



The bill includes provisions to enhance the critical supports that ensure a Native American child's placement, adoption, or other actions are done collaboratively with the child's guardian and tribe and in a manner that promotes the best interest of the child. New definitions and processes are delineated, including identification and designation of Indian child, parents, Indian custodian, guardian, domicile, and tribe roles, responsibilities, and rights. The focus is on keeping or returning children to Native American families and tribes through accurate use of the dispositional proceedings, notifications, and coordination and communication with and from the courts, Native American tribes and nations, and CYFD.

The bill requires the state to make reasonable efforts to identify Native American children on contact and to communicate with the tribe within 48 hours of a Native American Indian child being brought into temporary custody. The state must inform the guardian, custodian, and tribe of all proceedings in advance and in writing and provides a process for the transfer of a Native American child and concurrent jurisdiction and proceedings. The bill mandates the following in all placement and adoption proceedings involving Native American children:

1. **Written determination** must be made in every adoption case to actively determine whether the child is an Native American child and establish the membership of the child if a tribal affiliation has been determined. This must happen at the beginning of every proceeding under the Delinquency Act, Family Services Act, Family in Need of Court-Ordered Services, Abuse and Neglect Act, and the Adoption Act.
2. **Tribal-state agreements** must be established between tribes and CYFD so that proceedings can be transferred to the jurisdiction of the tribe where the child resides or is domiciled. Through the agreement, the state shall coordinate with the appropriate tribal court to facilitate the tribal court's assumption of jurisdiction. CYFD may enter into an agreement with a tribe outside of New Mexico in order to accomplish this.
3. **Full faith and credit** will be extended to the public acts, records, and judicial proceedings of an Indian tribe in every Indian child custody proceeding.
4. **Active efforts** must be made to notify the Indian child's tribe pursuant to SICWA and ICWA regarding the proceedings. This requires documentation, in writing and on the record, that assistance has been provided to parents in completing a case plan consistent with the social and cultural standards of the Native American child's tribe. This must be in collaboration with the child, child's parents, extended family members, Indian custodians, and the tribe.
5. **Reunification** of the child with their tribe, tribal family, and culture is the ultimate goal.
6. **Office of Tribal Affairs** is established within CYFD to ensure compliance with SICWA.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

## **FISCAL IMPLICATIONS**

HB209/HHHCS/HSEICS contains mandatory training that may have some impact on the operating budgets of the affected state agencies. Specifically, the bill requires AOC, in collaboration with CYFD, to develop and deliver annual mandatory training to all children's court judges, district court judges, attorneys, guardians ad litem, and youth attorneys who are appointed by the court. The bill also requires training for any foster parent or pre-adoptive parent who is not a member of the Native American child's tribe. However, CYFD reports the department already has a training budget, which trains attorneys and foster parents, and no

additional funding is necessary to meet the requirements of this bill.

## SIGNIFICANT ISSUES

### Background

Passed in 1978, the federal Indian Child Welfare Act (“ICWA” 25 U.S.C. §§ 1901-63 *et seq.*) governs the removal and out-of-home placement of Native American children. The law was enacted after recognition by the federal government that Native American children were being removed from their homes and communities at a much higher rate than non-Native children. The intent of Congress under ICWA was to protect the best interests of Native American children and to promote the stability and security of tribes and Native families. ICWA establishes minimum federal standards for the removal of Native American children and placement of such children in homes that will reflect the unique values of Native American culture. ICWA is considered the “gold standard” of child welfare by experts and national leading child advocacy organizations. See [NCSL's ICWA Summary](#) for more information.

Several states have enacted legislation related to the Indian Child Welfare Act in varying degrees. Six states (Iowa, Michigan, Minnesota, Nebraska, Oklahoma, and Washington) have enacted their own Indian Child Welfare Act, adopting provisions from the federal ICWA in whole or in part. Other states have adopted some provisions, most commonly, the definition of “Indian child” and the notification requirements. Still, others simply have references to ICWA, including compliance requirements.

The creation of a New Mexico Indian Child Welfare Act is CYFD’s top legislative priority for 2021. The current Children’s Code contains elements of ICWA; however, much of the information is outdated and does not reflect the best interest of Native American children, families and communities nor does it support the need for culturally responsive interventions, which would help support the stability of the state’s pueblos, nations, and tribes. Native families in New Mexico are four times more likely to have their children removed and placed in foster care.

