
SENATE COMMITTEE ON HUMAN SERVICES

Senator Hurtado, Chair

2021 - 2022 Regular

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Consultant: Marisa Shea
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Fiscal: Yes

Subject: Tribally Approved Homes Compensation Program.

SUMMARY

This bill creates the Tribally Approved Homes Compensation Program to provide \$75,000 annually, subject to an appropriation for this purpose in the annual Budget Act, to eligible tribes and tribal organizations to assist in funding the costs associated with recruiting and approving resource family homes for Indian children pursuant to the federal Indian Child Welfare Act (ICWA). This bill requires, to be eligible for annual funding, tribes or tribal organizations to submit letters of intent, as provided, and requires funded tribes and tribal organizations to submit annual process reports to the California Department of Social Services (CDSS) for each year funding is received. This bill also requires CDSS to annually compile the received process reports and submit a compiled report to the Legislature, as provided, and changes the definition of tribal organization to allow tribal organizations to serve one or more federally recognized tribes.

ABSTRACT

Existing Law:

- 1) Establishes a state and local system of child welfare services, including foster care, for children who have been adjudged by the court to be at risk of abuse and neglect or have been abused or neglected, as specified. (*WIC 202*)
- 2) Clarifies the purpose of provisions regarding dependent children as to provide the maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, neglected, or exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of harm. (*WIC 300.2*)
- 3) Provides legislative intent to preserve and strengthen a child's family ties whenever possible and to reunify a foster youth with their biological family whenever possible, or to provide a permanent placement alternative. (*WIC 16000*)
- 4) Establishes the Indian Child Welfare Act (ICWA), which provides guidance to states regarding the jurisdiction requirements, proceedings of tribal courts, and custody

proceedings involving the removal of Indian children from their parent's custody. (25 *United State Code (USC) 1901 et seq.*)

- 5) Establishes federal regulations for the implementation of ICWA. (25 *Code of Federal Regulations Section 23*)
- 6) States the commitment of California to protect the essential tribal relations and best interest of an Indian child by promoting practices in accordance with federal law, as specified. (*WIC 224(a)*)
- 7) Requires the court, in all Indian child custody proceedings as defined by ICWA, to strive to promote the stability and security of Indian tribes and families, comply with ICWA, and seek to protect the best interest of the child, and further requires, whenever an Indian child is removed from an existing foster care placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child should be in accordance with ICWA and other applicable state and federal law. (*WIC 224(b)*)
- 8) Requires the court, county welfare department, and probation department to inquire whether a child, as specified, is or may be an Indian child, as provided. (*WIC 224.2*)
- 9) Requires, CDSS, upon an Indian tribe's request, enter into an agreement with any Indian tribe, tribal organization, or tribal consortium located in California or with lands that extend into this state regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, including but not limited to agreements that provide for orderly adjudication of and transfer of jurisdiction on a case-by-case basis for cases subject to exclusive tribal or state jurisdiction, or for concurrent jurisdiction between the state and tribes, as provided. (*WIC 10553.1(a)*)
- 10) Provides that a federal recognized tribe is authorized, but not required, to license or approve a home for the purpose of foster or adoptive placement of an Indian child, as specified under ICWA. (*WIC 10553.12(a)*)
- 11) Defines "tribally approved home" (TAH) as a home that has been licensed or approved by an Indian child's tribe or a tribe or tribal organization designated by the Indian child's tribe for foster care or adoptive placement of an Indian child using standards established by the child's tribe, as specified. Further, declares that a TAH is not required to be licensed or approved by the state or county and is equivalent to a state-licensed or county-licensed, or approved home, including an approved resource family home. (*WIC 224.1(r)*)
- 12) Requires a tribal agency to submit to the Department of Justice (DOJ) fingerprint images and related required information of an individual applying with the tribal agency as a prospective foster or adoptive parent, any adult who resides or is employed in the home of an applicant, or employee of the child welfare agency who may have contact with the child, for the purposes of obtaining information as to the existence and content of a record of state or federal convictions and state or federal arrests, as provided. (*Penal Code (PEN) 11105.08(b)*)

- 13) Requires out-of-home placement of a child in foster care to be based upon the selection of a safe setting that is the least restrictive family setting that promotes normal childhood experiences and the most appropriate setting that meets the child's individual needs, as specified. (*WIC 16501.1(d)(1)*)

This Bill:

