TECHNICAL ASSISTANCE BRIEF

COURT REFORM AND AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN:

INCREASING PROTECTIONS AND IMPROVING OUTCOMES

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COURT REFORM AND AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN: INCREASING PROTECTIONS AND IMPROVING OUTCOMES

EXECUTIVE SUMMARY

Tribal children have a unique political status in the United States. They are U.S. citizens as well as citizens of the sovereign tribal nation of which they are a member. The federal government has a special trust relationship with tribal people that requires it to establish policy and programs to protect the well-being of all American Indian and Alaskan Native (AI/AN) people. In the area of child welfare, this unique status and patterns of inappropriate practice historically by many state and private child welfare agencies and state courts have resulted in the federal government establishing federal policies to further protect AI/AN children and families and ensure that tribal governments were actively involved in state child welfare matters involving their members (Indian Child Welfare Act of 1978). Laws have also been created that clarify jurisdictional boundaries of tribal, state and federal courts with respect to child welfare proceedings involving AI/AN children. While the federal protections for tribal children and families have helped to elevate practice and outcomes, there are still ongoing challenges related to the role courts can take in effectively handling child welfare matters for tribal children and families.

- *Pew Commission on Children in Foster Care* Recommendations

In response to the concern expressed by Congress and other important stakeholders, The Pew Charitable Trust established a high-level commission, the Pew Commission on Children in Foster Care (Pew Commission), to conduct an investigative study and issue recommendations on improving the federal financing system for child welfare services and the role of court oversight in such cases. Focused on data collection and tracking, collaboration and training, representation, and court operation, the resulting Pew Commission on Children in Foster Care Recommendations[1] garnered significant support and action on the part of Congress, government leaders, child welfare agencies and dependency[2] courts. One of the most notable outcomes of these recommendations was the establishment of additional Court Improvement Program (CIP) funding in support of data collection and dependency court training.

- State Court Involvement in AI/AN Juvenile Dependency Cases

Although all tribal governments have the authority to establish and manage their own tribal courts, not all have been able to exercise this right primarily due to the lack of funding made available to tribes for court improvement and the development of juvenile dependency courts. In instances where tribes are not operating such court systems, cases involving AI/AN children in foster care are heard in state juvenile dependency courts, which sometimes lack the requisite cultural competency and familiarity with ICWA to serve the best interests of AI/AN children. This phenomenon and the fact that AI/AN children are overrepresented in some state child welfare systems underscore the need for strong tribal-state collaborations to improve court performance and outcomes for AI/AN youth.

- Tribal Courts

Since time immemorial, tribes have developed and utilized systems for addressing internal conflicts. Historically, these mechanisms were informal, unwritten, and rooted in holistic philosophies and processes. Many of these traditional dispute resolution systems were adversely affected and, in some cases, abruptly halted by the implementation of federal Indian policies that sought to remove, assimilate, and terminate AI/AN tribes. In the late 1960s, the federal government changed its course of action and began to support tribal

[1] For detailed information on the Pew Commission on Children in Foster Care recommendations see www.pewfostercare.org/research/docs/FinalReport.

[2] The term “dependency” is used throughout this report to refer to civil child abuse and neglect or child protection cases.

sovereignty, resulting in the strengthening and reestablishing of tribal dispute resolution systems. Despite the now commonly accepted fact that tribal courts are vital to tribal sovereignty, tribal courts remain severely underfunded and at a disadvantage in their ability to establish and develop their own courts so that they may effectively serve and protect AI/AN children.

- Jurisdictional, Deference and Resource Challenges Between State and Tribal Courts

Tribal and state courts have encountered many obstacles in their efforts to cultivate mutual understanding and productive working relationships with regard to AI/AN child welfare issues and cases. These difficulties can be mostly attributed to the courts' respective different evolutionary processes, present cultural differences, and complicated jurisdictional issues and laws that govern AI/AN child welfare cases. Many challenges have arisen from the way in which state courts have interpreted ICWA including the judicially created "Indian family exception"[3] and refusing to transfer ICWA cases to tribal courts. Additionally, state courts have not always accorded full faith and credit to tribal codes and court orders. These challenges are not surprising in light of the fact that, until very recently, tribes and states have not often collaborated to establish relationships, and have not thereby increased cross-cultural knowledge and improved practice for the betterment of AI/AN children.

- State Court Improvement Projects (CIP): Catalysts for Reform

The CIP was established as part of legislation passed in 1993 to enable state courts to perform assessments of their foster care and adoption laws and processes, and to draft and employ state plans for system-wide reform. The goal was to enable courts to fulfill the oversight role required of them by the Adoption Assistance and Child Welfare Act (P.L. 96-272). The passage of P.L. 96-272 provided for payments from the federal government to states to support children in state foster care, established national policy and standards for child welfare cases, and developed a model of federal-state collaboration. The Pew Commission recommended that Congress authorize additional CIP funding for data collection and training purposes. These recommendations were enacted into law by way of the Deficit Reduction Act of 2005 (DRA). In following the Pew Commission's emphasis on collaboration, the new CIP Program Instructions require that recipient state courts conduct ongoing and meaningful collaboration with child welfare agencies and tribes. This mandated tribal-state collaboration has yielded many improvements for AI/AN children in the foster care system.

- Challenges and Promising Practices

State courts and tribes have identified many challenges and promising practices resulting from their collaborative efforts to realize the Pew Commission's recommendations and to address issues specific to AI/AN children. Some of the most pervasive obstacles, which transcend any one of the four areas of court improvement, including data collection and tracking, collaboration and training, representation, and court operation, are the lack of funding made available to tribes, the cultural differences between states and tribes, and the geographical distances between all those that should be present and engaged for all court improvement activities. Despite these overarching challenges, tribal-state partnerships have developed many promising practices including collaboratively developed and implemented trainings on Indian child welfare (ICW) issues and ICWA, the creation of tribal CASA programs, and the establishment of tribal-state agreements that define processes and protocols that govern how AI/AN child welfare cases in state courts are handled.

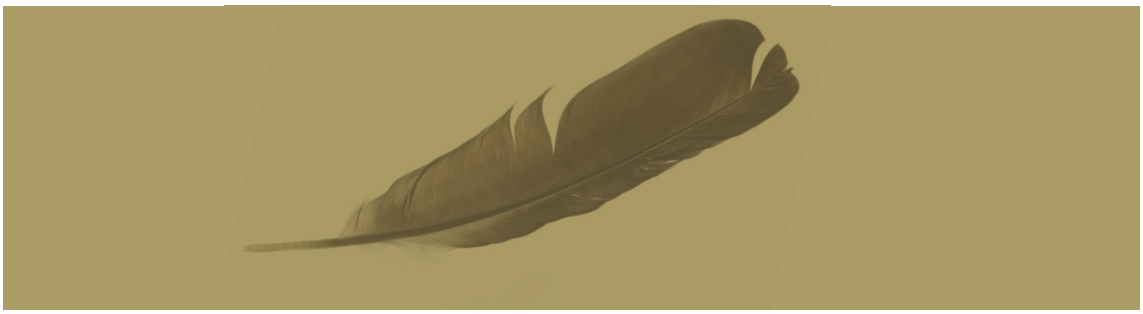
[3] Some states courts have modified the definition of "Indian child', in contradiction to the language contained in the federal ICWA, thereby creating exceptions to who is an "Indian child" and to whom the federal protections under ICWA apply. Such courts have used this exception to hold that ICWA does not apply to Indian children who have never lived with an Indian family member or to those who have only lived with an Indian family member who maintains limited ties to an Indian tribe. It is worth particular mention that in passing ICWA, Congress recognized that state courts were incapable of passing judgments specific to which Indians maintain adequate contact with their cultural and traditional backgrounds (Jones, 1997).

- Improving Implementation of the Pew Commission's Recommendations and Adding Tribal Applications

While recent tribal-state collaborations around court improvement have yielded many positive outcomes for AI/AN children, including improved understanding and cross-cultural knowledge and practice, there remains much to be done for AI/AN children. There is need for practices that build upon the recommendations of the Pew Commission, specifically aimed at meeting the unique needs of AI/AN children and youth. The Children's Bureau should emphasize the importance of the Pew Commission's recommendations as their implementation has improved outcomes for AI/AN children, Further:

- **Tribes should have access to funding that would enable them to further develop their capacity to hear AI/AN juvenile dependency cases;**
- **Tribes should be included in the state CIP strategic planning processes; and**
- **Culturally appropriate and effective training and technical assistance should be developed and offered to state courts, child welfare agencies, and tribes.**

If implemented, these recommendations would go a long way towards ensuring the well-being of AI/AN children.



INTRODUCTION

This briefing paper provides a preliminary examination of the Pew Commission on Children in Foster Care's recommendations as they pertain to state and tribal court involvement in Indian child welfare matters, state Court Improvement Program grants, challenges and promising practices gleaned from tribal-state collaborations around court improvement, and opportunities for progressing court systems for the betterment of AI/AN children. Intrinsic to this analysis is the recognition that AI/AN children have a unique political status as citizens of sovereign nations, and that these nations are inherently best equipped to identify, understand and respond to their needs.

Tribes' abilities to establish and develop tribal courts so that they may effectively serve and protect AI/AN children is largely dependent upon available funding. Unlike states, most tribes are unable to generate general revenue monies, and they do not have access to federal funding programs that support the development and operation of juvenile courts. One such example is the fact that tribes are not eligible to directly receive the federal Court Improvement Program (CIP) grants that states utilize. Consequently, many tribal courts are less developed and therefore unable to hear AI/AN dependency cases. This resource challenge and, where applicable, Public Law 83-280 (P.L. 280)[4] have resulted in the majority of AI/AN dependency cases being handled by state courts in the United States. Key among the challenges faced by state courts that hear AI/AN dependency cases is the often limited knowledge of tribal culture and lack of familiarity with the Indian Child welfare Act (ICWA) needed to adequately address Indian child welfare issues.

In light of this reality, the need for court improvement in both state and tribal courts is without question. The Pew Commission on Children in Foster Care recognized this need when it issued recommendations calling for broad based reform of the federal child welfare financing system and the role of court oversight, the latter of which being the focus of this briefing paper. In the "Strengthening Courts" section of their report[5], the Pew Commission identified and elaborated upon four major recommendations, including collaboration and training, data collection and use, legal representation, and court operation. While many of these recommendations did not specifically address the needs of AI/AN children, they have resulted in many changes which have improved outcomes for children nationwide, including AI/AN youth.

THE PEW COMMISSION ON CHILDREN IN FOSTER CARE: COURT REFORM RECOMMENDATIONS

The Pew Commission on Children in Foster Care was established in May of 2003 in response to the concern held by child welfare administrators, caseworkers, judges, advocates, and state and federal policy makers, who had grown increasingly aware and consequently critical of the failings of the foster care system. The continually high number of children entering the foster care system annually and the difficulty in helping many of them achieve permanency were identified as key concerns. Further compounding these problems was the apparent lack of accountability and coordination between state child welfare agencies and courts.

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[4] Congress passed P.L. 280 in 1953 during the termination era in which one hundred and nine tribes were "ordered to cease exercising governmental powers and to disperse all land and property to tribal members" (Pevar, 2002). Public Law 280 was an interim step towards the termination of some tribes. It provided for states, some as a mandatory matter and others at their option, to exercise criminal jurisdiction over all AI/AN people living within the state and over "civil causes of action" involving AI/AN people residing in the state as well (Pevar, 2002). Although many of the terminated tribes have had their federal recognition status restored and P.L. 280 has been mostly interpreted as not having deprived tribes of concurrent jurisdiction over their members and territory, P.L. 280 slowed the development of judicial and governmental branches of affected tribes because, and, in some cases disbanded their court systems as they believed that their jurisdiction had been preempted (Jones, 1995).

[5] The Pew Commission on Children in Foster Care's report, "Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care", can be found online at www.pewfostercare.org/research/docs/FinalReport.

Cognizant of these issues and the need for change, the Pew Charitable Trusts established and funded the Pew Commission on Children in Foster Care, a high level, nonpartisan commission charged with issuing recommendations to improve outcomes for children in foster care. After a year of thorough analysis of the federal child welfare financing system and role of courts, the Pew Commission released an official report and recommendations on May 18, 2004. Following the publication of its report, "Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care", the Pew Commission reached out to Congressional representatives, government leaders, researchers, child welfare advocates and other stakeholders to encourage action on the important issues identified therein.

The Pew Commission's recommendations for strengthening and supporting the nation's dependency courts are as follows:[1]

Pew Commission Recommendation #1:

Courts are responsible for ensuring that children's rights to safety, permanence and well-being are met in a timely and complete manner. To fulfill this responsibility, they must be able to track children's progress, identify groups of children in need of attention, and identify sources of delay in court proceedings.

- Every dependency court should adopt the court performance measures developed by the nation's leading legal associations[6] and use this information to improve their oversight of children in foster care;
- State judicial leadership should use these data to ensure accountability by every court for improved outcomes for children and to inform decisions about allocating resources across the court system; and
- Congress should appropriate $10 million in start-up funds and such sums as necessary in later years, to build capacity to track and analyze caseloads.

Pew Commission Recommendation #2:

To protect children and promote their well-being, courts and public agencies should be required to demonstrate effective collaboration on behalf of children.

- The Department of Health and Human Services (HHS) should require that state IV-E plans, Program Improvement Plans, and Court Improvement Program plans demonstrate effective collaboration;[7]
- HHS should require states to establish broad-based state commissions on children in foster care, ideally led by the state's child welfare agency director and the Chief Justice;
- Congress should appropriate $10 million to train court personnel, a portion of which should be designated for joint training of court personnel, child welfare agency staff, and others involved in protecting and caring for children; and
- Courts and agencies on the local and state levels should collaborate and jointly plan for the collection and sharing of all relevant aggregate data and information which can lead to better decisions and outcomes for children.