Since 2015, CYFD has been actively working to codify the federal ICWA at the state level and this bill is now of further import and significance as it is a requirement of the *Kevin S.* lawsuit settlement agreement. The settlement agreement requires “CYFD and the Human Services Department (HSD) to work with the AOC and with NM Tribes and Pueblos to draft a state ICWA law that mirrors and expands upon the federal version, with an appropriate facilitator, and will actively promote the law.”

New Mexico tribes and pueblos have been actively engaged in the drafting of this bill. A weekly drafting workgroup included the New Mexico Tribal Indian Child Welfare Consortium, Bold Futures, and the Coalition to Stop Violence Against Native Women. CYFD emphasizes this legislation will act as a protection for pueblos, nations, and tribal children, families and communities. It clarifies the role the state must take to provide active efforts toward prevention of the break-up of the Native American family; improve notification to the pueblos, nations, and tribes; identify placements that align with placement preferences set forth by the tribes and ICWA; and ensure culturally appropriate interventions and services are being provided.

According to a [2005 Government Accountability Office report on ICWA](#), “decisions regarding

the placement of children subject to ICWA as they enter and leave foster care can be influenced by how long it takes to determine whether a child is subject to the law, the availability of American Indian foster and adoptive homes, and the level of cooperation between states and tribes.” HB209/HHHCS/HSEICS addresses these concerns by providing clear guidance and timeframes to courts, attorneys, and guardians ad litem about when to engage with a Native American child’s tribe, how tribes should be involved in ICWA proceedings, and ensuring through cultural compacts that the relationship between Native American children and their tribes continues. Moreover, consolidating information related to ICWA, Native American children, families, and tribes into one section of law will aid practitioners in complying with the law.

### **Summary of Provisions**

HB209/HHHCS/HSEICS provides a new section to the Children’s Code titled the “State Indian Child Welfare Act,” codifying and expanding on the federal ICWA. Section 1 through Section 30 of the bill contains new material, all of which encompass the State Indian Child Welfare Act (SICWA). Section 32 to Section 62 amends existing provisions in the law to eliminate duplicative language and to reference the new state ICWA. Key sections are summarized below.

#### **Section 2: Definitions**

HB209/HHHCS/HSEICS provides definitions that define central terms used throughout the act, including terms that instruct who shall enter a cultural compact, members included in the term extended family, parents, tribal courts, tribal law and custom etc. This section also provide incorporates definitions from the federal ICWA and the Children’s Code into SICWA. HB209/HHHCS/HSEICS provides "fictive kin" means a person who: (1) is not a relative or extended family of a Native American child and who has a significant, family-like relationship with the child or the child's family, which relationship existed prior to the child's entry into foster care; (2) meets the definition of "fictive kin" as established by the law of the child's tribe, custom or tradition; or (3) is chosen by an Native American child who is fourteen years of age or older, regardless of when the relationship between the person and the Native American child was established, when it is in the best interest of the child to identify that personas fictive kin.

#### **Section 3: Requirement of Determination of Indian Child’s Domicile**

Provides that in a custody proceeding involving a Native American child, the state court shall determine and make an order of the domicile and residence of the child and whether the child is a ward of the tribal court. The bill clarifies that when determining domicile and residence, the department can communicate with the Indian tribe or Court, dependent on the structure of the tribe.

#### **Section 4: Standard for Determination of Indian Child’s Domicile**

Provides that a Native American child’s domicile is, in order of priority, the domicile of the child’s (A) parents, or if the parents do not have the same domicile, the parent with physical custody of the Indian child; (B) Indian custodian; or (C) guardian.

#### **Section 5: Active Efforts in Investigations and Child Custody Proceedings**

Provides heightened form and required statements within a petition initiating a child custody and foster care proceedings involving a Native American child, including the Native American child's tribe, the tribal affiliations of the Native American child's parents, a statement that active efforts were made to notify the Native American child's tribe, that active efforts were made to

provide remedial services and rehabilitative programs designed to prevent the breakup of the Native American family, and that these efforts have proved unsuccessful. Active efforts pursuant to this section require a higher standard of conduct than reasonable efforts and must include the connection to extended family, comprehensive assessments, identifying and establishing appropriate services to overcome any barriers to reunification, active efforts to keep siblings together and most importantly, ensuring the health, safety and welfare of the Indian child. Additionally, the quality and quantity of services must be detailed for the court record.

