

# The Society of Indian Psychologists

## Position Statement Regarding the Updated Guidelines to the Indian Child Welfare Act (2015)

by

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Today, Native communities face many challenges including socio-economic issues such as poverty, isolation, marginalization, discrimination, and health disparities. These issues find their roots in a long history of systemic and pervasive abuse and persecution. Since its earliest days, the United States government has cast its relationship with Native American tribes as that of remedial and paternalistic. Previously considered wards of the nation, Native people were characterized as being “uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence.” (United States v. Kagama, 118 U.S. 375, 383-84, 1886) Subsequently, the U. S. Government policy toward Native peoples has often shifted over the centuries, but oversight of Indian affairs has always been underpinned by provisions of assimilation, relocation, transference of jurisdiction and authority, and even termination (Getches, Wilkenson, & Williams, 2005).

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) which was an effort to protect Indian Children. The enactment of the ICWA was a response to grave concerns regarding the high number of American Indian and Alaska Native Children (AI/AN) who had been removed from their homes and families in compliance with assimilation policies. One estimate was that 25 to 35 percent of all Native children had been removed and placed with foster or adoptive families, as well as in institutions (Byler, 1997). The stated goal of the ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). Indeed, the U.S. Government Accountability Office report (2005) which examined the application of the ICWA indicated that in the states examined, children whose placements were arranged according to the ICWA guidelines did as well or better than non-Indian children in state care. This evidence clearly affirms the efforts of congress in creating and implementing the ICWA and sustains its effectiveness. Nonetheless, since its inception, remonstrations of the ICWA as inadequate to protect the Indian Child have prompted further updates and clarification with the intent of expanding beyond just policy, to include the act's purpose, term definitions, when the ICWA applies, how to notify the tribe, and how the guidelines interact with State laws.

Since the Department of the Interior Bureau of Indian Affairs (BIA) has updated the general provisions to the ICWA (2015), the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings have been called into question by concerned parties. At issue are three primary concerns regarding the ICWA Court Guidelines. Namely, there are questions as to (1) the “best interest” of the child, (2) how “good cause” is determined, and (3) who may serve as a qualified expert witness in Indian Child adoption and foster care proceedings. These points are explicated, followed by a few additional comments and the rationale applied by members of the Society of Indian Psychologists Executive Council in support of Native children and the updates to the ICWA Guidelines.

### **Best Interest and Good Cause**

According to the Guidelines for State Courts in ICWA proceedings (BIA, 2015), much of the concern with the State Court Guidelines centers on the transfer of a custody case to tribal court. The guidelines indicate that either a parent, custodian, or tribe may request a transfer of a case at any time to tribal court. Upon request, the case *must* be moved, save three exceptions: (1) If either parent declines to accept the transfer; (2) If the tribe declines the transfer; or (3) If the court determines there is “good cause” not to move the case.

The updated guidelines indicate that when considering “good cause” the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child. Further they may not consider (1) the Indian child’s contact with their tribe or reservation; (2) Socio-Economic conditions or any perceived inadequacy of tribal or BIA social services and/or courts; or (3) the tribe’s prospective placement. Consistent with the ICWA, the placement of the child and case within Tribal jurisdiction is considered to be in the best interests of Indian children. Preference for placement of a child in an adoption scenario is also clarified in a specific order with the first preference being with a member of the child’s extended family. Second preference would be the Indian child’s tribe, and next in preference would be other Indian families.

There is also the possibility for a good cause argument that departs from the standard placement preferences. This extension of the good cause determination rules do not include an

independent consideration of best interest of the child because this undermines *Congress's findings that ICWA's placement preferences are in the best interests of Indian children.*

Therefore, the Society of Indian Psychologists (SIP) concurs that the ICWA is consistent with American Indian and Alaska Native cultural values and systems. Representative of well over 500 federally recognized tribes, many of whom speak different languages and have different customs, SIP also affirms that the ICWA guidelines honor the complex nature and spirit of American Indian and Alaska Native culture and traditions.