[6] In the original text of the Pew Commission's recommendations, this entry was footnoted, directing the reader to Appendix B of the report for a more detailed description of the court performance measures developed by the American Bar Association Center for Children and the Law, National Center for State Courts, and National Council of Juvenile and Family Court Judges (pg 17).

[7] In the original text of the Pew Commission's recommendations, a footnote appears after this bulleted entry, stating that "tribal courts and service agencies should be included in the development and implementation of all plans" (pg 17).

Pew Commission Recommendation #3:

To safeguard children's best interests in dependency court proceedings, children and their parents must have a direct voice in court, effective representation, and the timely input of those who care about them.

- Courts should be organized to enable children and parents to participate in a meaningful way in their own court proceedings;
- Congress should appropriate $5 million to expand the Court Appointed Special Advocates program;
- States should adopt standards of practice, preparation, education, and compensation for attorneys in dependency practice;
- To attract and retain attorneys who practice in dependency court, Congress should support efforts such as loan forgiveness and other demonstration programs; and
- Law schools, bar associations, and law firms should help build the pool of qualified attorneys available to children and parents in dependency courts.

Pew Commission Recommendation #4:

Chief Justices and state court leadership must take the lead, acting as the foremost champions for children in their court systems and making sure the recommendations here are enacted in their states.

- Chief Justices should embed oversight responsibility and assistance for dependency courts within their Administrative Office of the Courts;
- State court leadership and state court administrators should organize courts so that dependency cases are heard in dedicated courts, or departments, rather than in departments with jurisdiction over multiple issues;
- State judicial leadership should actively promote: (1) resource, workload and training standards for dependency courts, judges and attorneys;[8] (2) standards of practice for dependency judges; and (3) codes of judicial conduct that support the practices of problem-solving courts; and
- State court procedures should enable and encourage judges who have demonstrated competence in the dependency courts to build careers on the dependency bench.

The Pew Commission's recommendations to strengthen dependency courts listed above can be summarized into four major categories: data tracking and analysis, collaboration and training, legal representation, and overall court structure and operation. Data collection, data tracking and data-sharing among the child welfare agencies, courts and tribes involved in child welfare proceedings is absolutely essential. In the absence of accurate and up-to-date data, dependency courts are without the information needed to educate and shape the way in which they address disproportionality issues[9] in their courts including the disproportionate representation and disparate treatment of AI/AN children. Regularly collecting and tracking these data would enable state courts to better meet the needs of AI/AN children.

Ongoing and meaningful collaboration among courts, child welfare agencies and tribes is also critically important. All too often, these entities have worked in silos, with the courts operating as the "unseen partners in child welfare,"[2] thus hampering the courts' ability to efficaciously promote and ensure the health and safety of children. The Pew Commission clearly affirmed the importance of tribal participation throughout all collaborations pertaining

[8] This recommendation was footnoted in its original form, reading that "court performance measures, discussed earlier in this chapter and presented in Appendix B, will assist courts in their initial development and subsequent tracking of compliance with these measures" (pg18).

[9] The term "disproportionality" in this report refers to the over-representation of AI/AN children in the state foster care and dependency court systems as compared to the percentages of children from other racial groups.

to state IV-E plans, Program Improvement Plans (PIP), and Court Improvement Program (CIP) plans in stating that, "tribal courts and service agencies should be included in the development and implementation of all plans."[3] As recognized and advocated by the Pew Commission, all involved must work together to ensure a well-functioning system, actively participating in all aspects of collaboration and information exchange activities, including cross-trainings. A collaborative system improvement focus would greatly increase the performance of dependency courts and would substantially improve outcomes for AI/AN children.

The final two recommendations issued by the Pew Commission, improving legal representation and the organization of juvenile courts, are of great importance as well. As observed by many stakeholders involved in child welfare cases, families are not always provided the most effective and supportive legal representation[10]. This is particularly true in the case of AI/AN dependency cases, in which ICWA may apply, thus requiring specialized knowledge on the part of the attorneys and the presiding judge. Legal professionals who are not thoroughly familiar with the jurisdictional, procedural and substantive provisions of the ICWA are unable to provide AI/AN families with effective representation.

Moreover, just as representation is in need of improvement, so is the organization of the courts. As the Pew Commission's fourth recommendation clearly states, state courts should be organized so that "…dependency cases are heard in dedicated courts or departments, rather than in departments with jurisdiction over multiple issues."[4] This stands to reason as all systems are more efficient when they are built upon well structured and systematized foundations. Children benefit tremendously when their dependency proceedings are handled by judges who specialize in such cases.[11]

To date, the Pew Commission and its supporters have successfully emboldened substantial action on the part of government leaders, state child welfare agencies and dependency courts to implement many of the above-mentioned recommendations. As stated in the Pew Commission's status report, issued April 6th, 2006,[12] Congress, state Supreme Courts and state child welfare agencies have already begun to implement many of the reform recommendations. Some of the key findings reported in the status report included:

- The enactment of the Deficit Reduction Act of 2005, which contains important new provisions and $100 million in new dependency court improvement funds, as recommended by the Pew Commission.
- State Supreme Court and child welfare agencies have collaborated to develop comprehensive plans to increase child and youth permanency.
- Over one third of states had formed or are in the process of establishing broad-based state-level commissions to promote collaboration among all child welfare stakeholders, as recommended by the Pew Commission.
- Many Chief Justices had brought attention and leadership to statewide efforts to strengthen dependency courts (Miller & Russo, 2006).

[10] This observation is described in brief on page 42 of the Pew Commission on Children in Foster Care's report. Staff from the National Indian Child Welfare Association (NICWA) continue to hear similar complaints from AI/AN families regarding the quality of legal service they are provided for ICWA and non-ICWA dependency cases.

[11] The one-judge one-family case assignment model, in which one judge presides over *all* hearings in a child abuse and neglect case from initial petition filing through permanency and case closure, is a recommended best practice of the National Council of Juvenile and Family Court Judges' (NCJFCJ) *RESOURCE GUIDELINES*: Improving Court Practice in Child Abuse and Neglect Cases. This best practice document for the handling of dependency cases has been widely disseminated and is endorsed by the Conference of Chief Justices, the American Bar Association, and the Board of the NCJFCJ. Judges who preside over all hearings in an abuse and neglect case report that they have a greater sense of responsibility for the case; the case plan for the child and family is usually more stable; the judge is better prepared for each new hearing; the judge more readily learns about child welfare law and practice; parties can feel more connected with the judge; directives for families are more consistent; and parents are more likely to comply with judicial orders. The *RESOURCE GUIDELINES* also stress the importance of limiting judicial rotations out of dependency courts so that judges with sufficient training and specialization in dependency are hearing these complex cases.

[12] This status report is entitled, "Foster Care Reforms Advance in Congress, Courts and States," and can be found on the Pew Charitable Trusts' website at http://www.pewtrusts.org by going to the site's newsroom page.

Although all of these advancements have gone a long way toward improving outcomes for children in foster care, the passage of the Deficit Reduction Act of 2005 (DRA) deserves special attention. The DRA amends Section 438 of the Social Security Act, authorizing two new Court Improvement Program (CIP) grants, one for data collection and tracking, and another for training, both of which are made available to the highest state courts. As discussed in greater detail in the CIP section of this briefing paper, the purpose of these new funding streams is to enable courts to assess their foster care and adoption laws and judicial processes, and to craft and employ plans for court improvement as recommended by the Pew Commission. All of this is to be accomplished with the goal of ensuring the safety, permanency and well-being of children in the foster care system.

Pursuant to Children Bureau's CIP Program Instructions, state court applicants for any of the CIP programs must demonstrate "meaningful and ongoing collaboration among the courts in the State, the State agency… and, where applicable, Indian Tribes".[5] The establishment of the new CIP grant programs and subsequent requirement that state court and child welfare agency personnel and tribes collaborate is aligned with the Pew Commission's recommendations, which clearly recognize the unique political status of AI/AN children and the need for agency-court collaboration. Thus, the Pew Commission provides an initial blueprint for improving tribal-state court collaborations, which if conducted in a meaningful and ongoing way, will help to ameliorate the many problems associated with state courts handling of AI/AN dependency cases.

"Tribal courts are one of the means by which tribes exercise their sovereign authority over child protection and custody matters. For tribal child welfare systems to be successful they must earn the confidence of the community that the rights and interests of children and families will be dealt with professionally, fairly, and dependably. Faith in the tribal court, as an institution of government, is built on its capacity to consistently adhere to due process, to understand the needs of children, and to use available professional resources to help restore families to safety. The Pew Commission on Children in Foster Care recognized that critical nature of the situation and provides important direction to advocates, funders and tribal leaders alike. Unfortunately, tribes still do not have access to funding to support court improvement projects. Without access to funding tribes are at a distinct disadvantage."

- Terry Cross,
Executive Director, NICWA

STATE COURT INVOLVEMENT IN CHILD WELFARE MATTERS INVOLVING AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN

While tribal governments have the authority to establish and operate their own court systems, not all tribes have been able to do so primarily because of the limited availability of funding, such as CIP grants, which are currently only made available to states. Where tribal governments are not operating a child welfare court system, particularly in P.L. 280 states, tribal children and families who are in the child welfare system are likely to have their cases adjudicated by state dependency courts. The guiding federal law in these cases is the Indian Child Welfare Act (ICWA), which contains requirements for state courts child custody proceedings involving AI/AN children.

The ICWA requires states to notify tribal governments of child custody proceedings involving their members, allow them to intervene in state proceedings and establish preferences for the placement of these children in foster care, adoptive or other out of home placements. The ICWA requires a higher standard of proof and clear immediate safety threat in order to place a child in foster care. In addition, active efforts are required by the placing agency to prevent removal and to help rehabilitate the parent(s) so that the child may be reunified with the parents. The Act also recognizes exclusive tribal jurisdiction over AI/AN children resident or domiciled on reservations (except that jurisdiction is concurrent in some instances in P.L. 280 states),[6] provides for the transfer of off-reservation state court proceedings to tribal court, absent parental objection or good cause to the contrary,[7] and requires state courts to accord full faith and credit to tribal public acts, records and court judgments.[8]

Congress passed the ICWA to prevent bias and abuses that have often occurred in the placement of AI/AN children by public and private agencies and the courts. Even today we see disproportionate numbers of AI/AN children represented in state child welfare systems giving evidence to the continued need for the requirements of the ICWA.

According to national data from the Adoption and Foster Care Analysis and Reporting System (AFCARS), AI/AN children comprised 2 percent of the children who entered state foster care systems in FY 2005 and 2 percent of the children waiting to be adopted (NICWA & Pew, 2007). Other national research shows that AI/AN children are overrepresented in the state foster care systems at 1.6 times the expected level and at up to 4 times the expected level among children waiting for adoption. Representation of AI/AN children in state foster care systems varies from 0.0 percent in Arkansas to 52.2 percent in South Dakota. In looking at these data, it is important to note that AFCARS only includes AI/AN children who self-identify as AI/AN and it does not include the estimated one third to 40 percent of AI/AN children who receive services from tribal child welfare programs. Moreover, the numbers of AI/AN children in state foster care systems may be higher than reported in the national data (ibid).

The available national data underscore the need for cross-system collaboration between state courts, which have the oversight role of ensuring that the state and private child welfare agencies comply with the requirements of the ICWA, and tribes, which pursuant to the Act, maintain exclusive jurisdiction over reservation-domiciled AI/AN children[9] and concurrent jurisdiction over their children wherever located.[10] Underlying the need for such collaboration is the fact many state court systems lack the cultural competency and familiarity with the ICWA to effectively carry out their oversight role. While no national research or data are available measuring state court performance in implementing the ICWA, anecdotal evidence indicates that the challenges that state juvenile courts face, such as judge turnover or rotation, resource challenges and lack of cross-training, contribute to a lack of uniform understanding or implementation of the ICWA.

The collaboration between state courts, child welfare agencies and tribes required by the CIP program instructions, have caused many states to engage in relationship building with tribes in an effort to address these issues. Where state courts and tribes have been able to establish effective relationships and develop forums for sharing information, indications are that state court practice and policies that implement the ICWA become more institutionalized. While these collaborations are a step in the right direction, there remains much to be done for the betterment of AI/AN children.

TRIBAL COURTS

History of Tribal Court Development

In order to fully understand the current status of tribal courts, a consideration of the federal Indian policies which directly affected their development is in order. 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 (Melton, 1995). Many of these dispute resolution structures and practices were, however, disrupted and in some cases destroyed by colonization and federal Indian policies, such as those of the assimilation and termination eras.

It was during the assimilation era, a time characterized by the federal government's attempts to dissolve reservations and to assimilate its members, that the federal government established the Courts of Indian Offenses, which were the first formal court institutions utilized by tribes. Interestingly, these courts were set-up following the famous Ex Parte Crow Dog case of 1885 in which the Lakota used traditional dispute resolution methods to address a crime, which occurred on Indian Country between two Lakota men.[11] The federal government acted in response to what they thought was a lack of law enforcement in Indian Country as a whole. Unfortunately, many of the judges who worked in these federally established court systems, also known as CFR courts, also served

as the local BIA superintendents whose very job was to assimilate Indians into Anglo society (Jones, 2000).