Section 6: Determination of Whether a Child is an Indian Child and Tribal Membership

When a child is taken into custody by the department, the department must make active efforts to determine if a child is eligible for membership in an Indian tribe, but provides that the tribe has the sole right to determine membership and membership eligibility, as defined by the tribe's law, custom, tradition and practice.

Section 7: Indian Child Custody Proceedings- Jurisdiction as to State and Tribal Court

Provides that the state court has concurrent jurisdiction with the tribal court in Native American child custody proceeding. However, the state court has temporary exclusive jurisdiction over a Native American child taken into protective custody under the Children's Code. The tribal court has exclusive jurisdiction over a child custody proceeding involving a Native American child domicile or residing on the reservation (absent contrary federal law or tribal-state agreement). The tribe retains exclusive jurisdiction over a Native American child who is a ward of the tribal court.

This section also provides for the required transfer of certain proceedings, "in the absence of good cause to the contrary," to the jurisdiction of the tribal court. The burden to establish good cause is on the party opposing the transfer. Good cause shall be established by clear and convincing evidence. If the state court denies the transfer, the basis for the decision shall be stated orally on the record or in a written order. A finding of good cause (to prevent the transfer) cannot be based on: (1) the advanced stage of the proceeding if the parent, custodian or child's tribe did not receive notice of the proceeding until an advanced stage; (2) whether there have been prior proceedings involving the child for which no petition to transfer was filed; (3) predictions of whether the transfer could result in a change in the placement; (4) the child's perceived cultural connections with the tribe or reservation; (5) consideration of any perceived inadequacy of judicial systems; or (6) consideration of the perceived socioeconomic conditions within a tribe or reservation. The tribal court may decline jurisdiction.

Section 8: Tribal State Agreements

Requires CYFD to make a good faith effort to enter into a tribal-state agreement with the tribes within the borders of this state so that proceedings can be transferred to the jurisdiction of the tribe where the child resides or is domiciled. The department may make such agreements with tribes outside the state if the tribe has a significant number of children in the state who are tribal members or eligible to become tribal members. Tribal-state agreements may relate to a number of areas and must provide for cooperative delivery of the child to welfare services (including services provided by the tribe, if possible). If services provided by the tribe are unavailable, services and resources developed for Native American families are to be used.

Section 9: Transfer

When a transfer motion is granted, this section requires the state court to notify the tribal court, gather pleadings and records, and direct the department to coordinate with the tribal court and

tribe. Documentation is to be provided to the tribe relating to the Native American child's eligibility for state and federal assistance and the child's history. The state court will dismiss the proceeding on confirmation of receipt from the tribal court.

Section 10: Full Faith and Credit

Provides that state agencies, courts, or political subdivisions must give full faith and credit to public acts, records, and judicial proceedings of a tribe related to Native American child custody. This section provides for the enforcement by the state and its agency of tribal orders relating to the Native American child. This section also contains requirements of cost splitting and negotiation of funding.

Section 11: Improper Removal of Indian Child

In a proceeding where the state court has improperly removed the child from the parent or custodian or improperly retained custody, the state court shall return the child to the child's parent or custodian unless doing so would subject the child to "substantial and immediate danger or threat of danger." This section further provides that nothing in the Act "shall be construed to prevent the emergency removal of a Native American child" who is temporarily located off the reservation in order to prevent imminent physical danger or harm to the child, but requires the department to "expeditiously" initiate a child custody proceeding to transfer the Native American child to the jurisdiction of the appropriate tribe or restore the child to the parent or Native American custodian, as may be appropriate.

Section 12: Investigations Pending Court Proceedings and Notice and Documentation of Applicability and Compliance

Within 48 hours of initiating an investigation, the department must notify the child's tribe of the investigation, the involvement of the child, and CYFD's obligations to collaborate with the child's tribe to identify a qualified expert to participate in any adjudicatory proceeding. During an investigation the department shall: (1) coordinate services with the Indian child's tribe to prevent taking the child into custody; (2) provide culturally appropriate remedial services to the parents; and (3) make active efforts to identify extended family and fictive kin able to be alternative care providers or to ensure the safety of the child.