- 1) Establishes the Tribally Approved Homes Compensation Program to provide funding to eligible tribes and tribal organizations, as defined, in California to assist in funding the costs associated with recruiting and approving homes for the purpose of foster or adoptive placement of an Indian child pursuant to the federal ICWA, as described.
- 2) Requires, under the Tribally Approved Homes Compensation Program, CDSS to provide annual allocations of \$75,000 to eligible tribes and tribal organizations, subject to an appropriation for this purpose in the annual Budget Act.
- 3) Requires, to be eligible for the \$75,000 allocation, a tribe or tribal organization to submit a letter of intent for funding to CDSS by May first prior to the fiscal year for which the funding is requested describing how the tribe or tribal organizations may share a staff position to conduct program activities. Further requires the letter of intent include an estimated number of homes the tribal staff member will investigate and potentially approve per year, while prohibiting CDSS from establishing a minimum number of tribally approved homes requirement.
- 4) Requires a tribe or tribal organization that receives funding pursuant to the Tribally Approved Homes Compensation Project to submit a progress report to CDSS by August 1 in the fiscal year subsequent to the year in which an allocation was received that includes details about how many homes were approved, recruitment efforts, and challenges experienced, as provided.
- 5) Requires CDSS to annually compile the Tribally Approved Homes Compensation Project progress reports it receives annually and submit a report to the Legislature with the information from those progress reports not later than January 1, as provided.
- 6) Adds the ability to serve one or more federally recognized tribes to the definition of "tribal organization."

FISCAL IMPACT

According to an analysis prepared by the Assembly Committee on Appropriations, this bill will likely have the following fiscal impact:

- Estimated ongoing costs in the range of \$5 million to \$8 million (General Fund (GF)), to provide an annual allocation of \$75,000 to each eligible tribe and tribal organization and cover their associated administrative costs. There are 109 federally recognized tribes in California and many additional others. If 75 tribes each received \$75,000, the annual cost would be \$5.6 million.

- Estimated costs of approximately \$200,000 (GF) to CDSS for one staff position in the Office of Tribal Affairs and one quarter-time administrative position to administer the program, process the new fund, and provide technical assistance to recipients.

(The author is also pursuing this proposal in the Legislative budget process.)

BACKGROUND AND DISCUSSION

Purpose of the Bill:

According to the author, “the Indian Child Welfare Act was passed as a remedial statute to protect the best interests of Indian children and tribes in ensuring that Indian children in foster care are placed in family homes in their community. Yet in California, the majority of Indian children (56 percent) are being placed in non-familial homes that are not tied to the child’s tribal culture even though there is a large body of evidence that children placed with extended family develop strong attachments and have better long-term outcomes than children in non-familial placements. Some researchers even say ‘ICWA placement preferences should be the gold standard for all children, not just those who are Native, given the benefits of kinship care.’”

The author goes on to state “this bill seeks to ensure Indian children are placed in culturally appropriate and legally compliant placements by establishing the Tribally Approved Homes Compensation Program. Through the Tribally Approved Homes Compensation Program, tribes will receive funding, as non-tribal home approval agencies do, so tribes can continue providing this vital service and build additional internal capacity to approve foster and adoptive homes, thereby creating more available ICWA compliant family placements while easing county home approval workloads.”

Child Welfare Services

The purpose of California’s CWS system is to protect children from abuse and neglect and provide for their health and safety. When children are identified as being at risk of abuse, neglect, or abandonment, county juvenile courts hold legal jurisdiction; these children are served by the CWS system through the appointment of a social worker. Through this system, there are multiple opportunities for the custody of the child, or their placement outside of the home, to be evaluated, reviewed, and determined by the judicial system, in consultation with the child’s social worker, to help provide the best possible services to the child. The CWS system seeks to help children who have been removed from their homes reunify with their parents or guardians, whenever appropriate. However, the court may determine that an alternate permanent placement is more fitting and give preference to relatives or nonrelative extended family members.

As of January 1, 2022, there were 55,539 children in California’s CWS system. Of these 55,539 children, according to the California Child Welfare Indicators Project (CCWIP), there were 668 Native American children in foster care.¹ The CCWIP data does not specify whether these children are affiliated with a tribe. Additionally, there are likely youth in care who would qualify under ICWA but may not be identified through the CCWIP as Native American.