Subsequent to the implementation of the disastrous policies and laws of the assimilation era, the federal government changed course with the enactment of the Indian Reorganization Act (IRA), which, in essence, imparted a formal federal recognition of tribal governments. Pursuant to federal regulations adopted following the enactment of the IRA, tribal councils were created and many tribes enacted tribal codes and established tribal courts (Deloria & Lytle, 1984). Other tribes continued to operate under the provisions of the Code of Federal Regulations, as were used in the Courts of Indian Offenses. Some tribes, most of which were smaller and lacking in sufficient resources, opted to retain the CFR courts as opposed to developing their own (National Tribal Justice Resource Center, website).

In the 1950s, the federal government reversed its course of action again and began what has been termed the "termination era. During this time, one hundred and nine tribes were "ordered to cease exercising governmental powers and to disperse all land and property to tribal members" (Pevar, 2002). It was also during this time that P.L. 280 was enacted. Although many of the terminated tribes have had their federal recognition restored and P.L. 280 has been widely interpreted as not having divested tribes of concurrent jurisdiction over their members and territory, these laws slowed and in some cases halted the development of the judicial systems of a number of tribes (Jones 1995).

Beginning in the late 1960s and continuing until the present, the federal government changed course yet again and embraced tribal sovereignty. Congress passed laws such as the ICWA and the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638) which authorizes tribes to contract with the federal government to run certain programs previously operated by the federal government,[12] and the Indian Tribal Self-Governance Act which transfers to participating tribes the control of, funding for, and decision making concerning a number of federal Indian, services, functions and activities.[13] The increase in tribal governmental activities and responsibilities pursuant to these statutes has provided an impetus for the expansion of tribal courts over the last three decades.

Contemporary Tribal Courts

As evidenced by the brief historical analysis provided above, tribal courts are fairly new institutions with a very different evolutionary process from that of state courts. Today "tribal courts play a vital role in tribal self-government and the Federal government has consistently encouraged their development."[14] Congress has enacted the Indian Tribal Justice Act which authorized funding for tribal courts and tribal judicial conferences,[15] recognized inherent tribal sovereignty and the right of tribes to choose their own court systems[16] and created an Office of Tribal Justice Support in the Bureau of Indian Affairs.[17]

Tribal courts have a variety of forms, including traditional systems, also known as peacemaking courts, hybrid systems, and CFR courts. It is important to note that there are 563 federally recognized tribes in the United States, all of which are unique and have the authority to operate their own court systems. Indeed, this is understood by the federal government. The definition of "tribal court" in the ICWA 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."[18]

The most common tribal justice systems are hybrid systems, which are largely based upon the American model, operating pursuant to written codes and procedures, but which try in different ways to incorporate tribal laws, customs and ways (Jones, 2000). In some cases, these systems may operate side-by-side with more traditional forms of dispute resolution, such as the Coquille Indian Tribe's court system, which includes a peacemaking court (Vicenti, 1995; Sekaquaptewa, 2000; Cruz, 2001; Davis 2005; Coquille website).

Some tribes continue to operate exclusively traditional systems, such as the Pueblos in New Mexico and the Emmonak Village Elders in Alaska, while others make AI/AN child welfare decisions at the tribal council level (Vicenti, 1995; Jaeger, 2002). The latter of which is recognized by ICWA as a judicial body which can adjudicate ICWA cases and is most common in smaller tribes, such as certain Alaskan villages, where tribal councils often function as tribal courts (Jaeger, 2002).

Some tribes also utilize Code of Federal Regulations (CFR) courts which 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 CFR court, subject to approval by the Assistant Secretary of Indian Affairs,[19] and must approve the appointment of CFR judges.[20] Tribes may, however, opt out of the system by establishing their own court systems.[21] If the tribe has not enacted its own code, then the CFR court operates pursuant to federal regulations promulgated by the Bureau of Indian Affairs.

In 2002, the Department of Justice conducted a survey which included 314 of the 341 tribes in the "Lower 48".[22] Of the 314 tribes surveyed, 188 had tribal justice systems of some kind, with 175 of the 188 having tribal courts, 46 having CFR courts, and 39 having indigenous or traditional courts. Seventy-eight percent or 147 of the courts heard family law cases, 80 had juvenile courts, and 51 had separate family courts. Almost 75% of the tribes that had no tribal justice system were located in California.[23] Less than 20 of the tribes that responded outside of California lacked a tribal justice system (Perry, 2005).

The survey did not look at tribal child welfare data systems, but did compile information about criminal records. It found that 75% of the 314 tribes surveyed recorded crime incidents on the reservation, 54 tribes submitted information on tribal sex offenders to the National Sex Offender Registry, and less than 12% of tribal justice systems were electronically networked with other justice systems on and off the reservation (Perry, 2005). Studies of tribal child protection agencies show similar results in regard to reporting of child abuse and neglect. In a recent study, only 49% of tribes surveyed shared child abuse and neglect data with other governments and only 19% of tribes indicated that the data about child abuse and neglect was actually entered into a computer database (Earle, 2000).

Tribal Codes

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.[24] 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 (Jaeger, 2002). Moreover, it is important to note that tribes have and continue to develop codes that reflect their culture and the needs of their children.

In general, it should be emphasized that most tribal courts operate in the child welfare context in a manner that is similar in most respects with non-tribal justice systems and the requirements of Titles IV-B and IV-E of the Social Security Act – the federal statutes that govern state child welfare practice.[25] Thus, codes governing these tribal courts routinely provide for emergency removals, preliminary hearings, adjudicatory, dispositional and/or permanency hearings.[26] Guardians ad litem and Court Appointed Special Advocates (CASAs) are often appointed.[27] 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 (Jones, 2000). As noted, many tribes have established family or juvenile courts specifically to hear these cases.[28] 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.[29] Many tribal systems have Indian child

welfare workers, probation officers, community review boards, tribal prosecutors and law enforcement personnel and other categories of people with roles and responsibilities similar to those involved in state systems.[30] Although the Major Crimes Act limits tribal jurisdiction over such cases, some tribes have established codes dealing with criminal sexual abuse,[31] as well as specific standards to determine when state and other tribal court decisions should be recognized and honored.[32]

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.[33] This is indicative of the emphasis on preserving or reuniting the family found in most tribal codes.

In some cases, these alternative dispute resolution systems may operate as an alternative to the "regular" tribal court system.[34] 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 (Zion, 1998). 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.[35] Many believe that the prevalence 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 (Sekaquaptewa, 2000).

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 (Sekaquaptewa, 2000) or provisions in tribal codes. As to the latter, many tribal codes recognize the rights of extended family, grandparents and traditional custodians to continued visitation even when parental rights have been terminated, as well as their right to participate in the judicial proceedings.[36] 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,[37] individuals who traditionally assist with parenting,[38] any person viewed by the family as a relative,[39] first cousins of parents (defined as aunts and uncles),[40] step-family and godparents.[41] Concepts such as grandparents may include brothers and sisters of the child's lineal grandparents.[42] 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."[43]

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.[44] In some cases, "terminated" natural parents have responsibilities under codes to provide continued financial support for the child.[45] Some codes have best interests definitions that specifically tie best interests to the child's relationship with the tribe, culture and extended family[46] and many codes specifically recognize the relevance, or even the controlling nature of, tribal laws and customs in interpreting the codes.[47]

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. These provisions essentially sever the connection between a child and natural parents upon termination and replace it with the adoptive parent-child relationship.[48] 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.

Funding for Tribal Courts

Due to limited availability of funding, tribal courts are historically underfunded, seriously hampering their ability to develop courts that may effectively serve and protect AI/AN youth. Yet, the vital role played by tribal courts has been widely recognized. Attorney General Janet Reno said, "fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement, but enhancement of the tribal justice systems as well."[49] Federal Indian Law attorney and professor Frank Pommersheim said that while tribal courts have had to struggle to address complex criminal and social issues with far fewer financial resources than their state counterparts, they must also "strive to respond competently and creatively to federal and state pressures coming from the outside, and to cultural imperatives and values from within."[50]

Many AI/AN communities face chronic under-funding for their justice systems, lack access to meaningful training for law enforcement and justice personnel, and lack comprehensive programs that focus on preventing juvenile delinquency, providing intervention services, and imposing appropriate sanctions. The 2009 Omnibus Appropriations Act provided over $85 million for Tribal programs, including $20 million for the COPS Tribal Resources Grant Program, over $40 million for Native American and Tribal related issues through set-aside funding and direct appropriations for programs such as the Tribal Governments Program and Tribal Coalitions Program, and $25 million for the Office of Justice Programs' (OJP's) Indian Country initiatives for tribal prison construction, tribal courts, and tribal alcohol and substance abuse initiatives. It also included $25 million for OJJDP's Tribal Youth Program, which supports and enhances tribal efforts to prevent and control delinquency and strengthen the juvenile justice system for American Indian and Alaska Native youth. In FY 2009, OJJDP will make additional Tribal Youth Program awards based on the 2009 Appropriation and the number of applications received. These awards will range from $250,000 to $450,000 over a 48 month period and will reach out to federally-recognized tribes across Indian Country.

Today, tribal courts receive funds from a few different funding sources, namely the Bureau of Indian Affair's (BIA) Division of Tribal Justice Support (DTJS) and the Department of Justice (DOJ) (Ragsdale 2008). The BIA currently funds 156 tribal courts and CFR courts through a line item called Tribal Priority Allocation (TPA) funds. These funds are administered through the Indian Self-Determination Act (P.L. 93-638) and support the development of criminal, civil and in some cases inter-tribal appellate court systems. This funding is used for the salaries of judges, prosecutors, defenders, court clerks, probation officers and juvenile officers, as well as other administrative costs. It is worth noting that TPA funds are not made available to tribes residing within P.L. 280 states (Ragsdale, 2008).

The FY 2006 appropriations for tribal courts under the TPA program were $12.3 million while the proposed FY 2007 budget was $12.1 million. In FY 2008, Congress enacted $14.3 million for tribal courts, which although an increase, is still not enough to support the increasing funding needs of the 156 tribal courts which continue to evolve and develop.

The DOJ funds tribes through competitive grants under its Tribal Courts Assistance Program (TCAP). This program's funds are not specific to juvenile courts and are allocated for three main purposes: to plan and implement an intertribal court system for small service populations, to plan and implement a single tribal court system for large tribes (1,000 people or more), and to enhance and continue the operations of tribal courts (DOJ

Bureau of Justice Assistance, 2009). The latter category may include establishing a core structure for the court, improving case management, training court personnel, acquiring equipment or software, enhancing prosecution or indigent defense, supporting probation diversion and alternative sentencing program, accessing services, with a focus on juvenile services and multi-disciplinary protocols for child physical and sexual abuse, and for structuring intertribal or tribal appellate systems (ibid). The TCAP program provided $8 million to tribes in FY 2006.

Since FY 1999, OJJDP has awarded 348 grants to 199 federally-recognized tribes under this program.

TYP funds can be used for:

- Prevention services to impact risk factors for delinquency, including risk factor identification, anti-gang education, youth gun violence reduction programs, truancy prevention programs, school dropout prevention programs, after school programs, and/or parenting education programs.
- Interventions for court involved tribal youth, including graduated sanctions, restitution, diversion, home detention, foster and shelter care, and mentoring.
- Improvements to the tribal juvenile justice system, including developing and implementing indigenous justice strategies, tribal juvenile codes, tribal youth courts, intake assessments, advocacy programs, and gender specific programming and enhancing juvenile probation services and reentry programs.
- Alcohol and drug abuse prevention programs, including drug and alcohol education, drug testing, and screening.
- Mental health program services, including development of comprehensive screening tools, crisis intervention, intake assessments, therapeutic services, counseling services for co-occurring mental health and substance abuse disorders, drug testing, and referral and placement services.

In FY 2008, OJJDP made 18 awards of $300,000 to $500,000 each totaling $8 million to federally-recognized tribes in 15 states. OJJDP also provided extensive training to the FY 2008 grant recipients, including training that focused on successful community planning.

In addition, OJJDP funds a Tribal Youth Training and Technical Assistance (T/TA) Center for the provision of culturally sensitive T/TA to all federally-recognized tribes in Indian Country and for TYP grantees. The technical assistance provided includes: access to professional staff with expertise in developing cultural based approaches to prevention and intervention, capacity building, strategic planning; program implementation; program evaluation; and program sustainability.

In FY 2009, OJJDP released a solicitation, 2009 Tribal Juvenile Detention and Reentry Green Demonstration Program. This program furthers the Department's mission by enhancing opportunities for federally recognized tribes to provide comprehensive and quality programs for tribal youth who reside within or are being released from a tribal juvenile detention center. For the first time OJJDP is sponsoring an initiative that encourages funding recipients to partner with institutions and organizations to incorporate green technologies and environmentally sustainable activities as part of their educational, training, and reentry activities for you participants. As a related effort, OJJDP will fund a Training and Technical Assistance for Tribal Juvenile Detention and Reentry Green Program. This program provides training and technical assistance to help federally recognized tribes reduce delinquency and recidivism among tribal juvenile detainees and will assist tribes as they develop partnerships with organizations to incorporate green technologies and environmentally sustainable activities into their reentry programs.

OJJDP also administers the Tribal Juvenile Accountability Discretionary Grants Program (T-JADG).

This program provides awards to federally recognized American Indian and Alaska Native (AI/AN) communities to develop and implement programs that hold AI/AN youth accountable for their delinquent behavior and strengthen tribal juvenile justice systems. T-JADG funds derive from the Juvenile Accountability Block Grant (JABG) Program as a "Tribal Set-Aside." The JABG Program, reauthorized in 2005, supports State agencies and units of local government, including tribal governments, in efforts to strengthen juvenile justice systems within seventeen purpose areas. T-JADG program funds may be used to address one or more of seventeen T-JADG Program purpose areas:

1) Developing, implementing, and administering graduated sanctions for juvenile offenders.