On initiating a child custody proceeding, the department shall notify the Native American child's tribe of: (1) the investigation; (2) the involvement of the Native American child; (3) active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Native American family and that these efforts have proved unsuccessful. CYFD is required to document all active efforts made to coordinate services to prevent the taking of a Native American child, or a child who may be a Native American child, and in any subsequent action resulting in the child coming into the department's custody.

In a child custody proceeding or in a proceeding pursuant to the Delinquency Act, the department shall notify the parent or Indian custodian and the Native American child's tribe of (1) the pending proceedings; (2) the right of the Native American child's parent, Indian custodian, or Native American child's tribe to (a) intervention and (b) petition the state court to transfer the proceeding to the tribal court; (3) the right of the Native American child's parent or Indian custodian to court-appointed counsel if the state court determines that person is unable to afford counsel; and (4) the right of the Native American child's tribe, as a party to the child custody proceeding, to participate in the proceeding.

This section also requires the court to make a written determination at the beginning of the proceeding under the Delinquency Act, Family Services Act, Family in Need of Court-Ordered Services, Abuse and Neglect Act, and the Adoption Act as to whether the federal Indian Child Welfare Act of 1978 and the State Indian Child Welfare Act apply to the case.

This provision also contains procedures to be followed if an Native American child's parent or custodian has limited English proficiency or when the identity and location of the parent or custodian or tribe cannot be determined.

Significantly, this section also sets forth the standards of evidence to be followed in custody proceedings involving a Native American child. For a foster care placement determination, the court must find that clear and convincing evidence was presented that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child. For a determination regarding the termination of parental rights, the court must find evidence beyond a reasonable doubt. This section also requires that evidence show a causal relationship between the conditions in the home and the potential emotional and physical damage to the child who is subject of the proceedings.

Section 13: Right to Intervene

Only the Native American child's extended family, custodian, and the tribe have the right to intervene at any point in a state court proceeding involving foster care placement, guardianship placement, pre-adoptive placement, adoptive placement, or termination of the parent's right.

Section 14: Petition- Form and Content

Provides heightened form and required statements within a petition initiating a child custody and foster care proceedings involving a Native American child, including the Native American child's tribe, the tribal affiliations of the Native American child's parents, a statement that active efforts were made to notify the Native American child's tribe, that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Native American family, and that these efforts have proved unsuccessful. Active efforts pursuant to this section require a higher standard of conduct than reasonable efforts and this section includes a provision requiring CYFD to document the reasons why active efforts were not successful.

Section 15: State Court Record

Provides in a child custody proceeding involving an Native American child, a state court shall make a record including the determination of the child's tribe when the child is a member of, or eligible for membership in more than one tribe. The record must include the preference of each of the child's parents; the duration of the child's current or prior domicile or residence on or near the reservation of each tribe; the tribal membership of the child's custodial parent or Indian custodian, the interests asserted by each Indian tribe; whether the Indian tribe has previously adjudicated a case involving a Native American child; the Indian tribe's custom and tradition; and, if the court determines that the child is of sufficient age and capacity to meaningfully self-identify, the child's self-identified tribe.

Section 16: Right to Counsel in Indian Child Custody Hearings

Provides procedures for the state court at the commencement of a child custody proceeding to determine whether the child is a Native American child. This section also provides procedures for the state court to follow should the state court have reason to know that a child is a Native

American child but does not have sufficient evidence to make a full determination. Provides for the right to court-appointed counsel for a parent or Indian custodian in removal, placement, or termination proceedings. Provides for appointment of counsel for the child if the appointment is in the child's best interests. Provides the right to examination of reports and documents filed with the state upon which a decision was made to all parties and the tribe in Abuse and Neglect Act or Adoption Act proceedings. This section also provides a child's tribe may be present and may participate at a closed hearing, regardless of whether the child's tribe intervened.

