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## CHILD WELFARE SERVICES ON SOUTH DAKOTA INDIAN RESERVATIONS

This memorandum provides information regarding child welfare services on South Dakota Indian reservations.

### GOVERNOR'S COMMISSION ON THE INDIAN CHILD WELFARE ACT

In response to the high percentage of Indian children being removed from their families and tribal communities and being placed with non-Indian families, Congress, in 1978, enacted the Indian Child Welfare Act (ICWA). The Act sought to protect and preserve the bond between Indian children and their tribe and culture. The ICWA includes provisions addressing:

- Tribal rights and opportunities;
- Indian social and cultural considerations; and
- Minimum federal standards for state court proceedings.

In 2004 the South Dakota Legislature created the Governor's Commission on the Indian Child Welfare Act to study the requirements of the ICWA [25 U.S.C. 1901-1963], including:

- Compliance with the requirements for notice.
- Placement.
- Expert witness testimony.
- Intervention.
- Transfer of jurisdiction.
- Active efforts.
- Means by which Indian tribes could assist in pursuing the policies of ICWA.

The commission analyzed South Dakota's compliance with ICWA by involving the National Center for State Courts, in partnership with Native American Legal Services. The final reports were presented to the Governor and the 2005 South Dakota Legislature. Each report contained numerous recommendations for the state and the tribes to improve the outcomes for Indian children who enter the child welfare system. The commission ceased to exist on December 31, 2004, but was reestablished by executive order of the Governor to assist in the implementation of its recommendations.

The executive order (attached as an [appendix](#)) directed the commission to focus its efforts on implementation of 30 high-priority recommendations found in the commission's earlier report. Further, the commission was directed to review each of the recommendations to determine, in regard to the implementation of each recommendation, the entity or entities responsible, action plans, timelines, and barriers to implementation. The commission was also directed to issue a report to the Governor by November 30, 2005.

### IMPLEMENTATION OF RECOMMENDATIONS

The South Dakota ICWA commission report included a recommendation to hire a statewide ICWA coordinator to help enforce a statewide ICWA compliance plan. This position was created in February 2005 within the Department of Social Services.

The 2005 South Dakota Legislature enacted legislation to establish certain notice provisions related to the custody and placement of Indian children and to provide a preference for placement of abused and neglected children with relatives and to provide a hearing for review of adoptive placement decisions.

The Division of Child Protection Services, Department of Social Services, requested two full-time employee positions to act as family locators in its 2005 budget request which were authorized beginning July 1, 2005. These two positions were placed in Rapid City and Pierre. These workers identify and recruit relative placement resources for children in the department's foster care program. The family services specialists make personal contact with the child's relatives to provide them information about the child in foster care and inquire about relatives who may be able to provide care for the child. They share information about kinship care, resources and economic assistance available to kinship providers, and the home study process. These workers assist relatives with the home study process and serve as a liaison between them and the agency completing the home study. Relatives who choose to become licensed foster care providers are eligible to receive foster care payments. The goal is to increase the number of children who can be placed with relatives. Children will achieve permanency in a more timely manner if their extended family members are identified quickly and provided placement support when the child initially comes into care.

The 2006 South Dakota Legislature enacted legislation to revise certain provisions regarding notice to a tribe of a child custody proceeding subject to ICWA. Under South Dakota Codified Laws (SDCL) Section 26-7A-15.3, each tribe may designate an individual or agency to whom ICWA notices must be sent and to whom information regarding a temporary custody hearing should be provided. However, following intervention by a tribe, notices must be sent to the tribal representative or counsel who has appeared on behalf of the tribe pursuant to SDCL Section 26-8A-33. In order to designate an agent, the tribe must submit a request form along with a copy of the provision of the tribal code or tribal resolution appointing the individual or agency as the designated agent for receipt of the notices. Effective July 1, 2006,

state's attorneys were required to send the notices required under ICWA and SDCL Chapter 26-7A to the individual or agency designated. If a tribe has not designated an agent under SDCL Section 26-7A-15.3, notices are sent in accordance with relevant federal regulations. Proceedings covered by ICWA include foster care placements, termination of parental rights (voluntary and involuntary), preadoptive placements, and adoptive placements. In determining adoptive placements, preference must be given, in the absence of good cause to the contrary, to placement with:

1. A member of the child's extended family.
2. Other members of the Indian child's tribe.
3. Other Indian families [25 U.S.C.A. 1915(a)].

A tribe may intervene at "any point in the proceeding" [25 U.S.C. 1911(c)]. Tribes have a right to intervene under the Act to enforce placement preferences. Regarding child placement, tribal code may include the department among those authorized to place the child.

The Division of Child Protection Services and the Casey Family Programs in Pine Ridge and Rosebud entered a memorandum of understanding in April 2004 regarding a collaborative effort for Casey Family Programs to offer family group decisionmaking to families involved with the Division of Child Protection Services from the Pine Ridge and Mission offices. The goal of family group decisionmaking is to facilitate the preservation and stability of families by providing a forum for families to make plans that are designed to ensure the safety, permanency, and well-being of their children and youth when the child has entered or is at risk of entering the child welfare system. The Division of Child Protection Services office in Rapid City has implemented a family group decisionmaking program with assistance from the Casey Family Programs in Pine Ridge.