2) Building, expanding, renovating, or operating temporary or permanent juvenile correction, detention, or community corrections facilities.

3) Hiring juvenile court judges, probation officers, and court-appointed defenders and special advocates, and funding pretrial services (including mental health screening and assessment) for juvenile offenders, to promote the effective and expeditious administration of the juvenile justice system.

4) Hiring additional prosecutors so that more cases involving violent juvenile offenders can be prosecuted and case backlogs reduced.

5) Providing funding to enable prosecutors to address drug, gang, and youth violence problems more effectively and for technology, equipment, and training to help prosecutors identify and expedite the prosecution of violent juvenile offenders.

6) Establishing and maintaining training programs for law enforcement and other court personnel with respect to preventing and controlling juvenile crime.

7) Establishing juvenile gun courts for the prosecution and adjudication of juvenile firearms offenders.

8) Establishing drug court programs for juvenile offenders that provide continuing judicial supervision over juvenile offenders with substance abuse problems and integrate administration of other sanctions and services for such offenders.

9) Establishing and maintaining a system of juvenile records designed to promote public safety.

10) Establishing and maintaining interagency information sharing programs that enable the juvenile and criminal justice systems, schools, and social services agencies to make more informed decisions regarding the early identification, control, supervision, and treatment of juveniles who repeatedly commit serious delinquent or criminal acts.

11) Establishing and maintaining accountability-based programs designed to reduce recidivism among juveniles who are referred by law enforcement personnel or agencies.

12) Establishing and maintaining programs to conduct risk and needs assessments that facilitate effective early intervention and the provision of comprehensive services, including mental health screening and treatment and substance abuse testing and treatment, to juvenile offenders.

13) Establishing and maintaining accountability-based programs that are designed to enhance school safety, which programs may include research-based bullying, cyber-bullying, and gang prevention programs.

14) Establishing and maintaining restorative justice programs.

15) Establishing and maintaining programs to enable juvenile courts and juvenile probation officers to be more effective and efficient in holding juvenile offenders accountable and reducing recidivism.

16) Hiring detention and corrections personnel, and establishing and maintaining training programs for such personnel, to improve facility practices and programming.

17) Establishing, improving, and coordinating pre-release and post-release systems and programs to facilitate the successful re-entry of juvenile offenders from state and local custody in the community.

In FY 2008, OJJDP made 3 awards ranging from $306,408 to $353,542 each, totaling $1,012,199 million to federally-recognized tribes in 3 states. OJJDP provided extensive training to the FY 2008 grant recipients, including training that focused on program strategic planning, implementation, and sustainability. In FY 2009, OJJDP anticipates making awards totaling $1,050,069.

In addition, OJJDP supports a number of research and demonstration projects related to prevention of child abuse and victimization in Indian tribes.

Lastly, some tribes also use limited funds made available to them through Title II of the Indian Child Welfare Act, and Title IV-B, Subpart 2 of the Social Security Act from the monies appropriated to the Promoting Safe and Stable Families Program (PSSF). Both of these sources may be used to support the operation of tribal courts. However these supplemental funding sources are very small in size. Furthermore, to date, very few tribes have actually received funding under the latter (NARF, ICWA Handbook). States, however, are eligible to receive comparatively large grants under the PSSF program for court improvement (NICWA & Pew, 2007).

JURISDICTIONAL, DEFERENCE, AND RESOURCE CHALLENGES BETWEEN STATE AND TRIBAL COURTS

State and tribal courts have struggled to foster understanding and effective working relationships in the area of AI/AN child welfare for decades. Much of this difficulty can be attributed to the courts' different evolutionary processes, the lack of funding available to tribes, the striking cultural differences, the complex jurisdictional maze and laws involved in AI/AN dependency cases, and, until very recently, the lack of tribal-state collaboration around court improvement.

Although the ICWA recognizes that tribes maintain concurrent jurisdiction over their children wherever located,[51] and the Supreme Court has characterized this as presumptive tribal jurisdiction[52], many issues have arisen around the Act and when its transfer provision is applied by state courts. Perhaps one of the most contentious issues regarding tribal-state jurisdictional disputes is the "existing Indian family exception", which a minority of state courts have judicially created and interpreted to mean that the ICWA, and hence the corresponding placement preferences, do not apply when the AI/AN child at issue has never lived with an Indian parent or family.[53] Of course Congress did not intend for states to interpret the law as such and this interpretation leads to other issues such as the state courts' definition of an "Indian parent" or "family".

Secondly, there are jurisdictional disagreements between state court and tribes as to what constitutes good cause for a state court to decline a motion to transfer a proceeding to tribal court. Congress intended the good cause provision to be used in very narrow circumstances when it would either be inconvenient or unfeasible for the case to be heard in tribal court. However, some state courts have interpreted this more broadly and applied it in regards to "best interests of the child" as a way to prevent transfer.[54] This too represents a deviation from what Congress intended when it enacted ICWA. It suggests that state courts are better able to ascertain the "best interests of the child" than tribal courts, which share the culture and unique political status of the AI/AN child at issue.

Another problematic issue arising between state and tribal courts is that of state deference to tribal courts and standards. The ICWA requires that state courts give full faith and credit to official acts of tribes, including court orders and codes, although states have more leeway with regards to the latter.[55] Many state courts do not accord tribes full faith and credit, especially when tribal court orders and codes are inconsistent with those of the respective enforcing state.[56] This proves troublesome in the realm of AI/AN dependency cases as many tribal codes reflect the tribes' Indian child welfare philosophy and practices and define certain terms such as "extended family members" and "Indian custodian."[57]

Compounding the difficulty that state and tribal courts have encountered in addressing AI/AN dependency issues is the historic lack of mutual cultural understanding and collaboration around these issues. Both state and tribal courts generally lack an appreciation of the parallel court system (Thorpe, 1999). Without such knowledge, it is undeniably challenging for state court judges to understand that tribal court systems are intentionally different from those of states, as they represent and serve the needs of an entirely different culture. Furthermore, tribal courts are severely underfunded and relatively new institutions in comparison to those of their state counterparts.

Tribal courts, as a whole, are therefore in need of additional resources so that they may further develop their courts. Among many things, such funds could go towards data collection and tracking, professional advancement of tribal judges and legal personnel, and updating tribal codes, where applicable. If made available, this funding would also better enable tribes to proactively collaborate with state courts and child welfare personnel on issues pertaining to AI/AN child welfare. State courts, attorneys and child welfare agency personnel are in need of cross-training on the application of the ICWA and how to best work with tribes in order to serve the needs of AI/AN children.

Although not available to tribes, Court Improvement Program (CIP) grants were established in an effort to address the data collection, training and collaboration needs of dependency courts for the betterment of children in foster care. Because of these grants and the corresponding Program Instructions, which mandate tribal-state collaboration, states and tribes have begun to work together on many of these important issues. The following section provides an overview of court improvement, key statutory requirements that support positive court results, and the role of CIP grants.

STATE COURT IMPROVEMENT PROJECTS; CATALYSTS FOR REFORM

"Court improvement" is one element of federal-state collaboration to improve outcomes for children in foster care. Housed in the highest state courts across the country, these programs were created by one of a series of federal statutes passed since 1980 that developed a national child welfare policy and a model of federal-state collaboration. Initially, it was not envisioned that a comprehensive, integrated system would result from the creation of CIP and subsequent laws. Rather, the resulting policy and model of federal-state partnership evolved incrementally and in response to experience, creating national standards for child welfare practice and a data-driven means to measure state progress toward meeting those standards.

This federal-state system overseeing child welfare practice assigns state courts with the role of both protecting the rights of children and families who come into the child welfare system, and of overseeing the actions of the state agencies responsible to serve these children and families. Serving these two functions, the court contributes to improved outcomes for children and families. While much has been accomplished in this regard, the outcomes for AI/AN children and families are, in many respects, still not benefiting as fully, whether under the jurisdiction of state or tribal courts, and therefore need additional attention.

Indian children are historically, culturally and politically unique and consequently their needs cannot be addressed adequately by only using mainstream methods. Congress recognized this when it passed the Indian Child

Welfare Act (ICWA) in 1978, which was passed prior to the federal child welfare legislation that began the process of developing the current national policy. The ICWA "was the product of rising concern in the mid-1970s over the consequences to American Indian /Alaska Native children, American Indian/Alaska Native families and American Indian/Alaska Native tribes of abusive child welfare practices that resulted in the separation of large numbers of American Indian/Alaska Native children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[58] "Evidence presented to Congress revealed that "25-35% of American Indian/ Alaska Native children had been separated from their families and placed in foster homes, adoptive homes or institutions."[59]

Congress found that "removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has damaging social and psychological impact on many American Indian/Alaska Native children."[60] In consideration of the causal factors, Congress discovered that courts and state agencies constituted a substantial part of the problem. Moreover, Congress found that "the States, exercising their recognized jurisdiction over American Indian/Alaska Native child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of American Indian/Alaska Native people and the cultural and social standards prevailing in American Indian/Alaska Native communities and families."[61] It was for these reasons that Congress enacted the ICWA, hence curtailing state authority and strengthening that of tribes over child welfare matters.[62] Protecting the rights of Indian children, families and tribes, the Act places substantive and procedural requirements on state courts and state child welfare agencies working with AI/AN children.

The ICWA's distinctive substantive and procedural remedies were also reflected in the Adoption Assistance and Child Welfare Act, which was enacted in 1980. This law established the current national standards on child welfare practice and model of federal-state collaboration. Since 1980, the Congress has made additional reforms in the area of practice via the Adoption and Safe Families Act (P.L. 105-89) and Fostering Connections to Success Act (P.L. 110-351), but many of the core practice values established in the Adoption Assistance and Child Welfare Act (P.L. 96-272) still remain intact. While the federal practice standards in ICWA have been intact since 1978, states have often struggled to provide a consistent and effective implementation of ICWA's procedures and remedies to improve outcomes for AI/AN children, families and tribes. Some of the struggle can be tied to the lack of federal assistance and oversight in implementing ICWA, while other factors are related to differing jurisdiction's reluctance to embrace the requirements of the law and working collaboratively with tribal governments.

The Pew Commission's recommendations have both directly and indirectly contributed to the amelioration of this shortcoming by specifically acknowledging the unique political status of AI/AN children and by advocating for effective and continual collaboration between all parties involved in child welfare proceedings. While the Pew

"The national Court Improvement Project has provided courts across the country the opportunity to focus on improving outcomes for children and families involved in the child welfare system. The CIP has been instrumental in raising the profile and priority of juvenile court cases, building collaborative relationships focused on system change, and giving courts the opportunity to implement best practices. Led by the highest state courts in the land and building on a model first launched by the National Council of Juvenile and Family Court Judges in its Model Courts, judges have committed themselves to training, establishing collaborative system change teams, collecting and measuring outcomes, and ensuring that the nation's most vulnerable children's needs for safety, permanency, and well-being are met." *- Nancy Miller, PPCD Director, NCJFCJ*

Commission's recommendations pertaining to court improvement do not explicitly stress the involvement of AI/AN tribes, they did result in many system improvements including the establishment of data and training Court Improvement Program (CIP) grants. Consistent with the Pew Commission's emphasis on collaboration, the CIP Program Instructions mandate that recipient state courts collaborate with both state agencies and federally recognized AI/AN tribes.

Two years later, in looking at the success of the steps taken to implement this CIP mandate and to project ways in which it can be enhanced, it is necessary to understand not only how CIP, itself, works, but also how this program fits into the overarching federal-state model for collaboration on improving child welfare system outcomes.

The CIP was part of legislation passed in 1993 to help state courts fulfill the role they were assigned in child welfare cases by P.L. 96-272. The passage of P.L. 96-272 was the watershed event leading to creation of the current national consensus on child welfare practice. Not a coherent, unified "law," P.L. 96-272 was a compilation of amendments to the Social Security Act, which provides for payments from the federal to state governments for support of children in state foster care (and for family services). The Adoption Assistance and Child Welfare Act was intended to create national standards for child welfare cases by providing the following requirements be met for each case in order for the state to be reimbursed with federal money for the child's keep. The main provisions are summarized as follows:

- Reasonable efforts[13] must be made to prevent removal of children from their families,
- Reasonable efforts must be made to make it possible for these children to be returned to their families, and
- A permanency plan must be developed for all youth under state supervision.[63]

Moreover, P.L. 96-272 formalized the role of state courts to oversee and ensure state agency compliance with these and other requirements. And, the flow of federal money to the state under Title IV-E now depended on the court finding that the agency was in compliance.

In 1993, the systems of child welfare practice and court oversight created by P.L. 96-272 were strengthened. Among other things, the Omnibus Reconciliation Act of 1993 (P.L. 103-66) amended Title IV-B of the Social Security Act to create the CIP and provide new financial support for family services and preservation. With the establishment of CIP grants, federal funding was provided to the highest state courts to assess their processes for reviewing and hearing dependency cases and for developing and implementing recommendations for improvement. Hence, starting in the 1990s, the CIPs performed state assessments of their adoption and foster care laws and judicial processes, and created and implemented recommendations for system improvement (DHHS website, 2009).

In 1997, Congress passed more landmark child welfare legislation, further refining national child welfare practice standards. Signed into law by former President Clinton, the Adoption and Safe Families Act (ASFA) (P.L. 105-89) drew upon the provisions of the *RESOURCE GUIDELINES*[14], a "best practices" manual of conducting court proceedings in child welfare cases. The *GUIDELINES* were written by the National Council of Juvenile and Family Court Judges (NCJFCJ), in consultation with expert judges, child welfare practitioners, researchers, advocates and others. The *GUIDELINES* were endorsed by the American Bar Association, the Conference of Chief Justices, and the Board of Trustees of the National Council of Juvenile and Family Court Judges.