¹ <https://ccwip.berkeley.edu/childwelfare/reports/PIT/MTSG/t/ab636/s>

According to the Legislative Analyst's Office (LAO), and their presentation "Initial Analysis and Key Questions: Racial Disproportionalities and Disparities in California's Child Welfare System," the proportions of Native American youth in foster care are around four times larger than the proportions of Native American youth in California over all. Additionally, by including recent research on California's 1999 birth cohort, this presentation noted that nearly one in two Black and Native American children experienced some level of child welfare involvement by the time they turned 18.²

Continuum of Care Reform

The CCR is a system-wide effort to institute a series of reforms to California's child welfare program. CCR seeks to improve placement and treatment options for youth in care. These reform efforts stem from an understanding that children who must live apart from their biological parents do best when they are cared for in committed nurturing family homes. For more than a decade, researchers have documented poor outcomes for foster children. These outcomes have been especially pronounced for those placed in group or congregate care settings. CCR seeks to improve outcomes for children and youth served by the CWS system by working to ensure that foster youth have their day-to-day physical, mental, and emotional needs met, that they have the opportunity to grow up in permanent and supportive homes, and minimize the incidences and duration of congregate care for youth in order to have the opportunities necessary to become self-sufficient and successful adults. Assembly Bill 403 (*Stone, Chapter 773, Statutes of 2015*) was the first of several CDSS-sponsored CCR bills and provided the statutory and policy framework to begin reforming the CWS system towards these goals.

Indian Child Welfare Act (ICWA)

In the 1970s, a multiyear Congressional investigation found that Indian children were being removed from their homes at significantly high rates, and that such removal was often unwarranted. This research found that 25 to 35 percent of all Indian children were being removed from their families and that of those removed, 85 percent were placed outside in non-Indian foster homes. This investigation found that four main factors were contributing to the high rate of removal and unnecessary termination of parental rights: state child welfare standards for assessing Indian families lacked cultural competence; due-process violations against Indian children and their parents that existed on a system-wide basis; economic incentives that favored the removal of Indian children from their families and communities; and, social conditions existing in Indian country.

In response to this investigation, ICWA was enacted by Congress in 1978 to address states "often fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," and the resulting unwarranted removal of Indian children. Congress's goal through the enactment of ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."³ In an effort to meet this goal, ICWA established minimum federal standards for state courts to meet any time an Indian child is removed from their family or custodial home and

² <https://lao.ca.gov/handouts/socservices/2022/CWS-Analysis-Questions-030922.pdf>

³ See 25 U.S.C. 1902

placed in foster care or adoptive homes. This results in a presumption that it is in the best interest of the Indian child to retain tribal ties.

ICWA authorized states to establish higher standards that go above the federal baseline. In 2006, California adopted a state-level implementation of ICWA through the passage of SB 678 (*Ducheny, Chapter 838, Statutes 2006*). SB 687 established Cal-ICWA, revising and recasting portions of state code that address Indian child custody proceedings and codifying into state law various provisions of ICWA, the Bureau of Indian Affairs Guidelines for State courts, and state Rules of Court. As a result, in any child custody proceeding in which the court knows or has reason to know that an Indian child is involved, the child's tribe must be notified of the proceeding and of their right to intervene in the proceeding.

Additional changes to California's implementation of ICWA were made in 2019, following the adoption of AB 3176 (*Waldron, Chapter 833, Statutes of 2018*). AB 3176 clarified county and state actions to determine tribal exclusive jurisdiction and how to properly handle cases in which exclusive tribal jurisdiction exists, as well as, clarified notice requirements and when inquiry as to whether a child is an Indian child begins. AB 3176 also strengthened what is required when caseworkers are attempting to identify and verify whether a child meets the definition of an Indian child in an effort to better identify those children and youth under the jurisdiction of ICWA.

ICWA Compliance Task Force Report

AB 3176, and other legislative efforts, were initiated, in part, in response to a 2017 report by California's ICWA Compliance Task Force to the California Attorney General's Bureau of Child's Justice. The report noted that "there has been incremental process with sincere and innovative efforts to address concerns that tribal leaders and stakeholders had brought forward" in regards to ICWA's implementation. However, the report also found that "the promise and potential of the federal ICWA and Cal-ICWA have not been realized, as neither the letter nor the spirit of the law has been fully implemented."⁴

The report went on to note that the system's most critical flaw is tied to funding, or the lack thereof, stating:

"The lack of funding which created an unfunded mandate of ICWA compliance for underresourced tribes, lack of pre-removal remedial services, lack of robust active reunification efforts, failure to complete diligent inquiry and notice, resistance to tribal court jurisdiction, barriers to tribal participation in court processes, lack of competency within court systems, and deviation from or violation of placement preferences. Tribal leaders, tribal social workers and tribal attorneys disclosed instances all over the state and at all stages of cases where non-compliance with the ICWA had devastating effects on tribes and tribal families."