**Section 17: Qualified Expert Witness**

Expert witness testimony is required in all adjudicatory proceedings and proceedings to terminate parental rights. Provides for the qualifications of such expert witness and the procedures for naming and objecting to an expert witness. a person recommended by the Indian child's tribe. The qualified expert witness shall be a person who is: (1) familiar with the Indian child's case and has communicated with the Indian child's tribe about the case; (2) knowledgeable about the prevailing social and cultural standards of the tribe and is familiar with the family and child-rearing practices of the Indian child's tribe; and (3) a member of the Indian child's tribe; or (4) a person recommended by the Indian child's tribe. This section requires CYFD to make good faith efforts to retain the Indian tribe's designated qualified expert witness. No employee of CYFD may serve as a qualified expert witness pursuant to this section.

**Section 18: Parental Rights-Voluntary Termination**

Requires execution in writing and recordation before a judge of competent jurisdiction, along with the presiding judge's certificate, when a Native American parent or custodian voluntarily consents to foster care placement or termination of parental rights. In any voluntary foster care placement or termination of parental rights proceeding in state court, when the court knows or has reason to know that an Indian child is involved, the party seeking to effectuate the foster care placement or termination of parental rights shall notify the Indian child's tribe of the pending proceedings and its right of intervention. A consent to a foster care placement or termination of parental rights given prior to or within 10 days of the birth of a Native American child is not valid. A Native American parent or custodian may withdraw consent to a foster care placement at any time, and the child shall be returned to the parent. In cases involving voluntary termination of parental rights or adoptive placement, parental consent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, and the child shall be returned to the parent. Following a final decree of adoption, the parent may withdraw consent if the adoption was obtained through fraud or duress and may petition the court to vacate the decree. An adoption that has been in effect for at least two years shall not be invalidated except as otherwise provided by law.

**Section 19: Petitions to Invalidate Actions**

A parent or Indian custodian from whose custody the child was removed in foster care placement, pre-adoptive placement, guardianship, adoptive placement, or termination of parental rights may petition any court of competent jurisdiction to invalidate the action on a showing that the action violated any provision of Section 7, 12, 13, 16, 17, 18, 20, 21 or 23.

**Section 20: Placement Preferences**

Provides placement preferences and requirements for Native American children in need of placement or continuation in substitute care, with preferences for the Native American child's special needs, sibling attachment, and geographic proximity of the child's home, and in accordance with the preference established by the child's tribe. The section specifies that

placement shall not depart from the preferences based on: (1) the socioeconomic status of any placement; (2) a home environment that does not impact the safety and well-being of the Indian child; or (3) ordinary bonding or attachment that occurred from time spent in a non-preferred placement that was made in violation of this Act or the federal Indian Child Welfare Act of 1978.

Subsection E provides the court-ordered mediation pursuant to Section 32A-4-29 NMSA 1978 shall not be waived and the Indian child's tribe shall be allowed to participate, whether or not it intervenes.

The section also requires training for any foster parent or pre-adoptive parent who is not a member of the Native American child's tribe. Training requirements are also provided for anyone involved in child welfare or juvenile justice systems, including all children's court judges, district court judges, and all attorneys, guardians ad litem, and youth attorneys who are court-appointed or whose practice involves the representation of clients in the areas of child welfare or juvenile justice.

#### Section 21: Change in Placement

An assessment must be made in consultation with the child's tribe if a child is placed in a foster or substitute care placement that was contrary to the placement preference provided in Section 20 of the Indian Child Welfare Act. This bill provides that CYFD shall, if a preferred placement is not made, monitor the placement every 30 days and undertake active efforts to identify a placement that aligns with the placement preferences. CYFD is required to complete a timely home study and document all active efforts taken to find an appropriate placement. Placement preferences must be followed unless there is good cause to the contrary. The good cause analysis must be applied any time there is a request to deviate from the placement preferences.

#### Section 22: Maintenance of Culture and Cultural Compacts

To ensure the SWICA and ICWA are fully implemented, in the case of placement with a nontribal parent, this section requires the parties to an adoption to enter a "cultural compact," at the discretion of the tribe, documenting the parties' agreement on how the Native American child will actively participate in cultural learning activities and engagement with family members. This cultural compact will become part of the court record, will be enforced by the court, and will be included in the adoption decree.