### **TRIBAL CONTRACTS**

The ICWA authorizes the state to enter tribal Title IV-E agreements with individual tribes for the care and custody of Indian children. Title IV-E of the Social Security Act also authorizes the state and tribes to enter Title IV-E agreements for the payment of foster care for children determined to be eligible for Title IV-E funding and for administrative funding associated with staffing and training of staff and foster and adoptive parents. There are nine tribes in South Dakota. The state entered a contract with the Sisseton-Wahpeton Oyate Tribe in 1978 and with the Oglala Sioux Tribe in 2008 for the provision of all services, including foster care and child protective services. These tribes receive funding for placement, training, and administration. The state provides services on the remaining seven reservations, except for investigation services for the Standing Rock Sioux

Tribe. Agreements with three tribes--Crow Creek Sioux Tribe, Flandreau Santee Sioux Tribe, and Standing Rock Sioux Tribe--provide for the passthrough of placement funding only. On reservations where a contract or agreement exists, tribal staff must use the state system for placement, and an ICWA program specialist visits the locations under contract to review files for compliance. Tribal staff is also included in training.

### **COLLABORATIVE CIRCLE**

State and tribal leaders formed a committee--the Collaborative Circle--to bring together all stakeholders who are committed to improving child well-being outcomes for Native American children in the state, including the tribes, the Division of Child Protection Services, families, consumers, providers, and other partners. The members of the Collaborative Circle include 18 representatives from each of the nine South Dakota tribes and 18 child welfare and other care providers, including nine state officials from the Division of Child Protection Services, four family consumers, and five partner representatives from the Bureau of Indian Affairs, Casey Family Programs, Children's Home Society, Lutheran Social Services, and South Dakota Association of Residential Care Providers. To ensure Native American children and families of South Dakota who enter the child welfare system achieve better results in the areas of safety, stability, and well-being, Collaborative Circle members commit to functional, trusting, and working relationships and to constantly strive to improve relationships with each other and other community stakeholders. Efforts are made to protect children through a system that:

- Matches them with their culture.
- Empowers families--birth, kinship, or foster/adoptive--to create a safe and nurturing home for the children.
- Prevents children and families from entering the child welfare system.
- Helps children and families leave as soon as possible after having achieved the goals they have set for themselves by providing individualized and appropriate services.

The Collaborative Circle meets quarterly, and members have recently identified the following as critical issues to be addressed by the group:

- Enhancing placement resources;
- Establishing transfer protocols; and
- Engaging tribes to contract with the state to provide services.

ATTACH:1

#### IV. IMPLEMENTATION OF THE TOP 30 RECOMMENDATIONS

Set forth below is a synopsis of the work that has been accomplished or is ongoing by the Department of Social Services, Unified Judicial System, and the tribes to implement the Commission's top 30 recommendations. The top 30 recommendations are:

1. Extend the service of the ICWA Commission for one year in order to provide guidance and assist in the implementation of its recommendations.
2. DSS should consider hiring "child placement investigators" to identify, locate, and investigate relative and kinship placements. This would be the sole responsibility of this position.
3. Create a position for a statewide ICWA coordinator within DSS to help enforce a statewide ICWA compliance plan (In the Interests of D.M., R.M., III and T.B.C., 2004 WL 1689673 (SD), 2004 SD 90).
4. The Governor of the South Dakota and Department of Social Services through its Secretary should offer to each tribe in South Dakota the opportunity to enter into a contract to enable the tribe to provide full child welfare services to its children domiciled on its reservation, including foster care licensing, Title IV-E payments, and administrative capacity.
5. Encourage the Department of Social Services to work with each tribe to identify qualified expert witnesses whose testimony will be relied upon by state courts and not just utilize those experts who will conform their opinions to the requested actions of DSS. Department of Social Services shall contact Tribal Community Colleges to identify persons who could serve as qualified expert witnesses.
6. Whenever possible, DSS and State's Attorneys shall provide tribes with notice of 48 hour hearings and the opportunity to participate, by telephone or in person. When the tribe indicates a desire to participate, the Circuit Court shall consider the input of the tribe in determining whether an emergency situation exists; whether a continued out-of-home placement is necessary; and whether extended family members are available to provide care for the child. DSS and the State's Attorneys shall attempt to introduce qualified expert witness testimony at the 48 hour hearing.
7. Create family placement specialist teams with representatives from the Department of Social Services and each tribe to search for relatives.
8. Proactively recruit American Indian foster homes throughout the state.