Last year AB 873 (*Ramos, Chapter 284, Statutes of 2022*) attempted to address some of this by eliminating the tribal share of cost requirements when CDSS, at the request of a tribe, enters into an agreement with a tribe, tribal organization, or tribal consortium regarding the care and custody

⁴ <https://theacademy.sdsu.edu/wp-content/uploads/2015/06/icwa-compliance-task-force-final-report-2017.pdf>

of Indian children. This bill builds upon these efforts by creating the Tribally Approved Homes Compensation Program to provide funding to eligible tribes and tribal organizations to assist in funding costs associated with recruiting and approving homes for the purpose of foster or adoptive placement of an Indian child pursuant to ICWA, as provided. The Program would provide annual allocations of \$75,000, provided there is an appropriation for this purpose in the annual Budget Act, to eligible tribes and tribal organizations in each fiscal year.

Related/Prior Legislation:

AB 873 (Ramos, Chapter 284, Statutes of 2021) requires CDSS, upon request of a tribe, to enter into an agreement with a tribe, tribal organization, or tribal consortium regarding the care and custody of Indian children.

AB 685 (Reyes, 2019) would have required the State Bar of California to administer grants to nonprofit legal service organizations to provide support and technical assistance related to the implementation of ICWA. AB 3076 was substantially amended to remove provisions relating to the ICWA.

AB 3176 (Waldron, Chapter 833, Statutes of 2018) made a number of changes to court proceedings related to tribal children in CWS.

AB 3076 (Reyes, 2018) would have required the State Bar of California to administer grants to nonprofit legal service organizations to provide support and technical assistance related to the implementation of ICWA. AB 3076 was held on the Senate Appropriations Committee suspense file.

AB 1962 (Wood, Chapter 748, Statutes of 2018) amended the definition of foster youth for Local Control Funding Formula purposes by including a student who is in foster care under the placement and care responsibility of an Indian tribe.

SB 678 (Ducheny, Chapter 838, Statutes of 2006) codified provisions of the federal ICWA in California law.

COMMENTS

As noted by the author, current data shows that 55 percent of Indian children involved in the CWS system are currently placed in non-familial homes that are not tied to the child's culture. Despite state law conforming to and extending the protections of ICWA, California's CWS system seems to continue to be involved with Native American families at a disproportionate rate, continuing this country's legacy of removing Indian children from their families and tribes. This legacy of cultural erasure, and racism, is furthered by the majority of Indian children being placed in non-familial homes that are not tied to the child's culture.

This problem is not California specific, but rather in line with nationwide data that shows the number of Native children in foster care has gone up, not down since the passage of ICWA. For example, in Oklahoma's foster care system, of the 7,774 children in foster care, 2,567 were

Native American. Of those 2,567 only 322 were in tribal custody.⁵ The issue does not seem to be with the law itself, but rather with implementation of the law across states. This is likely due to number of issues, including the financial challenges described above. Another factor seems to be a lack of cultural competency across states, and perhaps in California’s counties, in working with tribes and tribal families to identify and approve appropriate tribal placements for Native children. By providing tribes and tribal organizations with funding to identify and approve their own foster placements, this bill may better meet the goals of ICWA by improving the number of tribal placements available for Native children.

The impact of, and harm caused by, removing Indian children from their tribes and cultural connections is well documented. Native communities have dealt with generations of family separation. In Season Two of the podcast *This Land*, former adoptees speak to the trauma they endured growing up disconnected from their culture and extended family. Across various interviews the adoptees share the profound sense of loss they have felt growing up disconnected to their history and culture, and the ways in which this impacted them, ranging from mental health challenges to addiction issues.⁶ Many also shared the profound sense of coming home they experienced when they were able to reconnect with their heritage later in life. By improving the availability of tribal placements, this bill seems to present an opportunity to undo some of this legacy of harm caused by the CWS system in Native communities.

Double-referral. This bill has been double referred. Should it pass out of this committee, it will be heard in the Senate Judiciary Committee.

PRIOR VOTES

Assembly Floor:	76 - 0
Assembly Appropriations Committee:	16 - 0
Assembly Human Services Committee:	8 - 0

POSITIONS

Support:

- Alliance for Children’s Right
- Agua Caliente Band of Cahuilla Indians
- Habematolel Pomo of Upper Lake
- National Association of Social Workers California Chapter

Oppose:

None received

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⁵ <https://www.potawatomi.org/blog/2021/04/06/disproportionate-representation-of-native-americans-in-foster-care-across-united-states/>

⁶ For more on *This Land* hosted by Rebecca Nagle see <https://crooked.com/podcast-series/this-land/#all-episodes>