#### Section 23: Dispositional Judgements

Provides requirements for state court inclusions in findings at the conclusion of disposition hearings in Native American child custody proceedings, including whether the plan for family services or the case plan provides for maintenance of the Native American child's cultural ties and how access to cultural practices and traditional treatment will be provided to the child.

#### Section 24: Return of Custody

When a final decree of adoption of a Native American child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights, a biological parent or prior Indian custodian may petition for the return of custody. The state court must grant that petition, absent a showing in a proceeding pursuant to Section 11, that the return of custody is not in the best interests of the child. This section also provides for placement in accordance with the SICWA and ICWA when a Native American child is removed from a foster care home or institution for further foster care or pre-adoptive or adoptive placement (unless the child is being returned to the parent or Indian custodian from whose custody the child was originally removed).

Section 25: Best Interests of the Child

Provides facts for a state court, in consultation with the Native American child's tribe, to consider in determining a Native American child's best interests pursuant to the SICWA and ICWA.

Section 26: Tribal Affiliation and Other Information

On application by a Native American individual who has reached 18 years of age and was the subject of an adoptive placement, the state court that entered the final decree must inform the individual of the tribal affiliation of the individual's biological parents and provide any other information necessary to protect rights flowing from the individual's tribal relationship. This right to information extends to the department in relation to information related to the individual's tribe of origin.

Section 27: Adoption Decrees

Provides that in a state court decree or order in an adoptive placement of a Native American child the decree or order will include: (1) the name and tribal membership or eligibility of membership of the child; (2) the names and addresses of the child's biological parents; (3) the names and addresses of the biological parents; and (4) the identity of any agency having files or information relating to the adoptive placement.

Section 28: Conflict of Laws Provision

Provides the provisions of SICWA are in addition to other requirements for child custody hearings in the Children's Code and the Kinship Guardianship Act. Subsection (B) clarifies in case of conflicts of law between State ICWA and Federal Indian Child Welfare Act of 1978, the provision of law with the greatest protection to the interests of a parent or Indian custodian shall apply.

Section 30: Indian Child Welfare Rules

Requires CYFD promulgate rules to implement state ICWA through meaningful consultation with the nations, tribes and pueblos of New Mexico to implement the provisions of SICWA.

Section 39: Periodic Judicial Review of Dispositional Judgments

Requires subsequent periodic judicial review of dispositional orders and review of the placement preferences and whether it complied with State ICWA and requires a review to determine whether the department made active efforts to implement the treatment plan. If placement preferences were not followed, good cause for noncompliance must be stated. Provides that an Indian child may remain in the legal custody of CYFD with or without parental involvement in a treatment plan, but requires the department show active efforts were made to reunify the family. "Active Efforts" are required regardless of whether the following apply: 1) the efforts would be futile; or 2) the parent, guardian or custodian has subjected the child to aggravated circumstances.

Section 40: Transition Services.

Requires that CYFD to work with the child, child's attorney, and other individuals of the child's choosing to develop a transition plan prior to a child reaching seventeen year of age. CYFD must assist the child in identifying and planning to meet the child's needs, such as housing, education, employment, mental health, mentorships and other continuing support services. Under Section 32A-4-25.2(D), an Indian child's tribe must be included in developing a transition plan and must be provided with a copy prior to presentation of the plan to the court. Section 32A-4-25.3(D)

regarding discharge hearings requires documentation of the Indian child's tribal membership. It also requires the court to make findings regarding the department's active efforts to meet its requirement. The court may also continue to exercise its jurisdiction for a period not to exceed one year from the child's eighteenth birthday. The young adult must consent to continued jurisdiction of the court and the court may dismiss the case at any time after the child's eighteenth birthday for good cause.

Section 41: Discharge Hearing

Requires review of the child's tribal membership and requires the court to hold a hearing to determine if CYFD made reasonable efforts to implement a transition plan. If the court finds that CYFD did not make reasonable efforts to implement the transition plan, the court may continue to exercise jurisdiction for a period not to exceed one year from the child's eighteenth birthday. It further allows the court to dismiss the matter after the child's eighteen birthday for good cause.

Section 42: Intervention and Persons Permitted to Intervene.