[13] The Indian Child Welfare Act requires its own, higher standard, "active" efforts—along with all the other safeguards the Act defines—apply in all cases in which Indian children are subject to state child welfare jurisdiction.

[14] *RESOURCE GUIDELINES*: Improving Court Practice in Child Abuse and Neglect Cases. National Council of Juvenile and Family Court Judges, Reno, NV, 1995.

Like P.L. 96-272, the ASFA (P.L. 105-89) was a collection of amendments to the Social Security Act, designed to limit the amount of time a child could spend in out-of-home care and encourage permanent placement, especially adoption. The ASFA required courts to hold permanency hearings 12 months after a child entered foster care, rather than 18 months as required by P.L. 96-272, and it created national standards against which the outcomes of state efforts could be measured. These standards, aside from an emphasis on time lines, included a hierarchy of permanent placements to be attained.

The ASFA named the health and safety of the child as the paramount concern in child welfare cases, and its provisions required expeditious permanency for children in foster care. These two concepts defined national child welfare policy at the end of the 20th century. To guide compliance, the CIP grant Program Instructions required state CIPs to conduct a second assessment of court performance to use as a basis for planning reform, guided by the new, or, perhaps, restated, standards of the ASFA. A strategic planning requirement was added that required the states to define how they would develop their capability to fulfill their role under the ASFA.

As states began to adapt their statutes in order to be in compliance with provisions of the ASFA, and to focus the efforts of CIPs on applying them, the Children's Bureau finished developing rules to implement other amendments to the Social Security Act, which had passed in 1994. By 2000 that development process was completed and the stage was set to implement the Child and Family Service Reviews (CFSRs). This federal "performance audit" evaluates the quality of the outcomes for children, rather than the processes that the states use to pursue those outcomes. Moreover, data driven outcome measures became a significant focus of the entire child welfare system.

Starting in 2006, the CIP Program Instructions governing awarded funds, directed the CIPs to build their strategic plans around the outcomes of the CFSRs as well as the state-specific reform efforts which they had already undertaken.[15] Additionally, these awards required CIPs to collaborate with state child welfare agencies in conducting the CFSRs. At this point, it had become clear that improving outcomes for children in foster care was not going to come about as a result of organizational change within the agencies or courts alone. These outcomes were systemic, shared results, and consequently both the courts and the state agencies had to work together to affect system reform.

Since its inception, the CIP model has emphasized collaboration with all parties involved in the child welfare system as critical to effective systems' reform, with inclusive multi-disciplinary advisory boards informing and participating in those reform efforts. This orientation toward collaboration prepared the CIPs to develop into catalysts and conveners of system-wide reform in the wake of the Pew Commission's recommendations.

The Pew Commission proposed developing performance measures and the data systems to support them, promoting collaboration among state courts, child welfare agencies and Indian tribes, developing resources for representation of parties to child welfare cases to improve advocacy and therefore the quality of decisions, and orienting court procedure and practice, including judicial training and allocation of resources, so as to enable courts to effectively serve their oversight role.

The Pew Commission's report was instrumental in securing Congressional authorization that tripled the amount of money granted to CIPs. The Deficit Reduction Act of 2005 (DRA) provided for two additional CIP grants—one to support development of data driven performance measures and another to provide inclusive and multi-disciplinary training under the collaborative leadership of the state courts, child welfare agencies and Indian tribes. The Program Instructions sent out to the CIPs to govern application for these new grants thus incorporated the Pew Commission's recommendations.

[15] It is worth mention that the ABA, NCJFCJ and NCSC developed performance measures for dependency courts to utilize to "track their own progress in improving safety, performance, and timeliness for the children who come before them (Pew Commission, p59). Funded by the Department of Health and Human Services (DHHS) and the Office of Juvenile Justice and Delinquency Prevention (OJJDP), these performance measures were intentionally designed to be compatible with those used by the states for CFSRs, thus better enabling cross-system collaboration.

The DRA also added a Title IV-B requirement to Section 422 of the Social Security Act, requiring that the recipient state or tribe demonstrate substantial, ongoing, and meaningful collaboration with state courts in the development and implementation of its Title IV-B plan, CFSR and other program improvement plans. The Pew Commission's recommendations on strengthening the courts, thus incorporated into the CIP grant Program Instructions, helped to shape the future of court improvement efforts.

These efforts, however, should not be seen in isolation. The CIPs are now established to contribute to the overall effort to improve outcomes for children and families involved in the state child welfare systems, as those outcomes are measured by the CFSR process. By supporting and encouraging judges and stakeholders with training and technical support, by developing data systems to measure outcomes, and by creating the relationships upon which a systems' approach to reform is based, CIP is a part of the federal-state collaboration to implement the national consensus on child welfare policy.

The CIPs' role of bringing Indian tribes into this federal-state collaboration is an admittedly challenging, yet absolutely vital one. Tribes are best able to protect and serve the needs of AI/AN children and therefore must be actively engaged as partners in system reform. Only a few years following the advent of the 2006 CIP Program Instructions mandating tribal-state collaboration, some of the challenges and promising practices encountered by state CIPs and tribes implementing the Pew Commission's recommendations have become apparent. While it is important to note that some of the observed challenges are products of complex histories and ensuing strained relationships, and thus precede the establishment of CIPs, identifying the challenges and promising practices gleaned from tribal-state collaborations is incredibly valuable. Doing so points to successes which may be replicable and challenges which are in need of attention. Additionally, reviewing these outcomes reveals where further work is needed for the betterment of AI/AN children.

The next section of this briefing paper examines these challenges and promising practices, while making some recommendations as to how to increase the implementation of the Pew Commission's recommendations, and adding some application possibilities specific to AI/AN children.

PROMISING PRACTICES AND CHALLENGES

The national consensus that has emerged from more than two decades of experience and policy development is that the state will assist parents to ameliorate the shortcomings that prevent them from safely raising their own children and, failing their ability to do that, provide those children with permanency and well-being in families that can. Alongside this consensus there has also been a realization that the "fixing" of no single sector of the child welfare system, or no single agency within that system, will accomplish this goal. Child welfare agencies, tribes, courts, judges, lawyers, CASAs, foster care review boards, service providers and all other professionals in the field of child welfare must work together—rather than simply improving their practices in isolation.

The Pew Commission's recommendations pertaining to court improvement prescribe systemic approaches for implementing this national consensus and recognize the importance of tribal participation. It is understood that tribes need to become a stronger partners in this effort and that states, particularly the CIPs, have a responsibility to support this effort if outcomes for AI/AN children and families are to improve significantly. It is therefore important to survey the initial efforts made in developing this relationship and to identify the challenges that the agencies, tribes and courts have faced, as well as the promising practices that they have developed in addressing data collection and tracking, training and collaboration, improving representation, and court operations.

In analyzing these preliminary outcomes, it is sometimes difficult to neatly separate the efforts employed to address each of the four identified areas of court reform, as many do overlap. Furthermore, while it may seem that there is a "lead" partner in attaining some of the recommendations, all involved parties actually have a

hand in realizing all four reform areas. Similarly, despite the fact that there seem to be distinct challenges attached to each recommendation, there are some problems which are implicated in all four.

Chief among the overarching challenges is the lack of resources available to state courts and especially to tribes. Developing data systems that can support the use of performance measures to track outcomes and allocate resources requires funding that is difficult to secure. Collaboration of tribes, agencies and courts in developing and delivering training and planning to improve performance requires investments of time, money and human resources at a time when the supply of these is stretched beyond the capacity to accomplish core court functions. Improving representation means funding more attorneys and guardians ad litem, as well as recruiting, training and organizing more volunteer CASAs and foster care review boards. For tribes, increasing their capacity to develop and enhance child welfare programs and juvenile courts in many areas is seen as necessary if tribes are going to be able to effectively partner with state court systems in this effort.

A few other pervasive obstacles include geographical distances, a lack of understanding about parallel court systems, cultural differences and the logistical challenges resulting from the sheer number of people collaborating. Cultural differences play heavily into these challenges, especially at the onset of such collaborations between tribes and state courts. This would stand to reason as many of these tribal-state working relationships are new and in need of significant cultivation.

Despite these challenges, state courts and tribes have developed many promising practices, laying the groundwork for future collaborations. The relatively modest increases in resources that have been made available through CIPs have been put to good use and people from all domains of the system have begun to engage with one another, despite the apparent obstacles. An atmosphere of good will and understanding of what is to be done, and why it is important, seems to be developing along with efforts to overcome existing cultural barriers. The sections below survey some of these tribal-state collaborations, showcasing examples of the promising practices and challenges or lessons learned from these partnerships and the implementation of the Pew Commission's recommendations.

DATA COLLECTION AND TRACKING; CHALLENGES AND PROMISING PRACTICES

Introduction

In child welfare proceedings, data can be used to track case progress, identify groups of children in need of attention, target stages of the process in need of reform, determine sources of delay in court proceedings, and ultimately determine the outcomes of child abuse and neglect cases. Accurate data and valid performance measures are necessary to ensure that decisions are made on the basis of actual conditions and not on anecdote or politics. The lack of resources, especially among tribes, the fear held by courts and agencies that performance will be measured solely by data which they may believe to be unreliable, and the lack of agreement on what constitutes appropriate outcome measures impede the progress of developing performance measures and the systems that support them. Yet, as a result of increased collaboration and resulting improved relations, tribes and states have begun to discuss the issue of data collection and its relation to AI/AN children specifically. Moreover, data sharing between state courts, child welfare and other agencies and, in some cases, tribes has begun to provide an improved, if not yet adequate, compilation of data in many states. Notwithstanding this positive development, it is important to note that some of the most critical data that determines outcomes for Indian children is that regarding the implementation of ICWA requirements. However, ICWA contains no national review system and in most circumstances the collection of data on ICWA compliance is not mandated. Consequently, few states collect any regular ICWA data that is regularly reported.

Challenges

Although most state courts acknowledge that collecting data on child welfare proceedings is both advantageous and necessary, many challenges exist to accomplishing this goal. Difficulties associated with creating state court data systems that are adequate to support performance measures as a whole, and especially those specific to AI/AN children and youth, can be attributed to a variety of factors, such as lack of understanding that specific dependency court data systems are needed, challenges in sharing data between systems and lack of funding to support these activities. Many state court and tribal data systems are inadequate. Compounding this problem is the fact that state child welfare agencies, courts and tribes lack the resources to compete with the private sector for the services of skilled data professionals.

Of the state court data systems that do exist, many are relatively obsolete, allowing only for the collection of limited data, and restricted in the ability to compile statistics and generate reports. These systems are also often unable to share data, because, for example, court and agency systems were developed at different times, for disparate purposes and were not created subsequent to collaboration between either entity. This has resulted in the majority of these systems being configured in such a way that they cannot readily share information. For example, data points assigned the same name in each respective system do not necessarily define or measure the same thing.

Considering the above-mentioned obstacles and the fact that state courts have just recently begun to address data collection in its entirety, it is not surprising that many state courts have not yet started to gather and analyze data specific to AI/AN dependency cases. Notwithstanding this unfortunate reality, some states have begun to dialog with tribes about this deficiency. The very act of meeting and speaking with tribes about this central issue is vital to improving outcomes for AI/AN children. Tribes need to be actively and regularly conferred with in all planning discussions and activities pertaining to AI/AN children. This is particularly true considering the fact that tribes are severely underfunded, barring their ability to address these issues alone. Additionally, state courts hear the majority of AI/AN dependency cases and therefore need to attend to data collection and performance measure specific to these proceedings.

Considering the unique political, cultural and historical status of AI/AN children, it should be understood that the same performance measures that apply to non-Indian children, which are implemented by state courts, will not always work well for tribal children. ICWA provides the primary basis for outcome measurements for tribal children in state care in addition to those required by Title IV-E and Title IV-B. Therefore, tribes and state courts should consider how ICWA, Title IV-E and Title IV-B outcome measures can be implemented for tribal children under state care. For tribal children under tribal care, where tribal law and federal requirements stemming from Title IV-E, Title IV-B and the BIA apply, the same consideration is in order. Moreover, having tribal courts simply adopt Title V-E and Title IV-B performance measures will not ensure positive outcomes for tribal children under tribal care either.

Most tribes are operating with either inadequate or non-existent automated systems for gathering and using data. Although many tribes have expressed sincere interest in developing up-to-date comprehensive data collection systems, they, unlike their state counterparts, have not been eligible for federal subsidy under Title IV-E to do so. With the enactment of the Fostering Connections to Success and Adoption Act (P.L. 110-351) on October 7th of 2008, which enables tribes to apply directly to administer the Title IV-E program, participating tribes will now be eligible for this funding. In light of this historic development, it is even more imperative that tribes receive adequate funding to develop and improve upon their court systems so that they may qualify for, and be in compliance with, this important program.

While the enactment of P.L. 110-351 is a welcome step in the right direction, not all tribes are currently set-up to administer Title IV-E and are therefore in need of other funding sources to support data collection efforts. In

absence of any such reliable funding, most tribal programs are capable of collecting only minimal data on child welfare cases, specifically that which is required by Title IV-B and the Bureau of Indian Affairs. Thus, because many tribes currently lack funding requisite to develop the basic infrastructure needed to collect and track data, they are disadvantaged in their ability to reform their court systems and to effectively collaborate with their state partners. If tribal courts were sufficiently funded, they would be able to expand their systems and participate with other stakeholders on more equal footing (Simmons, 2004).