9. DSS and the State's Attorneys should adopt a statewide and uniform notification process for notifying the tribes, the ICWA worker, and the Bureau of Indian Affairs (BIA). This should include uniform language and format including the right of the parties to review the court files and inclusion of the mother's maiden name. The same notice should be given to parents and Indian custodians.
10. Revise the format of the PRIDE classes to include culturally appropriate parenting practices. Consider contracting with a tribal community college or colleges to train American Indian foster care providers to expand the pool of providers and make PRIDE classes more culturally appropriate.
11. Enter into agreements with each tribe and provide appropriate training so that the tribes may license their own foster homes both on and off the reservations. The Department of Social Services shall honor tribal licenses pursuant to 25 U.S.C. Section 1931(b) and children in homes shall be eligible for all state and federal benefits.
12. All of the state agencies involved in CHINS cases must develop a realistic and consistent protocol for the application of ICWA in CHINS cases. At a minimum, (1) State's Attorneys should include an ICWA statement in the petition and notice the tribes, and (2) judges should make active inquiry and a record (at each stage of the proceeding) whether ICWA is applicable. This information should also be included in the court order. The tribes should develop a consensus regarding how they are to respond to CHINS.
13. Create a statewide ICWA office within state government.
14. Provide tribes before every hearing, if necessary by fax, copies of all DSS reports generated by workers. This includes 48 hour emergency hearings if DSS has determined the tribal affiliation of the child prior to the hearing.
15. The tribes should fully staff and fund ICWA offices, as a top priority, to include paralegals and attorneys. Additionally, the tribes should fully staff and fund the juvenile and family courts on each reservation.
16. DSS should expand family group conferencing to each reservation.
17. Create a brochure to be distributed to families in court explaining the Indian Child Welfare Act and their rights under the Act.
18. Develop a protocol for transfer of cases from state to tribal court including those cases where DSS maintains the child in foster care placement and provides services. DSS shall work with each Indian tribe to apprise them of the options available to DSS and the tribes for paid placements under the Interstate Compact Act for Indian Children transferred from out of state.

19. Increase the resources necessary to quickly and thoroughly complete home studies. Delays hold up kinship placements and jeopardize placement options.
20. The tribes should keep DSS, the South Dakota Attorney General, State's Attorneys and the Circuit Courts regularly apprised of any change in tribal law regarding child protection issues including any tribal resolution or amendments to tribal law changing the order of preference for foster care and adoptive placements for the children of that tribe.
21. All state and private adoption agencies should designate specific local, regional and state-level ICWA employee resources within their organizations. For DSS and UJS, this may include specifically designated individual(s) within the private agency "network". This information should be widely disseminated throughout each organization.
22. All of the state agencies, in consultation with the tribes, must work to develop a network of ICWA experts. This may include DSS social workers and supervisors (in the circuits where DSS testimony is accepted) if the DSS worker meets established minimum criteria (i.e., three completed ICWA cases, advanced training in ICWA, and the knowledge of services available to Indian children and families and Indian culture). Additionally, at a minimum, DSS workers should not be in a position to testify as an expert on their own cases.
23. UJS should also fund a statewide ICWA coordinator to work with the DSS counterpart to serve as a liaison between courts, DSS, and the tribes. Furthermore, this coordinator should work to implement the many recommendations contained in this report.
24. Request the Supreme Court to update the South Dakota Guidelines for Judicial Process for Child Abuse and Neglect Cases (SD Guidelines – "The Green Book").
25. All judicial circuits should require that an ICWA affidavit or court report be filed in every case involving an Indian child. The ICWA affidavit or court report should be updated at each step of the proceedings in terms of the ongoing need for the child's placement consistent with ICWA placement preferences.
26. When actions venued in state court, involving children domiciled off the reservation, are transferred to tribal court, DSS, if so ordered by the tribal court, will maintain legal custody, similar to placements by tribal courts with DSS for reservation domiciled children, and the tribal courts shall commit to conducting court proceedings in a manner that accommodates the families of off-reservation children and witnesses. DSS and the tribes that take advantage of this opportunity shall develop procedures for such cases addressing issues such as the applicability of ASFA to such children and other matters.

27. Tribes should respond to DSS contacts either by telephone or in writing to assure regular communications with DSS workers to prevent perception by DSS or State Court that the tribe is not desirous of participating in a pending state court proceeding.
28. Certificates of Mailing should clearly indicate which documents were included in the mailing.
29. At each stage of the proceeding, judges should make an active inquiry about the applicability of ICWA and the status of the determination that the child is an Indian Child. This information should be included for the record of the case and the court order. Moreover, the UJS should consider adopting the standards and practices set out by the National Council of Juvenile and Family Court Judges – Indian Child Welfare Act Checklists for Juvenile and Family Court Judges (June 2003). These checklists articulate best practice standards for state courts processing of ICWA cases. (Appendix 29)
30. The provision of active efforts can be strengthened by caseworkers becoming more hands on or directly involved in helping clients achieve the goals outlined in the family service and treatment plans. For example, rather than simply giving a mother the telephone number of a program that provides parenting classes and expecting her to set up classes, the caseworker and mother could together visit with a program representative to discuss how the class will meet the needs of the mother and then discuss any barriers, such as transportation, childcare, or work schedule, that might make it difficult for the mother to attend classes.