. 677(b)(2)(E).

<sup>185</sup> 42 U.S.C. 675(8)(B)(i).

<sup>186</sup> 42 U.S.C. 675(8)(B)(iii) and (iv).

<sup>187</sup> 42 U.S.C. 679c(c)(1)(B).

<sup>188</sup> 42 U.S.C. 671(a)(23).

<sup>189</sup> 42 U.S.C. 675(5)(G).

<sup>190</sup> 42 U.S.C. 671(a)(29).



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<sup>191</sup> P.L. 110-351, sec. 301(d), codified as 42 U.S.C. 671 note.

<sup>192</sup> 42 U.S.C. 671(a)(9).

<sup>193</sup> 42 U.S.C. 472(h); 42 U.S.C. 473(b); 42 U.S.C. 679c(g).

<sup>194</sup> 42 U.S.C. 671(a)(8); 42 U.S.C. 671(a)(20)(B)(iii).