Moreover, there is reason to believe that with the increased role of tribes in court reform efforts, the need for AI/AN data will garner additional attention. Current data on AI/AN children is severely lacking and devoid of accurate and up-to-date statistics. This hampers courts in their ability to effectively serve AI/AN youth, which are overrepresented in the state foster care system.[16]

This is especially true in the case of AI/AN child welfare proceedings because different jurisdictional, procedural and substantive requirements apply. Surveying these data would enable state courts to keep track of how many ICWA cases they had at any given time, the status of these cases and how well they were progressing. This and other gathered data would help state courts to determine whether dependency court judges, attorneys, and CASA volunteers would benefit from further professional training, providing them with additional guidance as to how to best handle AI/AN cases.

Promising Practices

Despite the challenges faced by state courts in their efforts to collect and share data on dependency proceedings, some progress has been made in this undertaking. Due to the increase in funds allocated through CIP data grants, many recipient state courts are preparing for or have begun to implement plans to create systems needed to gather this information. Performance measures, such as those developed by ABA, NCJFCJ and NCSC, are also being developed and used. State courts, child welfare agencies and, most recently, tribes have begun to collaborate in an effort to build capacity to follow and evaluate child welfare caseloads.

While many state courts are cognizant of the need to accumulate data on AI/AN dependency proceedings, state child welfare agencies have and continue to collect the majority of data on AI/AN child welfare cases. Due to the nature of their work as the primary foster care administrators, they have worked more extensively with tribes over the years. State agencies are required to gather and report data in a number of different systems including the Adoption and Foster Care Analysis and Reporting System (AFCARS) and the National Child Abuse and Neglect Data System (NCANDS), all of which have been compiled at the federal level. Since the advent of the Child and Family Service Reviews (CFSRs), which were established to evaluate outcomes for children, state governments have begun to amass and supply data on their efforts to comply with the ICWA. Of course, this and other data captured by the child welfare agencies is different from that which state dependency courts gather.

Many state court data systems were not designed to compile aggregate data and generate statistical reports. Rather, they were intended to serve a case management function, mechanizing the paper docketing, calendaring and registry systems in which courts record events in order to keep track of cases and to provide a location to store information so that it could be retrieved at a later date. The beginning of a legal case, the filing of documents and pleadings, the dates on which hearings were held and orders and judgments were made were all recorded. Nevertheless, in many state courts any information about the parties involved in legal proceedings would be stored, if at all, in the documents contained in the hard copy files and not an automated management information system. As the need to compile statistics grew, court data professionals created “work arounds” to modify their “look up” systems to compile statistics for analysis. Yet, doing so was expensive and therefore not all systems benefited from these improvements.

[16] The use of data, for example, shows that Indian children represent 1% of the population of children in the United States and 2% of all children in foster care. (www.casey.org/NR/rdonlyres/4F632D30-69AA-4BAD-A948 9F3F950A3C7E/565/Disproportionality_Fact_Sheet_31407.pdf)

In some state courts, these systems are now being replaced by new systems better suited to the kind of reporting that is necessary to support the use of performance measures. For example, Oregon is developing a new system that will allow for the gathering and generation of statistical data. This means, of course, that improvements in performance are now increasingly intertwined with and dependent upon these new technologies, and few, if any, resources are being invested into enhancing old systems that will soon be discarded.

Even where state court systems are limited in their ability to docket and register information, the data collected and utilized, albeit narrow, has proven indispensable. The tracking of cases through the system, measuring compliance with time lines, and recording when hearings have been held is a basic part of using data to improve outcomes in child welfare cases. In Oregon and New York, the court systems are challenged by identifying AI/AN children, but regular reports to local courts about time to jurisdiction and timely permanency hearings have improved compliance with case timelines.

Some states have successfully collaborated with child welfare agencies and tribes to gather and follow results for AI/AN children. The California Administrative Office of the Courts is able to track outcomes for AI/AN children through its own data system, as can Washington, although both pull data from their respective child welfare systems for this analysis. California's constellation of performance measures is also being expanded, and will include new measures designed to track outcomes for AI/AN children. Providing yet another example, 10% of Michigan's performance measures are specifically related to ICWA cases, addressing issues of due process (notice of hearings, presence of parties, etc).

The sharing of data between courts and agencies, usually by way of storing data in warehouses, to create combined databases is a promising practice. The success of this practice depends entirely on successful collaboration, preventing gaps in the information obtained, resolving definitional and reliability issues, and avoiding the unnecessary duplication of efforts. Michigan's data warehouse compiles data on 62 performance measures in three pilot counties, and has completed mapping of the entire court and agencies' systems to prepare for extensive data sharing. The tribes, child welfare agency and state courts in Michigan have collaborated on planning for projects to be funded by the CIP data grant. Involving tribes as partners in the planning process for CIP data grant activities is a promising practice and will yield improved results for AI/AN children.

Several states report improved outcomes through the use of the performance measures and are expanding the range of these measures through collaborative processes that share data. Although some states do not have measures specific to cases involving AI/AN children, others do and many of those that lack them are in the process of developing them.

COLLABORATION AND TRAINING; CHALLENGES AND PROMISING PRACTICES

Introduction

In the context of court improvement and the Pew Commission's recommendations, the term "collaboration" is used to mean child welfare agencies, tribes and courts working together to attain outcomes for which they share responsibility. This joint effort includes, but is not limited to conferences, strategic planning sessions, and cross-trainings, and it is necessary because no one group can attain improved results without the contribution of the others. Lack of resources and understanding of parallel court systems, geographical distances, and cultural differences impede collaboration between state courts and tribes, but joint efforts at developing multi-disciplinary training events and opportunities, as well as establishing memoranda of understanding agreements (MOUs) and protocols have improved outcomes.

Collaboration among state courts, agencies and tribes has been ongoing in some areas for quite some time, although the Pew Commission's recommendations call for its expansion. Moreover, the incorporation of these recommendations into the CIPs' Program Instructions has accelerated this process. In these undertakings, state courts, agencies and tribes have developed many promising practices, actualizing the Pew Commission's recommendations and promoting the welfare of children in foster care.

As encouraged by Pew, state agencies, courts and tribes have begun to work collectively on the CFSR and PIP processes, broad-based state commissions on foster care (or their equivalents) have been established and expanded, joint trainings have been conducted, and conferences and trainings on the ICWA and Indian child welfare (ICW) issues are taking place. The latter of these is occurring in several forums, including broad-based state commissions, institutions within the child welfare agencies, among tribes, within CIPs, and various best practice or Model Court initiatives. Lastly, as mentioned in the previous section, collaboration on data collection and sharing is in progress. Including tribes in these court improvement activities has provided them the much overdue opportunity to establish themselves as both a presence and as a resource.

Challenges

Although initial steps have been taken and notable progress made, state courts, tribes and child welfare agencies have encountered obstacles throughout their collaborative efforts. These challenges include, but are not limited to, problems associated with insufficient resources, cultural competency, deficiency of trust in parallel judicial systems, lack of agency-court collaborations, and states' need for strategic, effective outreach methods to build and improve relationships with tribes. Many of the issues mentioned herein are affected, either positively or negatively, by one another. Consequently, these identified problems cannot be considered in isolation as they are all interrelated.

As discussed in previous sections, the lack of sufficient funds constitutes perhaps the most pervasive issue, hindering state CIPs' and particularly tribes' ability to conduct all of the necessary court improvement activities. For instance, state CIP funding does not currently reflect the amount of work that effective relationship building and cross-trainings between states and tribes necessitates. Furthermore, tribes are not receiving any funding, such as per diem compensation, to cover expenses incurred by their participation in planned CIP activities, which usually require a substantial amount of travel. This, in conjunction with the fact that tribes generally do not possess excess resources to cover such expenses, renders attending many of these events either difficult or impossible.

Many of the other identified challenges, such as the lack of cultural competency and trust in tribes' judicial systems, can be understood, at least in part, as by-products of insufficient tribal-state communication and relationship-building. Many state judicial personnel involved in AI/AN dependency cases are not entirely familiar, if at all, with the political and cultural status of AI/AN children and are therefore in need of cultural training so that they may effectively hear such proceedings. Similarly, due to a lack of tribal-state communication regarding the structure and function of their respective court systems, many state judges are unfamiliar and uncomfortable with tribal court systems. This can result in state courts refusing to accord full faith and credit to tribal codes and court orders, which can, in-turn, be to the detriment of AI/AN children.

In order to improve tribal-state communication, thus cultivating productive tribal-state collaborations, state courts must conduct effective, inclusive and culturally tailored outreach to tribes, regardless of any existing historical and cultural barriers. Some state CIP personnel have reported frustration and uncertainty as to whom, exactly, they should contact from any given tribe, each of which brings different processes, structures and values to the table, and how to best foster these relationships. Tribes have complained that they are not always provided with adequate notice, leaving them with insufficient time to plan to attend CIP activities.

"Like state governments, tribes are very busy and therefore need time to plan to attend court improvement events."

- Judge Attebury, Karuk Tribal Court Administrator

Moreover, state CIPs struggle in their efforts to overcome the challenges resulting from geographical distances and cultural differences, and are therefore in dire need of an instructional model. One such example is that of Alaska, home to over 500 Native Alaskan villages and the recipient of one of the smallest CIP grants (amounts are based on state population). Alaska faces perhaps the starkest challenge as it has the steepest curve with which to deal. Obtaining and utilizing an outreach model designed specifically for tribal-state collaborations, would improve states' ability to develop these relationships and to solicit the meaningful and continued participation of tribes. It would also ensure the inclusion of all of the tribal stakeholders who should be present and actively engaged in all planned CIP activities.

Promising Practices

Despite the challenges discussed above, tribal-state collaboration around court improvement has yielded some noteworthy promising practices. Some CIPs are utilizing preexisting collaborative vehicles to meet and work with tribes in addition to establishing new collaborative infrastructures. Tribes and states are using these frameworks to conduct relationship-building meetings and cross-trainings on the ICWA and ICW issues. Many of these partnerships have generated outcomes such as inter-governmental agreements and memoranda of understanding (MOUs), which have improved practice and thus outcomes for AI/AN children.

State child welfare agencies and courts are collaborating with one another by using preexisting forums as vehicles for working with tribes on court improvement issues. Child welfare agencies, due to the nature of their work and frequency with which they interface with tribes, have developed many institutions, including quarterly meetings with tribes, ICWA conferences, and tribal liaison meetings, to which they are inviting state CIP personnel. Alaska, Oregon, Arizona, and other state CIPs have become a part of such vehicles and institutions established by the state child welfare agencies to work with tribes.

Using these institutional mechanisms amplifies the work accomplished by the broad-based state commissions recommended by the Pew Commission. They provide tribal representatives with a forum to educate state government partners, resulting in increased communication and understanding. Some state CIPs have also begun to integrate themselves into Title IV-E institutions, including tribal-state agreements, tribal liaison systems and roundtables, which were developed as a result of collaboration between tribes and state child welfare agencies. One example of such collaboration is that of the state of California, in which the state child welfare agency, tribes and CIPs are using these forums to address Title IV-E and other federal program issues.

While joining existing collaborative vehicles engages all parties without needing to set up new meetings requiring additional resources to organize and attend, it is not the only means by which states and tribes collaborate. State CIPs and tribes have established other forums at which they meet to address issues pertaining to AI/AN dependency cases. One example is tribal-state collaboration that takes place at multi-disciplinary advisory committee meetings which CIPs are required to establish as a condition of their grants. Many state CIPs have had success in encouraging and achieving tribal attendance at these meetings.

In addition to the above, many other models of collaboration have emerged. New York's Federal-State-Tribal Forum is a model for a collaborative infrastructure. Through its Listening Forum and Listening Conferences, several issues of jurisdiction, the granting of full faith and credit and ICWA compliance are addressed, improving outcomes for AI/AN children. The Alaska CIP has worked with the state's Tribal State Collaboration Group that

addresses issues of cultural competence, family group conferencing and the weight given to extended family input, as well as the ICWA conference that annually draws judges, village council members, and ICWA workers. It has also succeeded in working with the Bureau of Indian affairs to get court improvement issues on its training agendas.

Collaborative training events with tribes in the lead have proven to be especially effective in developing tribal-state collaboration. State CIPs and tribes have reported success in shifting the focus of collaboration in training from "including tribes" to a team work model, and from fashioning agendas that "address tribal concerns" to including tribal representatives in all planning processes and presentations. Involving tribes in this way ensures optimal participation, improves cross-cultural understanding and practice, and leads to results which help all stakeholders to meet the needs of AI/AN children.

It is important to note that while tribes do not receive CIP funding to conduct cross-trainings, some have taken an admirably proactive approach and have organized trainings for state judicial personnel. Additionally, some tribes have reached out to state court systems in an effort to educate them about their tribal codes and processes and to promote understanding and confidence among their judicial peers. One example is the tribal panels in Oregon which have trained Oregon juvenile judges at their annual conference. Another exemplary case from Oregon is that of Judge Don Costello of the Coquille Tribal Court, who has devoted years to developing his court systems and relationships with state judicial personnel.

Beyond simply improving tribal-state relationships, these meetings, conferences and cross-trainings have resulted in mandates, process protocols, and MOUs, which institutionalize how business is to be done and further strengthen relationships and trust. Oregon has a statute, and New Mexico's governor has promulgated an executive order, requiring all state agencies to collaborate with tribes. Such state government-wide mandates put tribal, court and agency collaboration in a larger context and enhance support for court improvement efforts. In Oregon, the court engaged the child welfare agency and all nine federally recognized tribes in a two year effort to develop "Principles and Expectations" governing the making of active efforts findings. Mutually agreed upon, these principles and expectations are utilized in the foster care review board process and serve as a resource to judges as well.