Section 32A-4-27(D)(2) regarding intervention adds that an Indian custodian, the Indian child's relative or a member of the Indian child's extended family may intervene during any stage of an abuse or neglect proceeding. Section 32A-4-27(E)(4) provides that bonding between an Native American child and the child's foster parent may not be considered as a factor in terminating parental rights.

Section 44: Requires a motion for termination of parental rights to include specific actions that were made to comply with active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent breakup of the Native American family.

**Issues Identified**

1. Qualified Expert Witness

IWCA requires the testimony of a qualified expert witness at multiple stages of an abuse and neglect matter. HB209/HHHCS/HSEICS addresses the requirement of CYFD to communicate with tribes and identify qualified expert witnesses in a timely manner and provides specific timelines by which a qualified expert witness must be identified. If the tribe does not wish to participate or is not able to meet the deadline, the bill provides, "if, after active efforts and in no case later than forty-five days after contacting the Indian child's tribe for a recommendation, the department does not receive a recommendation from the Indian tribe, the department shall identify a qualified expert witness who meets the statutory requirements from a list of qualified expert witnesses compiled by CYFD in cooperation with the Indian tribes in the state.

2. SICWA Rules

HB209/HHHCS/HSEICS, Section 30, requires the department, through meaningful consultation with the Indian nations, tribes and pueblos of the state, to promulgate rules to implement the provisions of the State Indian Child Welfare Act pursuant to the State-Tribal Collaboration Act and other applicable law and policy. The bill also requires CYFD to consult with the Indian nations, tribes, and pueblos of the state to recommend court rules for potential adoption by the courts of the state.

3. Applicability to All Open Cases

HB209/HHHCS/HSEIC states the provisions of this act apply to all open cases prior to July 1, 2021. While, this retroactive application could have consequences on the timeliness to permanency for some children and families, the settlement agreement in the *Kevin S., et al. v. Blalock* case already requires CYFD to move children into ICWA compliant placements and many of the active efforts and preferred placement requirements contained in the bill already exist in federal ICWA legislation and regulations. AOC contend the bill has very specific and extensive requirements for the placement of a Native American child and the retroactive application of the bill will result in extended time in foster care for many children to allow for the development of process, procedure, forms, and holding hearings to bring the cases into compliance with HB209/HHHCS/HSEICS. However, CYFD does not believe the retroactive application of the bill this will drastically impact permanency timelines and contends an analysis of currently open cases indicates that most could be resolved regardless.

#### 4. Cultural Compact

HB209/HHHCS/HSEICS introduces the concept and requirement of a cultural compact to the protections offered by ICWA. It requires that in a situation where an Native American child is placed in a household for pre-adoption, adoption, or guardianship that does not include a parent who is a member of the Native American child's tribe, the court shall require the parties to the adoption to enter a cultural compact, at the discretion of the Native American child's tribe, that documents the parties' agreement regarding how the Native American child will continue to actively participate in the Native American child's cultural learning and activities and engagement with family members. HB209/HHHCS/HSEICS defines a cultural compact, and it is designed to ensure the Native American child's cultural learning, activities, and engagement is not lost through the adoption or guardianship process.

#### 5. Aggravated Circumstances

HB209/HHHCS/HSEICS removes the ability for the court to determine that reasonable efforts to preserve and reunify the family are not required in cases involving a Native American child. The Abuse and Neglect Act provides, “The court may determine that reasonable efforts are not required to be made when the court finds that: (a) the efforts would be futile; or (b) the parent, guardian or custodian has subjected the child to aggravated circumstances.”

However, the language in the State Indian Child Welfare Act as it relates to aggravated circumstances is taken from the language given in the federal Bureau of Indian Affairs (BIA) 2016 regulations.<sup>1</sup> The core purpose of the aggravated circumstance exception for Indian children is that the CYFD must still pursue active efforts to preserve and reunify the family. It does not prohibit a court or the department from considering actions of the parent and denying reunification or custody.