### **Qualified Expert Defined**

The updated Guidelines for State Courts (2015) also clarify who qualifies to serve as an *expert witness* in AI/AN adoption cases. The guidelines specifically note that the court may request help from the tribe or BIA in locating an expert witness. The witness *must have expertise in the tribe's culture and customs*, and further denotes specific characteristics that presume expertise. These characteristics include: (1) a tribal member who is an expert in tribal customs with respect to family and child rearing; (2) a member from another tribe who has knowledge in family and child services; (3) a layperson, recognized by the tribe, who understands social and cultural child rearing practices, the delivery of family and child social services; or (4) an expert who has substantial education and experience in their specialty and who can demonstrate knowledge of the social and cultural standards and child rearing practices within the child's tribe.

The ICWA protects AI/AN children by requiring ethno-cultural experts who have knowledge of tribal customs and child rearing practices—a key factor with respect to Tribal sovereignty and self-determination. The ICWA recognizes that Native people have the knowledge to make appropriate decisions in the best interest of their constituents and do not need to have Western views imposed upon them by those who are *not experts* in Native culture, child welfare, or familial relationships. Furthermore, *AI/AN psychologists do possess the ethno-cultural expertise* and psychological knowledge to evaluate attachment, bonding, child development, trauma and other associated psychological outcomes. Indeed, all who are party to the authorship of this statement are, in fact, AI/AN ethno-cultural experts, many of whom regularly testify as expert witnesses in regard to the psychological outcomes of AI/AN child and adult cases.

At this time there are approximately 125 Native doctoral level members, plus more than 80 masters level members of SIP. There are also more than 125 Native doctoral level psychologists who are members of the American Psychological Association. Although there is some overlap of the doctoral level psychologists of both groups, the numbers we cite represent only psychological professionals and do not include the many other ethno-cultural experts who are also qualified to serve as expert witnesses regarding AI/AN culture, such as social workers, medical professionals, other paraprofessionals, and experts within tribes. The number of people who qualify as experts are well sufficient to meet whatever caseload demand may arise.

### **Culture in the Context of Family, Community, and Tribe**

As is characteristic of so many Native cultures, when considering the best interest of any Native child, we are talking about the whole child—which means that child’s entire family, community, tribe, and culture must be considered! The vast majority of Native cultures and communities are collectivistic and their values follow accordingly. We certainly acknowledge that Native people have their share of hardships and trauma within their communities—they may well be over-represented in that regard, especially in terms of familial circumstances. However, the Society of Indian Psychologists stands united with the National Indian Child Welfare Association (NICWA) and the National Congress of American Indians (NCAI) in supporting the updates to the ICWA guidelines.

Historically, as previously stated, the Governmental solution to deal with “problem Natives” or more to the point, the “Native problem,” has been to take away their children and place them in the care of more “suitable” parents by Anglo values. The evidence has demonstrated that strategy often creates more problems than it solves (US GAO, 2005). Taking the same course of action, that of removal and relocation of children, with any other ethnic minority population with the United States would scarcely be tolerated. Yet this egregious historical approach continues against Native people today.

As ethno-cultural experts, we know that it takes the entire village to sustain what we call *community*—thus, as tribal, collectivistic cultures, the loss of a single child invariably impacts the entire community. Native family structures are unlike the conventional nuclear family structures of

Western societies. Even before the catastrophic upheaval of Native family structures with the onset of colonization, the “village” served as surrogate guardians for the children to care, teach, and be indoctrinated into their respective cultural communities. In this respect, Native children have long benefited from bonding with multiple caretakers and secure attachment relationships with multiple people. Although times have changed, these values and practices remain relevant in Natives communities.

### **Looking to the Future**

Many ethno-cultural experts have long supported efforts to get the BIA to clarify the ICWA in order to encourage greater compliance with policy and mitigate the confusion that has continually enabled the courts or attorneys to circumvent the ICWA. Finally, under new leadership, the BIA has stepped up to offer guidelines that have not been updated for several decades (35+ years). With these updates, the future has finally arrived with the result that ICWA is now being challenged because organizations are recognizing that the long-standing lack of compliance to the intent of IWCA has now been called into account and is being redressed.

The BIA updated ICWA guidelines seeks to bring us forward from outdated policy and we perceive that those who oppose the updates to the ICWA would take us back into old, colonial paradigms of Western superiority and Native oppression. It is the position of the Society of Indian Psychologists that the solution we seek will be found in empowering Native people to find redress for the historic injustice, and to reinvigorate their communities in ways that will honor their sovereignty and traditions.

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