MOUs that govern process and procedure can settle long standing disputes among agencies, courts and tribes. The state of New York and the Oneida Nation's MOU creates predictability about the granting of full faith and credit to tribal orders in state court, while the newly updated inter-governmental agreement between the state of Washington and the Jamestown S'Klallam Tribe is specific to the tribe's codes and practices, including such things as how the tribe defines expert witnesses, deals with membership requirements, etc. These formalized agreements are the result of effective outreach, relationship-building and tribal-state collaboration and significantly improve results for AI/AN children.

Tribal-state collaboration in the realm of court improvement, albeit a new development, has yielded many promising approaches which have increased cross-cultural understanding and practice. State child welfare agencies, courts and tribes are planning and actively participating in meetings, conferences and cross-trainings regarding ICW issues and compliance with the ICWA. Tribal-state collaborations that have resulted in systems' improvements, including mandates, process protocols and inter-governmental agreements are

"The basis for tribal-state conflict is lack of information and communication. Due to this lack of mutual understanding, some state judges can be uncomfortable with tribal court systems. If you give chance to be informed and give information, you are more than half way there."

- Judge Don Costello, Coquille Indian Tribal Court Judge

deserving of special recognition. While much has been accomplished, much remains to be done. In light of this sobering reality, it is absolutely imperative that state courts, child welfare agencies and tribes continue to collaborate in partnership to affect systemic change.

IMPROVING REPRESENTATION; CHALLENGES AND PROMISING PRACTICES

Introduction

All parties involved in child welfare dependency proceedings benefit from competent and timely representation, ideally from attorneys who either specialize or who have received continuing education in juvenile court cases. Biological parents, relatives, caregivers and children involved in dependency proceedings must have an informed voice in court, thus aiding judges in their ability to make informed decisions as to whether a child enters the foster care system, whether to terminate parental rights, and to assess the well-being of a child in temporary and permanent placements. Such due process is necessary to ensure that the unique interests of each party are presented adequately to the court and to the child welfare agency, and so that the procedures and rights of each are upheld.

Challenges

Unfortunately, many parents, relatives, custodians and children have not received adequate representation in dependency court proceedings. Rather, many of these parties have noted that their attorneys spent little to no time familiarizing themselves with the details of their case and were consequently ill-prepared and provided them with poor representation.[17] This troubling phenomenon can be attributed to a shortage of attorneys that specialize in this discipline, especially in those that are familiar with the ICWA. It is understood that such a deficiency exists because it is difficult to recruit, train and appropriately reward attorneys who chose to specialize in this field of law, one that is characterized by relatively high caseloads, complex and challenging cases, and reduced compensation.

High caseloads and demanding dependency court calendars often result in insufficient time for attorneys and judges to obtain and review all of the information pertaining to a dependency case. This is why Court Appointed Special Advocates (CASAs) and their equivalents are so essential. If trained and provided with adequate resources, CASAs can conduct additional investigations and issue recommendations to the court regarding the best interest of a child. Unfortunately, however, notwithstanding the fact that the NCJFCJ and ABA have endorsed the CASA program, it is underfunded and many state court systems either lack CASAs, or their CASA volunteers are in dire need of additional training. The National CASA Association has prioritized these urgent issues.

The lack of training is especially problematic in the context of AI/AN dependency cases, which necessitate cross-cultural training on ICW issues and the ICWA. Many CASA volunteers are middle class, non-Natives, who must diligently pursue cultural competency and familiarity with the ICWA. As a result, the involvement of CASAs in AI/AN dependency investigations and recommendations can be highly problematic if they are unaware of the fact that AI/AN children and families are historically, politically, and culturally unique and must be treated accordingly.

Promising Practices

Despite some of above-mentioned challenges, tribes and states have developed promising practices in their effort to implement the Pew Commission's recommendations addressing effective legal representation. Standards of practice have been established by the ABA to guide parents' and children's attorneys in dependency cases, and trainings have improved their knowledge base and ability to effectively represent AI/AN children and families.

[17] See previous site referencing relevant findings on pg 42 of the Pew Commission's report.

Additionally, with the support of state CIPs, many tribes have taken steps toward creating tribal CASA programs and their equivalents.

Training of attorneys and other legal personnel in multi-disciplinary settings on ICW issues and the ICWA have substantially improved cross-cultural awareness and practice. This has proven especially effective when tribes are actively engaged as partners in all of the training processes, including the planning stages. Many State Bars have also improved representation by developing standards of practice for attorneys working with dependency cases, as recommended by the Pew Commission. And a few have begun to establish standards specific to AI/AN dependency cases.

Another identified promising practice is that of increasing the capacity of state and local CASA programs to advocate on behalf of AI/AN children. In Alaska and New York, CASA programs are placing more emphasis on the cultural sensitivity components of their training programs. California's CASA program uses a curriculum that includes issues relevant to AI/AN children. California's Rules of the Court require that CASA volunteers undergo this training. While these improvements have not resolved all of the challenges discussed above, they have resulted in positive outcomes.

Developing tribal CASA programs constitutes yet another promising practice that has emerged as a result of tribal-state collaboration and is deserving of particular mention. With the support of Tribal Court CASA Programs, established in 1994, and state CIPs, a select number of tribes have either developed tribal CASA programs or are exploring their ability to do so.[64] Among others, tribes in Washington State, California and Alaska have established such programs, while tribes such as the Seneca Nation in New York are in the process of developing tribal CASA programs. Instituting tribal CASA programs enables tribes to bring culturally appropriate third-party advocates into their tribal courts, thus setting an example that may be replicated by other interested tribes. Moreover, AI/AN CASA volunteers are better equipped to evaluate the current circumstances and needs of AI/AN children and their families.

Establishing and employing standards of practice specific to dependency proceedings, participating in multidisciplinary trainings, incorporating curricula in state CASA trainings relevant to working with AI/AN youth, and developing tribal CASA programs all contribute to the improved representation of AI/AN children and families. These promising practices are indicative of what state courts and tribes are capable of accomplishing if provided adequate funding and support.

COURT OPERATION; CHALLENGES AND PROMISING PRACTICES

Introduction

Dependency courts are vested with tremendous oversight responsibility. They are responsible for making the determination as to whether a child has suffered abuse and neglect, whether a child should be removed from their home, and whether parents and child welfare agencies are in compliance with the laws' requirements. Courts are also obligated to make certain that dependency cases progress in accordance with all applicable statutory time frames. Courts also decide whether parental rights should be terminated and with whom a child should be placed. Considering the arguably unparalleled effect that these decisions have on the lives of children and families, it is crucial that these cases be heard by experienced judges who are committed to the field of juvenile dependency. In order for this aim to be realized, Chief Justices, state court leadership and tribal governments must take a leadership role in the implementation of the Pew Commission's recommendations, thus affecting systemic court reform (Pew, 2004).

Challenges

Chief justices and state court leadership face some very real challenges in their efforts to raise the priority and profile of juvenile dependency cases in state courts. They are attempting to do so in an environment of competing resource needs, and in situations where states have not typically allocated the resources necessary to keep up with growing dependency caseloads. Consequently, juvenile dependency courts are relatively underfunded and are encumbered in their ability to undertake larger efforts, such as systemic changes to the way in which courts operate and are structured.

American Indian and Alaska Native children are perhaps most adversely impacted by state courts' lack of prioritization of juvenile dependency issues. Their cases call for special expertise in both this discipline of law and in that of ICW. State courts that do not prioritize these cases are less likely to attract suitably trained attorneys and judicial personnel who possess the knowledge and experience necessary to effectively represent and hear such proceedings. This issue is exacerbated by the fact that Chief Justices and court leadership have often not included tribal governments as partners in their leadership efforts. In failing to do so, state Chief Justices' and court leadership's efforts to enact the court improvement recommendations are rendered less effective.

Unlike state courts, tribes do not receive funds specific to the development and improvement of juvenile dependency courts. In absence of adequate funding, tribes are dependent upon state courts to adjudicate AI/AN child welfare cases. Moreover, if state courts do not prioritize juvenile dependency proceedings, and AI/AN ICW issues, either as a result of limited resources, or in some cases due to a local court's autonomy, AI/AN children can suffer.

Fortunately, many state court Chief Justices and leadership have made concerted efforts to take the lead in implementing the Pew Commissions recommendations, bringing additional attention to juvenile dependency proceedings. Although there is little to no evidence suggesting that state Chief Justices and court leadership have collaborated on a strategic level with their tribal counterparts, there exist many examples in which they have partnered with tribes around issues on data collection, training, and improving legal representation in meaningful and ongoing ways.

Promising Practices

Notwithstanding these challenges, state court Chief Justices, the higher levels of state court administration and tribes have made considerable progress in their efforts to bring greater attention to the importance of juvenile dependency proceedings, including AI/AN cases, thus increasing their profile and priority. In surveying these advancements, there are a few promising practices deserving of particular mention. Chief Justices and administrators have collaborated with tribes in different capacities in an effort to improve cultural competency and practice in AI/AN child welfare cases. Trainings and resources on issues pertaining to AI/AN juvenile dependency cases have been developed and implemented as a result of extensive tribal-state collaboration. Bench guides and checklists, providing guidance to judicial personnel, attorneys, CASAs, and child welfare staff, have been designed and disseminated. Multi-disciplinary planning groups have been established and are actively engaged in problem-solving, as recommended by the Pew Commission. Lastly, a number of states have dedicated or specialized dependency courts, thus ensuring that each juvenile dependency proceeding is heard by a judge with expertise in such cases.

Although not at the strategic level, many Chief Justices and court leadership have partnered with tribes to implement the Pew Commission's recommendations. New York's Federal-State-Tribal Forum was initiated by the Chief Judge of the Court of Appeals, New York's highest ranking judicial officer, who brought the idea back from a Conference of Chief Justices. The California Blue Ribbon Commission, housed in the California Administrative Office of the Courts, operates under judicial leadership. Michigan's Supreme Court Justice is a liaison to the

tribes and is frequently a key-note speaker and a champion for court improvement, especially on tribal issues.

State CIPs and tribes have collaboratively developed trainings and resources on AI/AN child welfare issues and the ICWA specifically for the use of judicial personnel and attorneys. Training provided to new judges in California, Alaska, and Washington incorporates tribal issues and supplies resource materials that can be used for further study. Tribal judges have been invited to several of these orientation and training programs. State court judges and lawyers are also encouraged to attend multi-disciplinary trainings aimed at improving system wide reform that address challenges associated with creating better outcomes for AI/AN children. California and Oregon, among other states, have developed websites that provide specific ICWA materials, and their CIPs can provide training and technical support to local courts, if needed. Judges from both states, among many others, have attended the NCJFCJ's Child Abuse and Neglect Institute (CANI), which provides comprehensive training on many issues, including ICWA.

Bench guides and checklists delineating the requirements of the ICWA have been developed in almost all states and are perhaps the most useful resources provided. These invaluable tools have been disseminated to judges, lawyers, child welfare agency staff, CASA workers and tribes, improving knowledge and practice. One such example is that of the New York Office of Children and Family Services' (OCFS) "ICWA Compliance Desk Aid" which has been provided to CASAs, judicial personnel, child welfare professionals and tribal representatives at the Listening Forum meetings.

As many judicial and legal associations, including NCJFCJ, have recently begun to explore alternatives to the dominant adversarial model of jurisprudence, so have many dependency courts. In general, there has been a movement to shift away from simply processing cases, and towards identifying problems and achieving tangible results (Pew 2004, 46). Following this trend, many states have established local multi-disciplinary planning groups which are effectively identifying and ameliorating problems with case flow management and other court operations issues. Oregon's Model Court program, Arizona's local case flow management teams, and California's Riverside County Tribal Alliance for Indian Children and Families are examples of local problem solving institutions capable of identifying issues and affecting improvement in court processes.

Many state courts, especially those serving larger populations in urban areas, have courts dedicated solely to hearing juvenile dependency cases. This is, as noted by the Pew Commission, a promising practice that more state courts should work towards instituting. While dedicated courts benefit AI/AN children, establishing courts that specialize in ICWA cases, just as some state child welfare agencies have created departments designated to ICWA cases, is especially exemplary. The ICWA court in Los Angeles County constitutes one such example.

The NCJFCJ has developed training guides focused on the ICWA, including the *Technical Assistance Brief: Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*. The NCJFCJ has also launched a national initiative, Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care, which is specifically designed to reduce and eliminate the disproportionate representation and disparate treatment of children of color in the foster care system. NICWA, and numerous tribal and Native American state court judges, have assisted NCJFCJ to ensure that the particular issues faced by AI/AN children and families are actively addressed in this important initiative.

IMPROVING IMPLEMENTATION OF THE PEW COMMISSION'S RECOMMENDATIONS; ADDING TRIBAL APPLICATIONS

This briefing paper provides a preliminary analysis of what has been accomplished subsequent to the release of the Pew Commission's recommendations in May of 2004, which garnered much political attention and action, resulting in many positive developments. Among other advancements, additional juvenile court improvement funds were made available to the highest state courts. In accordance with the CIP Program Instructions, all recipient state courts are required to conduct ongoing and meaningful collaboration with child welfare agencies and AI/AN tribes.

The previous sections survey some of the identified challenges and promising practices gleaned from tribal-state collaborations in the four areas of court improvement outlined by the Pew Commission: data collection, training and collaboration, improving legal representation, and court operation. While these tribal-state partnerships have yielded many positive developments, much remains to be done to improve outcomes for AI/AN children and families involved in juvenile dependency proceedings. A list and discussion of four supplemental recommendations is outlined below. These supplemental recommendations build upon those of the Pew Commission and add application possibilities specific to the needs of AI/AN children. Incorporating these additional recommendations into court improvement efforts would go a long way towards ensuring the wellbeing of AI/AN children.