In cases involving a Native American child it is important for active efforts to remain because active efforts obligate the department to work with both the Indian Child's tribe and extended

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<sup>1</sup> Language from the 2016 Bureau of Indian Affairs (BIA) Regulations 25 CFR Part 23, Indian Child Welfare Act Proceedings; Final Rule.

family. The “active efforts” requirement is a vital part of ICWA’s statutory scheme, and the statute does not contain any exceptions. The final rule’s definition of “active efforts,” however, specifies that what constitutes sufficient active efforts may be based on the facts and circumstances of a particular case. This may include, for example, consideration of whether circumstances exist that other federal laws have recognized as excusing the mandatory requirement for reasonable efforts to preserve and reunify families.<sup>2</sup>

#### 6. Native American Child’s Substantive Due Process Rights

The general preference for an Native American child’s adoptive, pre-adoptive, and foster care placement with individuals associated with the child’s tribe may also violate the Native American child’s substantive due process. California enacted a law, which, like HB209/HHHCS/HSEICS, mirrors the language of the federal Indian Child Welfare Act of 1978. In *In re Santos Y.*, 92 Cal. App. 4<sup>th</sup> 1274, 112 Cal. Rptr, 2d 692 (2001), the California Court of Appeal found this provision violated the child’s constitutional substantive due process right to have placement in a stable and permanent home. *Id.* at 1315-16.

However, the cited law is counter to the federal ICWA statute and similar arguments have been rejected by multiple courts. One court noted, "The extent *Santos* relies on an existing Indian family exception, we reject that analysis because it is contrary to the plain language of ICWA, which was enacted not only to preserve interests of Indian children and Indian families, but also to protect a tribe's interest in the welfare of its children and the maintenance of its culture." In addition, the Supreme Court did not adopt the Existing Indian Family (EIF) exception and the court that created the exception (Kansas Supreme Court) in 1982 has since rejected it.

### **PERFORMANCE IMPLICATIONS**

CYFD has performance measures concerning Indian Child Welfare practice, compliance measures concerning the federal Indian Child Welfare Act and the *Kevin S.* settlement, and a commitment to improve and strengthen partnerships with New Mexico pueblos, nations, and tribes.

### **ADMINISTRATIVE IMPLICATIONS**

The passing of this new act within the Children’s Code will require the development of rules, forms, procedures, and processes to ensure that all provisions within the law are met.

Mandating greater tribal involvement in delinquency proceedings could necessitate the promulgation of a new set of Children’s Court procedural rules and the notification process could create new administrative obligations for the courts.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

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<sup>2</sup> See e.g., 42 U.S.C. 671(a) (15) (D) (reasonable efforts not required where a court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances, or committed murder or other specified felonies). Of course, even in the case where one parent has severely abused a child, the court should consider whether active efforts could permit reunification of the Indian child with a non-abusive parent.

The companion bill to HB209/HHHCS/HSEICS is SB278.

HB209/HHHCS/HSEICS relates to:

HB202 – Foster Care Requirements and Changes

SB97 – Guardianship Changes (amending Kinship Guardianship Act)

SB196 – Children’s Code Reform Task Force

SB127 – Family Representation and Advocacy Act

## **OTHER SUBSTANTIVE ISSUES**

Native American children and youth have a unique legal status as citizens of tribal governments with federal laws, like ICWA, that provide important safeguards to help maintain tribal and family relationships. Despite these important protections, Native American children are still overrepresented within state foster care systems nationally, and in some states, their rates in foster care are as much as 10 times their population rate. Research has consistently shown that connections to a child’s extended family and community are mitigating factors in reducing the trauma that is often experienced prior to a child’s placement in foster care or during their removal. Specifically, research shows that Native American communities are rich in culture, have a deep commitment to family, kinship, and community, and are rooted in spirituality.<sup>3</sup>

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

New Mexico is federally mandated to comply with the federal ICWA. However, other states have brought challenges against ICWA, and it may be compromised or dismantled. If ICWA falls at the federal level, there will be no protections in place for the Native American children and families in New Mexico.

The drafting and promotion for the passage of a state ICWA law is part of the *Kevin S.* settlement; if this bill is not enacted, the stakeholders behind this bill will likely continue to refine the proposed law and present it again in the next legislative session.

CLB/rl/al

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<sup>3</sup> (Center for Study of Social Policy; [Protecting Children, Families, and Tribes: The Importance of ICWA](#) | Center for the Study of Social Policy ([cssp.org](#))).