RECOMMENDATION ONE – The Children's Bureau should support and encourage improving processes and identifying new outcomes that support improved outcomes for AI/AN children in the state foster care system.

Strategies to raise the profile and priority of implementing these recommendations include:

1) The Children's Bureau should enhance existing mandates for CIPs to place more emphasis on attaining improved outcomes for AI/AN children.

2) The Children's Bureau should ensure that all of the CIP Program Instructions guide grantees in implementing best practices related to specific examples of successful strategies in increasing tribal participation.

3) The Children's Bureau should convene state CIPs, child welfare agencies, and tribes together for enhancing practice and policy with tribal children. These events should utilize the expertise of national organizations such as NCJFCJ and NICWA.

4) The Children's Bureau should encourage or require composite, systemic performance measures be developed to track outcome and process data specifically for AI/AN children that include additional tracking of implementation of the Indian Child Welfare Act. A primary data indicator to measure improved outcomes for Indian children would be to reduce their disproportionate representation and disparate treatment, along with all children of color, in the foster care system.

RECOMMENDATION TWO – Tribes should receive federal funding comparable to that of state CIP grants so that they may establish and further develop their capacity to hear AI/AN child welfare cases.

American Indian and Alaska Native children are benefited most when they are served by their respective tribes, which are inherently best equipped to recognize, understand and meet their needs as they share the same unique history, culture and political status. Although this fact is reflected in the ICWA and widely accepted, tribes do not currently have access to CIP grants, nor do they receive any federal funding specific to improving juvenile dependency courts. The absence of adequate court improvement funds in conjunction with the depressed socio-economic conditions present in Indian Country, renders tribes severely underfunded and at an undue disadvantage in their ability to meet the needs of their children and families.

Moreover, the federal government has a special trust relationship with tribes, requiring them to establish policy and programs that protect the well-being of all AI/AN children. Funding tribes so that they may develop their codes and capacity to hear AI/AN juvenile dependency cases constitutes the primary means to this end. Such tribal court systems should be data driven, and provide for collaboration with state courts and child welfare agencies, where appropriate. Strong tribal courts will benefit collaborations with state courts and their goals to improve outcomes for AI/AN children under their care.

RECOMMENDATION THREE – Culturally tailored training and technical assistance should be collaboratively developed and made available to state courts, child welfare agencies and tribes to guide action to improve outcomes for AI/AN children.

Organizations experienced in AI/AN child welfare and juvenile dependency issues should work collaboratively to develop AI/AN specific resources, training and technical assistance to help guide practice among state, child welfare agencies and tribal courts, respectively, as they work together to improve outcomes for AI/AN children. The NICWA and NCJFCJ are committed to pursuing these issues and developing relationships with other partners in this important work.

CONCLUSION

The Pew Commission's recommendations have garnered considerable attention and ensuing action on the part of government leaders, state juvenile dependency courts, child welfare agency personnel and tribes. Resulting in additional juvenile court improvement funding and the requirement that the recipient state courts collaborate with tribes, the Pew Commission's recommendations have proven vital to court reform and improving outcomes for AI/AN children. While the tribal-state collaborations that have emerged as result of the Pew recommendations and CIP mandates have generated many promising practices, further action aimed specifically at meeting the needs of AI/AN children is needed. The recommendations presented in this briefing paper build upon those of the Pew Commission and add specific tribal applications that, if implemented, would do away with many of the long-standing issues hampering states' and tribes' ability to ensure the well-being of AI/AN youth.

ENDNOTES

1 *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care,* Pew Commission on Children in Foster Care, pgs 17-18.
2 Ibid, pg 13.
3 Ibid, pg 17.
4 Ibid, pg 18.
5 DHHS, Administration for Children and Families, Children's Bureau. *Program Instruction 06-05.* Issued June 15, 2006.
6 25 U.S.C. 1911(a).
7 25 U.S.C. 1911(b).
8 25 U.S.C. 1911(d).
9 25 U.S.C. 1911(a).
10 25 U.S.C 1911(b).
11 109 U.S. 556 (1883).
12 25 U.S.C. 450 et seq.
13 25 U.S.C. 450aa et seq.
14 *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).
15 25 U.S.C. 3613, 3614 and 3621.
16 25 U.S.C. 3631.
17 25 U.S.C. 3611.
18 25 U.S.C. 1903(12).
19 25 C.F.R. 11.101(e).
20 25 C.F.R. 11.201(a).
21 25 C.F.R. 11.101(c).
22 Alaska was not included in the Justice Department survey. For decades after the purchase of Alaska, the Native peoples who resided in approximately 200 mostly remote and small villages were left largely undisturbed and traditional forms of governance remained intact. (Jaeger, 2002) In 1971, however, Congress transferred almost all of the village and reservation land (and other land as well totaling 40 million acres) to Alaska Native corporations established by the Alaska Native Claims Settlement Act as part of a comprehensive settlement of Alaska Native land claims. 43 U.S.C. 1601 *et seq.* ANCSA land has been held not to be Indian country, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), and Alaska state officials have opposed the exercise of sovereignty by Alaska Native villages for most of the period since statehood (Jaeger, 2002). Nonetheless, Native village governments in Alaska have continued to operate and, in recent years, their ability to exercise their sovereignty over their members has been increasingly recognized. *See, e.g,, John v. Baker*, 982 P.2d 738 (Alaska 1999). Child adoption, custody and protection cases are routinely part of the jurisdiction that has been exercised by Alaska Native villages and, indeed, traditional child adoption – usually an open adoption in form – has been practiced for centuries. (Jaeger, 2002) Many Alaska Native villages do not have a judicial system per se, but make child welfare decisions through a different mechanism such as a tribal council, with the village Chief or President acting as the presiding judge. In some cases, elders are added to the judicial panel. (Jaeger, 2002)

23 This is because of the unique history of California tribes. Because of pressure from California's Senators in the 1850s, treaties negotiated with California Indians were never approved and most California Indians were landless for many years. It was only in the 20th Century that very small reservations and rancherias were established providing home sites for small bands of landless Indians. (Castillo, 1998; National Park Service, 2004) Because of this history, tribal governmental systems for many California tribes virtually ceased to function for a period of time. This problem was exacerbated by the enactment of P.L. 280. (Goldberg and Champagne, 1996)

24 See generally http://www.tribal-institute.org/lists/codes.htm.
25 42 U.S.C. 620 et seq. and 42 U.S.C. 670 et seq, respectively.
26 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, Poarch Band of Creek Indians, Red Cliff Band of Lake Superior Chippewas, Sault Ste. Marie Tribe of Chippewa Indians, Stockbridge Munsee Indian Tribe, White Earth Band of Chippewa Indians, Absentee Shawnee Tribe, White Mountain Apache Tribe, Confederated Tribes of Warm Springs of Oregon, Chickasaw Nation, Assiniboine and Sioux Tribes of the Fort Peck Reservation, and the Coquille Indian Tribe.
27 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, Poarch Band of Creek Indians, Red Cliff Band of Lake Superior Chippewas, Salish and Kootenai Tribes, San Ildefonso Pueblo, Skokomish Indian Tribe, Stockbridge Munsee Indian Tribe, White Earth Tribe of Chippewa Indians, Absentee Shawnee Tribe, White Mountain Apache Tribe, Chickasaw Nation, Confederated Tribes of the Grand

Ronde Community of Oregon, Nisqually Indian Tribe, Sault Ste. Marie Tribe of Chippewa Indians and the Assiniboine and Sioux Tribes of the Fort Peck Reservation.

28 See, e.g., Codes of Blackfeet Indian Tribe, Little River Band of Ottawa Indians, Makah Indian Tribe, Poarch Band of Creek Indians, Red Cliff Band of Lake Superior Chippewas, Stockbridge Munsee Indian Tribe, White Earth Band of Chippewa Indians, White Mountain Apache Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Hopi Tribe, Mashantucket Pequot Tribe, Oglala Sioux Tribe, Pawnee Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Ute Indian Tribe of the Uintah and Ouray Reservation, and the Fort McDowell Yavapai Apache Community and the San Ildefonso Pueblo.

29 See generally http://www.tribal-institute.org/lists/codes.htm.

30 *Id.*

31 See, e.g., Codes of the Blackfeet Indian Tribe, Fort McDowell Yavapai Apache Community, Oglala Sioux Tribe and the Sisseton Wahpeton Oyate.

32 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, Poarch Band of Creek Indians, Confederated Tribes of Siletz Indians of Oregon, Skokomish Indian Tribe, Stockbridge Munsee Indian Tribe, White Earth Band of Chippewa Indians, Absentee Shawnee Tribe and the Little Traverse Bands of Odawa Indians.

33 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, Chickasaw Nation, Confederated Tribes of the Grand Ronde Community of Oregon, Nisqually Indian Tribe, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Ute Indian Tribe of the Unitah and Ouray Reservation, Makah Indian Tribe, Confederated Tribes of Warm Springs Reservation of Oregon and the Skokomish Indian Tribe.

34 See, e.g., Codes of the Pawnee Tribe, Chickasaw Nation, Poarch Band of Creek Indians, Ysleta del Sur Pueblo and the White Mountain Apache Tribe.

35 See Code of the Hopi Tribe.

36 See, e.g., Codes of the Blackfeet Tribe, Coquille Indian Tribe, Chickasaw Nation, Absentee Shawnee Tribe, Confederated Tribes of the Grand Ronde Community of Oregon, Pawnee Tribe, Salish and Kootenai Tribes, and the White Earth Band of Chippewa Indians.

37 See, e.g., Codes from the Hopi and Absentee Shawnee Tribes.

38 See, e.g., Code of the San Ildefonso Pueblo.

39 See, e.g., Codes of the Oglala Sioux Tribe and the Confederated Tribes of Siletz Indians of Oregon.

40 See, e.g., Codes of the Pawnee, Absentee Shawnee and Chickasaw Tribes.

41 See, e.g., Code of the Confederated Tribes of the Grand Ronde Community of Oregon.

42 See, e.g., Code of the Absentee Shawnee Tribe.

43 See, e.g., Code of the Skokomish Tribe.

44 See, e.g., Codes of the Confederated Tribes of the Grand Ronde Community of Oregon, Nisqually Indian Tribe, Skokomish Indian Tribe, San Ildefonso Pueblo, Stockbridge Munsee Indian Tribe, White Earth Band of Chippewa Indians, Blackfeet Indian Tribe, Red Cliff Band of Lake Superior Chippewa Indians, and the White Mountain Apache Tribe.

45 See, e.g., Codes of the Pawnee Indian Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, Absentee Shawnee Tribe, and the Chickasaw Nation.

46 See, e.g., Codes of the Confederated Tribes of the Grand Ronde Community of Oregon, Little Traverse Bands of Odawa Indians and the Coquille Indian Tribe.

47 See, e.g., Codes of Bay Mills Indian Community, Blackfeet Indian Tribe, Colville Confederated Tribes, Confederated Tribes of the Grand Ronde Community of Oregon, Grand Traverse Band of Ottawa and Chippewa Indians, Hopi Indian Tribe, Oglala Sioux Tribe, Confederated Salish and Kootenai Tribes, San Ildefonso Pueblo, Stockbridge Munsee Indian Tribe, Coquille Indian Tribe and the Little Traverse Bands of Odawa Indians.

48 See, e.g., Codes of the Chitimacha Indian Tribe, Colville Confederated Tribes, Fort McDowell Yavapai Apache Community, Sault Ste. Marie Tribe of Chippewa Indians and the Poarch Band of Creek Indians.

49 Reno, Janet. "A Federal Commitment to Tribal Justice Systems", Judicature (Vol. 79, No. 7), Nov-Dec 1995, p. 114.

50 Pommersheim, Frank. "Tribal Courts: Providers of Justice and Protectors of Sovereignty", Judicature (Vol. 79, No. 7), Nov-Dec 1995, p 111.

51 25 U.S.C. 1911(b)

52 Holyfield, supra, 490 U.S. at 36.

53 See, e.g. , Baby Boy L., 643 P.2d 168 (Kan. 1982).

54 Compare In re Adoption of S.W., 41 P.3d 1003 (Okla. Ct. App. 2001), In the Matter of the Guardianship of J.O., 743 A.2d 341 (N.J. App. Div. 2000), In re Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245 (Ariz. Ct. Apr. 1991), In the Interest of C.W., 479 N.W.2d 105 (Neb. 1992) and Matter of Adoption of T.R.M., supra (Indiana) (best interests determination is relevant to the evaluation of good cause in the context of a transfer petition) with Yavapai-

Apache Tribe v. Meija, 906 S.W.2d 152 (Tex.Ct. App. 1995), In re Arnell, 550 N.W.2d 1060 (Ill. App. 1990), In re C.E.H., 837 S.W.2d 947 (Mo. App. 1992), and People in Interest of J.L.P., 870 P.2d 1252 (Colo. Ct. App. 1994) (best interests not relevant to evaluation of transfer petition).

55 25 U.S.C. 1911(d).

56 See, e.g., In re Laura F., 99 Cal.Rptr.2d 859 (2000).

57 25 U.S.C. 1903(9).

58 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1988).

59 Id.

60 Id. at 50 quoting from findings of Congress' American Indian Policy Review Commission reprinted in United States Senate Report 597, 95th Cong., 1st Sess. (1977) at 52.

61 25 U.S.C. 1901(5).

62 Holyfield, supra, 490 U.S. at 45, n. 17.

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63 42 USC 601 et seq.

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